1   IN THE SUPREME COURT OF THE UNITED STATES

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3   DEPARTMENT OF HEALTH AND   :

4   HUMAN SERVICES, ET AL.,   :

5   Petitioners   :   No. 11-398

6   v.   :

7   FLORIDA, ET AL.   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Monday, March 26, 2012

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 10:12 a.m.

15   APPEARANCES:

16   ROBERT A. LONG, ESQ., Washington, D.C.; for

17   Court-appointed amicus curiae

18   DONALD B. VERRILLI, JR., ESQ., Solicitor General,

19   Department of Justice, Washington, D.C.; on behalf of

20   Petitioners.

21   GREGORY G. KATSAS, ESQ., Washington, D.C.; on behalf of

22   Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:12 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case Number 11-398, Department

5   of Health and Human Services v. Florida.

6   Mr. Long.

7   ORAL ARGUMENT OF ROBERT A. LONG

8   FOR COURT-APPOINTED AMICUS CURIAE

9   MR. LONG: Mr. Chief Justice, and may it

10   please the Court:

11   The Anti-Injunction Act imposes a "pay

12   first, litigate later" rule that is central to Federal

13   tax assessment and collection. The Act applies to

14   essentially every tax penalty in the Internal Revenue

15   Code. There is no reason to think that Congress made a

16   special exception for the penalty imposed by section

17   5000A. On the contrary, there are three reasons to

18   conclude that the Anti-Injunction Act applies here.

19   First, Congress directed that the section

20   5000A penalty shall be assessed and collected in the

21   same manner as taxes. Second, Congress provided that

22   penalties are included in taxes for assessment purposes.

23   And, third, the section 5000A penalty bears the key

24   indicia of a tax.

25   Congress directed that the section 5000A

1   penalty shall be assessed and collected in the same

2   manner as taxes. That directive triggers the

3   Anti-Injunction Act, which provides that "no suit for

4   the purpose of restraining the assessment or collection

5   of any tax may be maintained in any court by any

6   person."

7   JUSTICE SCALIA: Well, that depends, as --

8   as the government points out, on whether that directive

9   is a directive to the Secretary of the Treasury as to

10   how he goes about getting this penalty, or rather a

11   directive to him and to the courts. All of the other

12   directives there seem to me to be addressed to the

13   Secretary. Why should this one be directed to the

14   courts? When you say "in the same manner," he goes

15   about doing it in the same manner, but the courts simply

16   accept that -- that manner of proceeding but nonetheless

17   adjudicate the cases.

18   MR. LONG: Well, I think I have a three-part

19   answer to that, Justice Scalia. First, the text does

20   not say that the Secretary shall assess and collect

21   taxes in the same manner; it just says that it shall be

22   assessed in the same manner as a tax, without addressing

23   any party particularly.

24   JUSTICE SCALIA: Well, he's assessing and

25   collecting it in the same manner as a tax.

1   MR. LONG: Well, the assessment -- the other

2   two parts of the answer are, as a practical matter, I

3   don't think there's any dispute in this case that if the

4   Anti-Injunction Act does not apply, this penalty, the

5   section 5000A penalty, will as a practical matter be

6   assessed and collected in a very different manner from

7   other taxes and other tax penalties.

8   There are three main differences. First,

9   when the Anti-Injunction Act applies, you have to pay

10   the tax or the penalty first and then litigate later to

11   get it back with interest. Second, you have to exhaust

12   administrative remedies. Even after you pay the tax,

13   you can't immediately go to court. You have to go to

14   the Secretary and give the Secretary at least 6 months

15   to see if the matter can be resolved administratively.

16   And, third, even in the very carefully defined

17   situations in which Congress has permitted a challenge

18   to a tax or a penalty before it's paid, the Secretary

19   has to make the first move. The taxpayer is never

20   allowed to rush into court before the tax -- before the

21   Secretary sends a notice of deficiency to start the

22   process.

23   Now, if -- if the Anti-Injunction Act does

24   not apply here, none of those rules apply. And that's

25   not just for this case; it will be for every challenge

1   to a section 5000A penalty going forward. The taxpayer

2   will be able to go to court at any time without

3   exhausting administrative remedies; there will be none

4   of the limitations that apply in terms of you have to

5   wait for the Secretary to make the --

6   JUSTICE KENNEDY: Why will the

7   administrative remedies rule not be applicable,

8   exhaustion rule not be applicable?

9   MR. LONG: Well, because if the

10   Anti-Injunction Act doesn't apply, there's no

11   prohibition on courts restraining the assessment or

12   collection of this penalty, and you can simply --

13   JUSTICE KENNEDY: Well, but courts apply the

14   exhaustion rule. I mean, I know you've studied this.

15   I'm just not following it. Why couldn't the court say,

16   well, you haven't exhausted your remedies; no

17   injunction?

18   MR. LONG: Well, in -- you could do that, I

19   think, as a matter of -- of common law or judicially

20   imposed doctrine, but in the code itself, which is

21   all -- I mean, the Anti-Injunction Act is an absolutely

22   central statute to litigation --

23   JUSTICE KENNEDY: Yes. Yes.

24   MR. LONG: -- about taxes. And the code

25   says -- first it says you must pay the tax first and

6

1   then litigate. So, that's the baseline. And then, in

2   addition, it says you must -- I mean, it's not common

3   law; it's in the code -- you must apply for a refund,

4   you must wait at least 6 months. That's -- many of

5   these provisions are extremely specific, with very

6   specific time limits.

7   CHIEF JUSTICE ROBERTS: They would apply

8   even if the rule is not jurisdictional. The only

9   difference would be that the court could enforce it or

10   not enforce it in particular cases, which brings me to

11   the Davis case, which I think is your biggest hurdle.

12   It's a case quite similar to this in which the

13   constitutionality of the Social Security Act was at

14   issue, and the government waived its right to insist

15   upon the application of this Act.

16   Of course, if it's jurisdictional, you can't

17   waive it. So, are you asking us to overrule the Davis

18   case?

19   MR. LONG: Well, Helvering v. Davis was

20   decided during a period when this Court interpreted the

21   Anti-Injunction Act as simply codifying the

22   pre-statutory equitable principles that usually, but not

23   always, prohibited a court from enjoining the assessment

24   or collection of taxes. So, that understanding, which

25   is what was the basis for the Helvering v. Davis

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1   decision, was rejected by the Court in Williams Packing

2   and a series of subsequent cases -- Bob Jones. And so,

3   I would say, effectively, the Davis case has been

4   overruled by subsequent decisions of this Court.

5   JUSTICE GINSBURG: Mr. Long, why don't we

6   simply follow the statutory language? I know that

7   you've argued that the Davis case has been overtaken by

8   later cases, but the language of the Anti-Injunction Act

9   is "no suit shall be maintained." It's remarkably

10 similar to the language in -- that was at issue in Reed

11 Elsevier: "No civil action for infringement shall be

12 instituted." And that formulation, "no suit may be

13 maintained," contrasts with of the Tax Injunction Act,

14 that says the district court shall not enjoin. That Tax

15 Injunction Act is the same pattern as 2283, which says

16 "courts of the United States may not stay a proceeding

17 in State court." So, both of those formulas, the TIA

18 and the "no injunction against proceedings in State

19 court" are directed to "court." The Anti-Injunction

20 Act, like the statute at issue in Reed Elsevier, says

21 "no suit shall be maintained." And it has been argued

22 that that is suitor-directed in contrast to

23 court-directed.

24   MR. LONG: Right. Well, I mean, this Court

25 has said several times that the Tax Injunction Act was

 1   based on the Anti-Injunction Act. You're quite right,

 2   the language is different; but we submit that the

 3   Anti-Injunction Act itself, by saying that no suit shall

 4   be maintained, is addressed to courts as well as

 5   litigants. I mean, after all, a case cannot go from

 6   beginning to end without the active cooperation of the

 7   court.

 8   JUSTICE GINSBURG: But how is that different

 9   from "no civil action for infringement shall be

10   instituted" -- "maintained and instituted"? Anything

11   turn on that?

12   MR. LONG: Well, it's -- I mean -- perhaps a

13   party could initiate an action without the act of

14   cooperation of the court, but to maintain it from

15   beginning to end, again, requires the court's

16   cooperation.

17   And even if -- I mean, if the Court were

18   inclined to say as an initial matter, if this statute

19   were coming before us for the first time today, given

20   all of your recent decisions on jurisdiction, that you

21   might be inclined to say this is not a jurisdictional

22   statute, a lot of water has gone over the dam here. The

23   Court has said multiple times that this is a

24   jurisdictional statute. Congress has not disturbed

25   those decisions. To the contrary --

1   JUSTICE SOTOMAYOR: Counsel --

2   JUSTICE ALITO: Well, the Court said that

3   many times, but is there any case in which the result

4   would have been different if the Anti-Injunction Act

5   were not viewed as jurisdictional but instead were

6   viewed as a mandatory claims-processing --

7   MR. LONG: There's --

8   JUSTICE ALITO: -- rule.

9   MR. LONG: There -- there are certainly a

10   number of cases where the Court dismissed saying it is

11   jurisdictional.

12   As I read the cases, I don't think any of

13   them would necessarily have come out differently,

14   because I don't think we had a case where the argument

15   was, well, you know, the Government has waived this, so,

16   you know, even -- if it's not jurisdictional --

17   JUSTICE ALITO: Well, the clearest -- the

18   clearest way of distinguishing between the

19   jurisdictional provision and a mandatory claims

20   processing rule is whether it can be waived and whether

21   the Court feels that it has an obligation to raise the

22   issue sua sponte.

23   Now, if there are a lot of cases that call

24   it jurisdictional, but none of them would have come out

25   differently if the Anti-Injunction Act were simply a

1   mandatory claims processing rule, you have that on one

2   side.

3   And on the other side, you have Davis, where

4   the Court accepted a waiver by the Solicitor General;

5   the Sunshine Anthracite coal case, where there also was

6   a waiver; and, there's the Williams Packing case, which

7   is somewhat hard to understand as viewing the

8   Anti-Injunction Act as a jurisdictional provision.

9   The Court said that there could be a suit if

10   there is no way the Government could win, and the

11   Plaintiff would suffer irreparable harm. Now, doesn't

12   that sound like an equitable exception to the

13   Anti-Injunction Act?

14   MR. LONG: No, I think the -- I think the

15   best interpretation of the Court's cases is that it was

16   interpreting a jurisdictional statute. And, indeed, in

17   Williams Packing, the Court said it was a jurisdictional

18   statute.

19   But, again, even if you have doubt about

20   simply the cases, there is more than that because

21   Congress has -- has not only not disturbed this Court's

22   decision stating that the statute is jurisdictional,

23   they've passed numerous amendments to this

24   Anti-Injunction Act.

25   CHIEF JUSTICE ROBERTS: Well, it seems --

11

1   you can't separate those two points. The idea that

2   Congress has acquiesced in what we have said only helps

3   you if what we have said is fairly consistent. And you,

4   yourself, point out in your brief that we've kind of

5   gone back and forth on whether this is a jurisdictional

6   provision or not. So, even if Congress acquiesced in

7   it, I'm not sure what they acquiesced in.

8   MR. LONG: Well, what you have said,

9   Mr. Chief Justice, has been absolutely consistent for

10 50 years, since the Williams Packing case. The period

11 of inconsistency was after the first 50 years, since the

12 statute was enacted in 1867. And there was a period, as

13 I said, when the Court was allowing extraordinary

14 circumstances exceptions and equitable exceptions, but

15 then, very quickly, it cut back on that. And since --

16 and since Williams Packing, you have been utterly

17 consistent --

18   JUSTICE KAGAN: Well, even since

19 Williams Packing, there was South Carolina v. Regan.

20 And that case can also be understood as a kind of

21 equitable exception to the rule, which would be

22 inconsistent with thinking that the rule is

23 jurisdictional.

24   MR. LONG: Well, again, I mean, I think the

25 best understanding of South Carolina v. Regan is not

1   that its an equitable exception, but it's the Court

2   interpreting a jurisdictional statute as it would

3   interpret any statute in light of its purpose, and

4   deciding in that very special case, it's a very narrow

5   exception, where the --

6   JUSTICE SOTOMAYOR: Mr. Long, in Bowles, the

7   Court looked to the long history of appellate issues as

8   being jurisdictional, in its traditional sense, not as a

9   claim processing rule, but as a pure jurisdiction rule,

10   the power of the Court to hear a case.

11   From all the questions here, I count at

12   least four cases in the Court's history where the Court

13   has accepted a waiver by the Solicitor General and

14   reached a tax issue. I have at least three cases, one

15   of them just mentioned by Justice Kagan, where

16   exceptions to that rule were read in.

17   Given that history, regardless of how we

18   define jurisdictional statutes versus claim processing

19   statutes in recent times, isn't the fairer statement

20   that Congress has accepted that in the extraordinary

21   case, we will hear the case?

22   MR. LONG: No. No, Justice Sotomayor,

23   because in many of these amendments which have come in

24   the '70s and the '90s and the 2000s, the Congress has

25   actually framed the limited exceptions to the

1   Anti-Injunction Act in jurisdictional terms. And it has

2   written many of the express exceptions by saying

3   notwithstanding Section 7421 --

4   JUSTICE SOTOMAYOR: But doesn't that just

5   prove that it knows that the Court will impose a claim

6   processing rule in many circumstances, and so, in those

7   in which it specifically doesn't want the Court to, it

8   has to be clearer?

9   MR. LONG: Well, but Congress says,

10   notwithstanding 7421, the Court "shall have jurisdiction

11   to restrain the assessment and collection of taxes in

12   very limited" --

13   JUSTICE SOTOMAYOR: Could you go back to the

14   question that Justice Alito asked? Assuming we find

15   that this is not jurisdictional, what is the parade of

16   horribles that you see occurring if we call this a

17   mandatory claim processing rule? What kinds of cases do

18   you imagine that courts will reach?

19   MR. LONG: Right. Well, first of all, I

20   think you would be saying that for the refund statute,

21   as well as for the Anti-Injunction Act -- which has very

22   similar wording, so if the Anti-Injunction Act is not

23   jurisdictional, I think that's also going to apply to

24   the refund statute, the statute that says you have to

25   first ask for a refund and then file, you know, within

1   certain time -- so it would be -- it would be both of

2   those statutes. And, you know, we are dealing with

3   taxes here, if people --

4   JUSTICE SOTOMAYOR: That wasn't my question.

5   MR. LONG: I'm sorry.

6   JUSTICE SOTOMAYOR: My question was, if we

7   deem this a mandatory claim processing rule --

8   MR. LONG: Right.

9   JUSTICE SOTOMAYOR: -- what cases do you

10   imagine courts will reach on what grounds? Assuming the

11   Government does its job and comes in and raises the AIA

12   as an immediate defense --

13   MR. LONG: Well, that's --

14   JUSTICE SOTOMAYOR: -- where can a court

15   then reach the question, despite --

16   MR. LONG: That would certainly be the first

17   class of cases, it occurs to me, where, if the

18   Government does not raise it in a timely way, it could

19   be waived. I would think plaintiffs would see if there

20   was some clever way they could get a suit going that

21   wouldn't immediately be apparent that --

22   JUSTICE SOTOMAYOR: Assumes the lack of

23   competency of the Government, which I don't, but what

24   other types of cases?

25   JUSTICE SCALIA: Mr. Long, I don't think you

1   are going to come up with any, but I think your response

2   is you could say that about any jurisdictional rule. If

3   it's not jurisdictional, what's going to happen is you

4   are going to have an intelligent federal court deciding

5   whether you are going to make an exception. And there

6   will be no parade of horribles because all federal

7   courts are intelligent.

8   So it seems to me it's a question you can't

9   answer. It's a question which asks "why should there be

10   any jurisdictional rules?" And you think there should

11   be.

12   MR. LONG: Well, and, Justice Scalia, I

13   mean, honestly, I can't predict what would happen, but I

14   would say that not all people who litigate about federal

15   taxes are necessarily rational. And I think there would

16   be a great --

17   JUSTICE BREYER: I just don't want you to

18   lose the second half of your argument. And we have

19   spent all the time so far on jurisdiction. And I

20   accept, pretty much, I'm probably leaning in your favor

21   on jurisdiction, but where I see the problem is in the

22   second part, because the second part says "restraining

23   the assessment or collection of any tax."

24   Now, here, Congress has nowhere used the

25   word "tax." What it says is penalty. Moreover, this is

16

1   not in the Internal Revenue Code "but for purposes of

2   collection."

3   And so why is this a tax? And I know you

4   point to certain sentences that talk about taxes within

5   the Code --

6   MR. LONG: Right.

7   JUSTICE BREYER: -- and this is not attached

8   to a tax. It is attached to a health care requirement.

9   MR. LONG: Right.

10   JUSTICE BREYER: So why does it fall within

11   that word?

12   MR. LONG: Well, I mean, the first point

13   is -- our initial submission is you don't have to

14   determine that this is a tax in order to find that the

15   Anti-Injunction Act applies, because Congress very

16   specifically said that it shall be assessed and

17   collected in the same manner as a tax, even if it's a

18   tax penalty and not a tax. So that's one --

19   JUSTICE BREYER: But that doesn't mean the

20   AIA applies. I mean -- and then they provide some

21   exceptions, but it doesn't mean the AIA applies.

22   It says, "in the same manner as." It is

23   then attached to Chapter 68, when that -- it references

24   that as "being the manner of." Well, that it's being

25   applied -- or if it's being collected in the same manner

1   as a tax doesn't automatically make it a tax,

2   particularly since the reasons for the AIA are to

3   prevent interference with revenue sources. And here, an

4   advance attack on this does not interfere with the

5   collection of revenues.

6   I mean, that's -- you have read the

7   arguments, as have I. But I would like to know what you

8   say succinctly in response to those arguments.

9   MR. LONG: So, specifically on the argument

10 that it is actually a tax, even setting aside the point

11 that it should be assessed and collected in the same

12 manner as a tax, the Anti-Injunction Act uses the term

13 "tax"; it doesn't define it. Somewhat to my surprise,

14 "tax" is not defined anywhere in the Internal Revenue

15 Code. In about the time that Congress passed the

16 Anti-Injunction Act, "tax" had a very broad definition.

17 It's broad enough to include this exaction, which is

18 codified in the Internal Revenue Code. It's part of the

19 taxpayer's annual income tax return. The amount of the

20 liability and whether you owe the liability is based in

21 part on your income. It's assessed and collected by the

22 IRS.

23   JUSTICE SCALIA: There's at least some doubt

24 about it, Mr. Long, for the reasons that Justice Breyer

25 said, and I thought that we had a -- a principle that

1   ousters of jurisdiction are narrowly construed; that,

2   unless it's clear, courts are not deprived of

3   jurisdiction. And I find it hard to think that this is

4   clear. Whatever else it is, it's easy to think that

5   it's not clear.

6   MR. LONG: Well, I mean, the Anti-Injunction

7   Act applies not only to every tax in the code but, as

8   far as I can tell, to every tax penalty in the code.

9   And --

10   JUSTICE GINSBURG: Mr. Long, you said

11   before -- and I think you were quite right -- that the

12   Tax Injunction Act is modeled on the Anti-Injunction

13   Act. And, under the Tax Injunction Act, what can't be

14   enjoined is an assessment for the purpose of raising

15   revenue. The Tax Injunction Act does not apply to

16   penalties that are designed to induce compliance with

17   the law, rather than to raise revenue. And this is not

18   a revenue-raising measure because, if it's successful,

19   they -- nobody will pay the penalty, and there will be

20   no revenue to raise.

21   MR. LONG: Well, in Bob Jones the Court said

22   that they had gotten out of the business of trying to

23   determine whether an exaction is primarily

24   revenue-raising or primarily regulatory. And this one

25   certainly raises -- is expected to raise very

1   substantial amounts of revenues, at least $4 billion a

2   year by the --

3   JUSTICE SOTOMAYOR: But Bob Jones involved a

4   statute where it denominated the exaction as a tax.

5   MR. LONG: That's --

6   JUSTICE SOTOMAYOR: Here we have one where

7   the Congress is not denominating it a -- as a tax; it's

8   denominating it as a penalty.

9   MR. LONG: That's -- that's absolutely

10   right, and that's obviously why -- if it were called a

11   tax, there would be absolutely no question that the

12   Anti-Injunction Act applies.

13   JUSTICE SOTOMAYOR: Absolutely. But even

14   the section of the code that you referred to previously,

15   the one following 7421, the AIA, it does very clearly

16   make a difference -- 7422 -- make a difference between

17   tax and penalties. It's very explicit.

18   MR. LONG: Yes, that's -- it does; that is

19   correct. And there are many other places in the code

20   where tax is --

21   JUSTICE BREYER: The best collection I've

22   found in your favor, I think, is in Mortimer Caplin's

23   brief on page 16, 17. He has a whole list. All right.

24   So -- I got my law clerk to look all those up. And it

25   seems to me that they all fall into the categories of

1   either, one, these are penalties that were penalties

2   assessed for not paying taxes; or, two, they involve

3   matters that were called by the court taxes; or, three,

4   in some instances they were deemed by the code to be

5   taxes.

6   Now, what we have here is something that's

7   in a different statute that doesn't use the word "tax"

8   once except for a collection device, and, in fact, in

9   addition, the underlying AIA reason, which is to say to

10   the Solicitor General: We don't care what you think;

11   we, in Congress, don't want you in court where the

12   revenue of a state -- Tax Injunction Act -- or the

13   revenue of the federal government is at stake, and,

14   therefore, you can't waive it.

15   Now, I got that. Here it's not at stake,

16   and here there are all the differences I just mentioned.

17   So, I ask that because I want to hear your response.

18   MR. LONG: Well, I mean, there are penalties

19   in the Internal Revenue Code that you really couldn't

20   say are related in any -- in any close way to some other

21   tax provision. There's a penalty -- it's discussed in

22   the briefs -- for selling diesel fuel that doesn't

23   comply with EPA's regulations, you know. So, there are

24   all kinds of penalties in the code, and I think it's --

25   that you could rely upon.

1   JUSTICE KAGAN: Mr. Long, aren't there

2   places in this Act -- fees and penalties -- that were

3   specifically put under the Anti-Injunction Act? There's

4   one on health care plans, there's one on pharmaceutical

5   manufacturers, where Congress specifically said the

6   Anti-Injunction Act is triggered for those. It does not

7   say that here. Wouldn't that suggest that Congress

8   meant for a different result to obtain?

9   MR. LONG: Well, I mean, Congress didn't use

10   the language the Anti-Injunction Act "shall apply" --

11   JUSTICE KAGAN: No, but it -- it in section

12   9008 and in section 9010 --

13   MR. LONG: Right.

14   JUSTICE KAGAN: -- it specifically referred

15   --

16   MR. LONG: Right.

17   JUSTICE KAGAN: -- to the part of the

18   code where the Anti-Injunction Act is.

19   MR. LONG: Right, all of subtitle F, which

20   picks up lots of administration and procedure

21   provisions, but those -- those are fees, and they're

22   not -- Congress did not provide, you know, in the

23   sections themselves that they should be paid as part of

24   a tax return. So they were free-standing fees, and by

25   using that subtitle F language, Congress plugged in a

22

1   whole set of rules for how to collect and administer the

2   fees, and it went not just to assessment and

3   collection -- and the IRS has recognized this -- but to

4   examination, privacy, a whole series of additional

5   things.

6   So I think it would be a mistake to look at

7   that language and say, oh, here's Congress saying they

8   want the Anti-Injunction Act to apply. They're actually

9   doing more than that.

10   And, yes, I grant you, you could look at

11   section 5000A, the individual coverage requirement, and

12   say, well, they could have been clearer about saying the

13   Anti-Injunction Act applied, and that's certainly true,

14   but, again, they were trying to accomplish a lot. And

15   it's --

16   JUSTICE KENNEDY: Maybe it's easier to talk

17   about this case if we just forget the words "for the

18   purpose of restraining assessment and collection." In a

19   sense, that brings the jurisdictional question and

20   Justice Breyer's question together.

21   It seems to me -- maybe you could just

22   comment on that language. Is that sort of language

23   usually contained in a jurisdictional provision? I

24   mean, you often don't know the purpose of a suit until

25   after the thing is under way. I can see it with

1   malicious prosecution and some civil rights cases. Does

2   it strike you as somewhat unusual to have this provision

3   in a jurisdictional case?

4   MR. LONG: It does strike me, honestly --

5   JUSTICE KENNEDY: Yes.

6   MR. LONG: -- as a bit unusual, but this is

7   an old statute. I mean, this -- the core language is

8   essentially unchanged since 1867, and it -- you know, I

9   think that's part of the explanation for it. And,

10   again, it's, you know, become the center of a series of

11   provisions that very carefully control the circumstances

12   in which litigation about federal taxes can take place.

13   JUSTICE GINSBURG: Mr. Long, there's another

14   argument that has been made that I would like you to

15   address, and that is all this talk about tax penalty --

16   it's all beside the point because this suit is not

17   challenging the penalty. This is a suit that is

18   challenging the must-buy provision, and the argument is

19   made that, if, indeed, "must-buy" is constitutional,

20   then these complainants will not resist the penalty.

21   So, what they're seeking is a determination

22   that that the "must-buy" requirement, stated separately

23   from the penalty, that "must-buy" is unconstitutional.

24   And, if that's so, that's the end of the case; if it's

25   not so, they're not resisting the penalty.

1   MR. LONG: Well, I think that argument

2   doesn't work for two reasons. I mean, first, if you

3   look at the plaintiffs' own complaint, they clearly

4   challenge both the minimum coverage requirement and the

5   penalty. At page 122 of the Joint Appendix, they

6   challenge the requirement that the individuals obtain

7   health care coverage or pay a penalty.

8   JUSTICE ALITO: Well, why is that?

9   JUSTICE GINSBURG: If that's -- if that's

10   the problem, it's easier to amend the complaint. They

11   can just take that out of the complaint. So, it can't

12   turn on that.

13   MR. LONG: Well -- and -- yes, I mean, it's

14   -- or another complaint would be filed, but, still, I

15   think that's a serious problem. But even if they had

16   filed a different complaint, I don't think you -- in

17   this case, I don't think you can separate the minimum

18   coverage requirement from the penalty because the

19   penalty is the sole means of enforcing the minimum

20   coverage requirement.

21   So, first, I mean, I think these plaintiffs

22   would not be satisfied if the Court were to render a

23   judgment saying the minimum coverage requirement is

24   invalidated; the penalty, however, remains standing.

25   Anybody who doesn't have insurance has to pay the

1   penalty. Then they'd have to pay a penalty equal to the

2   cost of insurance and they wouldn't even have insurance.

3   So, I don't think that would be --

4   JUSTICE ALITO: Well, they say they want to

5   obey the law --

6   MR. LONG: Right.

7   JUSTICE ALITO: -- and they say that your

8   argument puts them in the position of having to disobey

9   the law in order to obtain review of their claim. And

10   what is your answer to that?

11   MR. LONG: Well, I mean, first of all, I

12   can't find that in the record, in their declarations. I

13   don't see a statement that they will, you know, never

14   incur a penalty under any circumstances. But -- but

15   even if that were so, what this Court has said in

16   Americans United is the Anti-Injunction Act bars any

17   suit, not just to enjoin the collection of your own

18   taxes, but to enjoin the collection of anyone's taxes.

19   And so even if it were really true that

20   these plaintiffs were not interested in the penalty and

21   would never pay the penalty, if they were to succeed in

22   this case in striking down the minimum coverage

23   requirement, the inevitable result would be that the

24   penalty would fall as well, because the Government

25   couldn't collect a penalty for failing to follow an

26

 1   unconstitutional requirement, and so it would still be

 2   barred because it would be a suit that would prevent the

 3   collection of some of the --

 4   JUSTICE ALITO: Well, let me take us back to

 5   Justice Kennedy's question about the "for the purpose

 6   of" language. I take it you interpret the statute to

 7   mean the following: "For the purpose of" means having

 8   the effect of. Is that correct?

 9   MR. LONG: Well, I mean, this Court in the

10   Bob Jones case, where a similar kind of argument was

11   being made by the plaintiff in that case, said, you

12   know, look, you know, where the -- where it's inevitable

13   that this is what the suit is about, they're sort of two

14   sides of the same coin, that clearly is a primary

15   purpose of the suit. And it's -- and you can't by

16   clever pleading get away from that. That's just the

17   nature of the situation.

18   JUSTICE KAGAN: But, Mr. Long, aren't you

19   trying to rewrite the statute, in a way? The statute

20   has two sections. One is the you have to have insurance

21   section and the other is the sanction. The statute has

22   two different sets of exceptions corresponding to those

23   two different sections. You are trying to suggest that

24   the statute says: Well, it's your choice, either buy

25   insurance or pay a -- or pay a fee.

                                  27

1   But that's not the way the statute reads.

2   And Congress, it must be supposed, you know, made a

3   decision that that shouldn't be the way the statute

4   reads, that it should instead be a regulatory command

5   and a penalty attached to that command.

6   MR. LONG: Well, I would not argue that this

7   statute is a perfect model of clarity, but I do think

8   the most reasonable way to read the entire statute is

9   that it does impose a single obligation to pay a penalty

10   if you are an applicable individual and you are not

11   subject to an exemption.

12   And the reason I say that, if you look at

13   the exemptions from the penalty, the very first one is,

14   you are exempt from the penalty because you can't afford

15   to purchase insurance. And it just doesn't seem

16   reasonable to me to interpret the statute as Congress

17   having said, well, you know, this person is exempt from

18   paying a penalty because we find they can't afford to

19   buy insurance, however they still have a legal

20   obligation to buy insurance. That just doesn't seem

21   reasonable.

22   So I -- so I do think, although it's -- I

23   certainly wouldn't argue it's clear -- that that's the

24   best way to understand the statute as a whole.

25   But again, I would say, you know, that's not

1   essential to the question we're discussing now of

2   whether the Anti-Injunction Act applies. Again, you

3   know, I think --

4   JUSTICE SOTOMAYOR: Could you tell me why

5   you think the Solicitor General's reading creates a

6   problem?

7   MR. LONG: Well, in going back to -- so if

8   the result were to say simply, this is not -- oh, I'm

9   sorry. The Solicitor General's reading. So now it's

10   not --

11   JUSTICE SOTOMAYOR: That it is a

12   jurisdictional bar, but there's an exemption for those

13   items that Congress has designated solely as penalties

14   that are not like taxes.

15   MR. LONG: Right. Well, I mean, I think the

16   Solicitor General's reading would probably create the

17   fewest problems, as I understand it. I mean, my -- my

18   main objection to the Solicitor General's reading is I

19   don't think it makes a whole lot of sense. I mean,

20   basically, the Solicitor General says every penalty in

21   the Internal Revenue Code, every other penalty in the

22   Affordable Care Act is --

23   JUSTICE SOTOMAYOR: But that's not -- that's

24   carrying it too far, because he says if a penalty is

25   designated as a tax by Congress, then it's subject to

1   the AIA, and that's most of the code, the tax code. And

2   he says for those portions of the Affordable Care Act

3   that designate things as taxes, the AIA applies. So

4   it's only -- and I haven't found another statute. I'm

5   going to ask him if there's another one. It's only for

6   those statutes in which Congress has designated

7   something solely as a penalty.

8   MR. LONG: Right.

9   JUSTICE SOTOMAYOR: And not indicated that

10   it is a tax.

11   MR. LONG: Right.

12   JUSTICE SOTOMAYOR: They don't fall within

13   the AIA.

14   MR. LONG: I think my -- my take on it is if

15   you adopted the Solicitor General's approach, there are

16   probably three penalties for alcohol and tobacco-related

17   offenses at 5114(c), 5684, and 5761 that I think would

18   be very difficult to distinguish from this one, and

19   possibly the 527(j) penalty for failure to disclose

20   political contributions.

21   If there are no further questions, I would

22   like to reserve my time.

23   CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

24   General Verrilli.

25   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

1   ON BEHALF OF THE PETITIONERS

2   GENERAL VERRILLI: Mr. Chief Justice and may

3   it please the Court:

4   This case presents issues of great moment,

5   and the Anti-Injunction Act does not bar the Court's

6   consideration of those issues. That is so even though

7   the Anti-Injunction Act is a jurisdictional limit that

8   serves what this Court described in Clintwood Elkhorn as

9   an exceedingly strong interest in protecting the

10   financial stability of the Federal Government, and even

11   though the minimum coverage provision of the Affordable

12   Care Act is an exercise of Congress's taxing power as

13   well as its commerce power.

14   Congress has authority under the taxing

15   power to enact a measure not labeled as a tax, and it

16   did so when it put section 5000A into the Internal

17   Revenue Code. But for purposes of the Anti-Injunction

18   Act, the precise language Congress used is

19   determinative. And there is no language in the

20   Anti-Injunction Act -- excuse me, no language in section

21   5000A of the Affordable Care Act or in the Internal

22   Revenue Code generally that provides a textual

23   instruction that --

24   JUSTICE ALITO: General Verrilli, today you

25   are arguing that the penalty is not a tax. Tomorrow you

31

1   are going to be back and you will be arguing that the

2   penalty is a tax.

3   Has the Court ever held that something that

4   is a tax for purposes of the taxing power under the

5   Constitution is not a tax under the Anti-Injunction Act?

6   GENERAL VERRILLI: No, Justice Alito, but

7   the Court has held in the license tax cases that

8   something can be a constitutional exercise of the taxing

9   power whether or not it is called a tax. And that's

10   because the nature of the inquiry that we will conduct

11   tomorrow is different from the nature of the inquiry

12   that we will conduct today.

13   Tomorrow the question is whether Congress

14   has the authority under the taxing power to enact it and

15   the form of words doesn't have a dispositive effect on

16   that analysis. Today we are construing statutory text

17   where the precise choice of words does have a

18   dispositive effect on the analysis.

19   JUSTICE SOTOMAYOR: Well, General, you also

20   have the Bailey child labor tax cases, because there the

21   Court said that the tax, which was a prohibitory tax

22   alone, was a tax subject to the AIA, and then it said it

23   was beyond the Court's taxing power in a separate case,

24   correct?

25   GENERAL VERRILLI: Yes. I do think, Justice

32

1   Sotomayor, that with respect to one of the arguments

2   that my friend from the NFIB has made in of the brief,

3   that Bailey against George is a significant problem

4   because I think their argument on the constitutionality

5   under the taxing power is essentially that the

6   Affordable Care Act provision is the same thing as the

7   provision that was held unconstitutional in Bailey

8   against Drexel Furniture.

9   JUSTICE SOTOMAYOR: That's a different

10   issue. The question Justice --

11   GENERAL VERRILLI: But on the same day --

12   right, but on the same day as Bailey against Drexel

13   Furniture, the Court issued Bailey against George, which

14   held that the Anti-Injunction Act did bar a challenge to

15   that provision, even though the Court had concluded that

16   it was invalid under the tax power.

17   So -- and I think the reason for that has

18   been -- is clear now after Williams Packing and Bob

19   Jones, in that, in order to find that the

20   Anti-Injunction Act doesn't apply to something that

21   otherwise would be a tax that triggers it, you have to

22   conclude essentially that there is no substantial

23   argument that can be made in defense of it as a tax. We

24   don't have that here, so I don't think you can get

25   around the Anti-Injunction Act if the Court were to read

33

1   it, as the amicus suggest it should be read, on that

2   theory, but --

3   JUSTICE GINSBURG: Mr. Verrilli, a basic

4   question about your argument. If you are right about

5   the second part, that is, for purposes of the statute,

6   the Anti-Injunction statute, this penalty does not

7   constitute a tax, then does the Court need to decide

8   whether the Anti-Injunction Act in other cases, where it

9   does involve a tax, is jurisdictional?

10   GENERAL VERRILLI: No. I apologize if I'm

11 creating any confusion about that, Justice Ginsburg. We

12 think by far the better route here is to understand the

13 statute as we have proposed that it be construed as not

14 applying here. From the perspective of the United

15 States -- and if I could, I'd like to take a minute on

16 this -- the idea that the Anti-Injunction Act would be

17 construed as not being a jurisdictional provision is

18 very troubling, and we don't think it's correct.

19   And I would, if I could, follow up on a

20 question, Justice Ginsburg, that you asked Mr. Long in

21 terms of the language of the Anti-Injunction Act,

22 7421(a), which can be found at page 16a of the appendix

23 to our brief.

24   I'd ask the Court to compare that to the

25 language of the very next provision in the code, which

1   is on the next page of our statutory appendix, 17a,

2   which is the refund statute, which we've talked about a

3   little bit so far this morning, 7422(a).

4   The refund statute this Court held in Dolan

5   was jurisdictional, and the Court in both Dolan and

6   Brockamp held that the statute of limitations that

7   applies to the refund statute cases is jurisdictional.

8   The language in 7422(a) is virtually

9   identical to the language in 7421(a) --

10   JUSTICE KENNEDY: That is correct, although

11   in the refund context, you have the sovereign immunity

12   problem, in which we presume that has not been waived.

13   GENERAL VERRILLI: Right. But I -- 7421(a)

14   --

15   JUSTICE KENNEDY: But you're --

16   GENERAL VERRILLI: -- and 7422(a) were the

17   same --

18   JUSTICE KENNEDY: The language is quite

19   parallel.

20   GENERAL VERRILLI: And, originally, they

21   were the same statutory provision. They were only

22   separated out later. So, I do think that's the

23   strongest textual indication, Justice Ginsburg, that --

24   that 7421(a) is jurisdictional.

25   JUSTICE KAGAN: General --

1   JUSTICE GINSBURG: But the question that I

2   asked you is, if you're right that this penalty is not

3   covered by section 7421, if you're right about that, why

4   should we deal with the jurisdictional question at all?

5   Because this statute, correct, the way you're reading --

6   read it, doesn't involve a tax that's subject to the

7   Anti-Injunction Act.

8   GENERAL VERRILLI: Yes, that is exactly our

9   position. And the reason we don't --

10   JUSTICE GINSBURG: So -- so, you agree that

11   we would not -- if we agree with you about the correct

12   interpretation of the statute, we need not decide the

13   jurisdiction.

14   GENERAL VERRILLI: There would be no reason

15   to decide the jurisdictional issue.

16   JUSTICE KENNEDY: Don't you want to know the

17   answer?

18   (Laughter.)

19   GENERAL VERRILLI: Justice Kennedy, I think

20   we all want to know the answer to a lot of things in

21   this case. But -- but I do -- but I do think that the

22   prudent course here is to construe the statute in the

23   manner that we read it.

24   JUSTICE KENNEDY: But you indicated -- there

25   was a discussion earlier about why does the government

1   really care, they have competent attorneys, et cetera.

2   But -- and you began your argument by saying it would be

3   very troubling to say that it's not jurisdictional.

4   I'd like you to comment on that. It's not

5   for us to tell a party what's in its best interests. It

6   would seem to me that there might be some instances in

7   which the government would want to litigate the validity

8   of a tax right away and would want to waive. But you

9   say it's -- that's not true; that it's very troubling.

10   GENERAL VERRILLI: I think there are two

11   problems. One is the problem that Justice Scalia

12   identified, that if it's not jurisdictional, then courts

13   have authority to craft equitable exceptions. And it

14   may seem from where we stand now that that authority is

15   or could be very, very tightly cabined, but if -- if

16   this Court were to conclude that it isn't

17   jurisdictional, that does empower courts to find other

18   circumstances in which they might find it equitable to

19   allow cases to go forward in the absence of -- despite

20   the existence of the Anti-Injunction Act.

21   And, second, although I certainly am not

22   going to stand up here and disparage the attorneys from

23   the United States in the slightest, the reality is that

24   if this isn't jurisdictional, then it's -- the argument

25   -- it's open to the argument that it's subject to

1   forfeiture by a simple omission in failing to raise it

2   in an answer. And that -- and that's a troubling

3   prospect.

4   JUSTICE KAGAN: General, can I ask --

5   JUSTICE GINSBURG: How likely is it --

6   CHIEF JUSTICE ROBERTS: Justice Ginsburg.

7   JUSTICE GINSBURG: How likely is it -- I

8   mean, the government is going to be defending these

9   suits. How likely is it that the government will

10   overlook the Anti-Injunction Act? It seems to me that

11   this is arming the government by saying it's waivable at

12   the government's option.

13   GENERAL VERRILLI: That's -- that is not our

14   assessment of the institutional interests of the United

15   States, Justice Ginsburg. And we do think that the --

16   the right way to go in this case is to read the statute

17   as not applying to the minimum coverage provision of --

18   of the Affordable Care Act.

19   CHIEF JUSTICE ROBERTS: It was -- it was the

20   calculation of the interests of the United States that

21   your predecessor made in the Davis case.

22   There, the Solicitor General exercised the

23   authority that we sanctioned to waive the

24   Anti-Injunction Act. And, of course, that couldn't be

25   done if it were jurisdictional.

1   GENERAL VERRILLI: That's true,

2   Mr. Chief Justice. Several points about that, though.

3   We do agree with Mr. Long's analysis that

4   Davis occurred in -- during a time in -- in which under

5   the Standard Nut case, the Court had interpreted the

6   Anti-Injunction Act as doing no more than codifying the

7   traditional equitable principles which allowed courts

8   discretion to conclude that in certain circumstances, a

9   case could go forward.

10   Williams Packing repudiated that analysis,

11 and Bob Jones v. Simon again repudiated that analysis

12 and said, no, we're no longer abiding by that. It is

13 true that the Davis case has not formally been

14 overruled, but we do think it's fundamentally

15 inconsistent with the Court's understanding now of --

16   JUSTICE BREYER: Davis was the case that --

17 where a shareholder sues the corporation.

18   GENERAL VERRILLI: Yes.

19   JUSTICE BREYER: And the remedy is that the

20 corporation shouldn't pay the money to the tax

21 authority. Now, it's a little technical, but that isn't

22 actually an injunction against the tax authority

23 collecting. He's not -- they're not restraining the

24 collection of the tax. They're saying to the taxpayer,

25 don't pay it.

1   GENERAL VERRILLI: Yes. And --

2   JUSTICE BREYER: I don't know how far that

3   gets you.

4   GENERAL VERRILLI: Well, in fairness,

5   Justice Breyer, the United States did intervene in the

6   -- in the Davis case and was a party, and so -- not as

7   far as I'd like, I guess, is the answer.

8   JUSTICE SCALIA: Don't do it again, because

9   I think that goes too far. I don't think that's

10   restraining the collection of a tax. It's restraining

11   the payment of a tax.

12   GENERAL VERRILLI: Well --

13   JUSTICE SCALIA: You don't want to let that

14   bone go, right?

15   (Laughter.)

16   GENERAL VERRILLI: Our view here is that it

17   is jurisdictional. Because it's jurisdictional as this

18   Court understands jurisdiction now, it's not waivable.

19   And, therefore, we don't think that -- that that part of

20   the Davis decision is good law.

21   JUSTICE KAGAN: General, can I ask you about

22   Reed Elsevier? Justice Ginsburg suggested that the

23   language was very similar in Reed Elsevier as it is

24   here, but there are even further similarities. Reed

25   Elsevier pointed out that the provision in question

1   wasn't in Title 28. Here, too, it's not in Title 28.

2   In Reed Elsevier, it was pointed out that the provision

3   there had numerous exceptions to it. Here, too, there

4   are numerous exceptions that we find that have been

5   created by the courts over the years.

6   In Reed Elsevier, the question was

7   essentially one about timing. Come to court after you

8   file your registration. Here, too, the question is one

9   about timing. Come to court after you make -- after you

10   pay your taxes.

11   So, Reed Elsevier seems in multiple respects

12   on all fours with this case.

13   Why is that wrong?

14   GENERAL VERRILLI: I don't think so, Justice

15   Kagan. First, we think -- I guess I'm repeating myself

16   and I apologize. But we think the closest analogue is

17   the very next provision in the United States Code,

18   7422(a), which this Court has held is jurisdictional,

19   and is phrased in exactly the same way as 7421(a). In

20   fact, as I said, they were the same provision back in

21   the earlier days. That's the closest analogue.

22   This isn't -- and it's actually 7422 that's

23   a statute that says do something first. But this

24   statute is just a flat-out command that no suit shall be

25   maintained to restrain --

41

1   JUSTICE KAGAN: I take the point --

2   GENERAL VERRILLI: -- the assessment or

3   collection.

4   JUSTICE KAGAN: -- but if you would comment

5   on the similarities of Reed Elsevier to this case. How

6   do you think it's different, at all?

7   GENERAL VERRILLI: Well, because the -- I

8   think the best answer to that is there are no magic

9   words, and that history and context matter, as the Court

10   said in Henderson. And the history and context here is

11   that 7422 and 7421 function together to protect an

12   exceedingly strong interest that the Court has held with

13   respect to 7422, sufficiently strong that it explains

14   the jurisdictional nature of that. The same interest

15   applies here.

16   This isn't just a matter of do X and then

17   you can -- and then you can come to court. It's just a

18   fundamentally different set of interests at stake.

19   So, we do think that that makes a big

20   difference. And --

21   JUSTICE GINSBURG: Why isn't Reed

22   Elsevier -- if you're dividing jurisdiction from claims

23   processing -- it says you have to register before you

24   can sue. There are a lot of things you have to do

25   before you can sue. So, why isn't Reed Elsevier like

1   you have to pay a filing fee before you can file a

2   complaint?

3   GENERAL VERRILLI: It is -- we do think it's

4   very much in that nature and different from this case,

5   Your Honor.

6   And one way I think it's helpful to get at

7   this is to look at the history. We've cited a string of

8   court of appeals cases in a footnote in our opening

9   brief, and over time, it's been very consistent that the

10   courts of appeals have treated the Anti-Injunction Act

11   as a jurisdictional provision.

12   Again, if the Court agrees with our

13   statutory construction, you don't need to reach this

14   issue. But they have -- in fact, one of those cases,

15   the Hansen case, the district court in that case had

16   dismissed the complaint under Federal Rule of Civil

17   Procedure 12(b)(6). The Court of Appeals vacated and

18   sent it back with instructions to dismiss under

19   12(b)(1), which is the subject matter jurisdiction

20   provision.

21   So I do think that, to the extent this issue

22   is before the Court, it is jurisdictional, but it

23   doesn't need to be before the Court because of the

24   statutory construction argument that we had offered.

25   JUSTICE GINSBURG: On your statutory

1 construction argument, is there any other exaction

2 imposed under the Internal Revenue Code that would not

3 qualify as a tax for Anti-Injunction Act purposes, or is

4 5000A just out there all by itself?

5   GENERAL VERRILLI: It's not quite out there

6 all by itself. There are other provisions that fall

7 outside of subchapter B of chapter 68 and, therefore,

8 wouldn't be governed by the instruction in Section

9 6671(a), which answers the question about the

10 applicability of the Act for most penalties.

11   The ones that we've identified, and I may be

12 overlapping a little bit with Mr. Long here, one is 26

13 U.S.C. 857, which imposes certain penalties in

14 connection with the administration of real estate

15 investment trusts.

16   There are provisions that Mr. Long

17 identified in his brief, Sections 6038(a) through (c) of

18 the Code, which impose certain penalties with respect to

19 reporting requirements for foreign corporations.

20   We have, in addition, in footnote 22 at page

21 36 of our brief, identified three provisions that Mr.

22 Long also identified about -- about alcohol and tobacco.

23 Now --

24   JUSTICE SOTOMAYOR: Could we address,

25 General, the question of whether there are any

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1   collateral consequences for the failure to buy -- to not

2   buy health insurance? Is the only consequence the

3   payment of the penalty?

4   The private respondents argue that there are

5   other collateral consequences such as for people on

6   probation who are disobeying the law, if they don't buy

7   health insurance, they would be disobeying the law and

8   could be subject to having their supervised release

9   revoked.

10   GENERAL VERRILLI: Yes. That is not a

11   correct reading of the statute, Justice Sotomayor. The

12   only consequence that ensues is the tax penalty. And

13   the -- we have made a representation, and it was a

14   carefully made representation, in our brief that it is

15   the interpretation of the agencies charged with

16   interpreting this statute, the Treasury Department and

17   the Department of Health and Human Services, that there

18   is no other consequence apart from the tax penalty.

19   And I do think, if I could talk for a couple

20   of minutes about the argument that was discussed as to

21   whether this can be conceived of as a suit just

22   challenging the requirement, which is entirely

23   stand-alone based on inferences drawn from the

24   exemptions. I really don't think that's right. And if

25   I could spend a minute on it, I think it's important.

1   The exemptions in section 5000A, it is true

2   that there are two categories of exemptions. There are

3   exemptions to the penalty and exemptions to the

4   subsection (a) requirement. But the -- but I think, not

5   only as a practical matter, but I think there's a

6   textual indication and even as a legal matter,

7   they are -- they both function as exceptions to the

8   requirement.

9   First, as a practical matter, one of those

10   exemptions is a hardship exemption. And if the Court

11   will just bear with me for one minute here, it's at page

12   11A of the appendix to our brief. It provides that a

13   person can go to the Secretary of HHS and obtain a

14   hardship exemption for -- which would, as a formal

15   matter here, excuse compliance with the penalty.

16   It seems to me to make very little sense to

17   say that someone who has gone to an official of the

18   United States and obtained an exemption would,

19   nonetheless, be in a position of being a law breaker.

20   We think another way in which you can get to

21   the same conclusion slightly differently is by

22   considering the provision on the prior page, 10A, which

23   is 5000A -- 5000A(e)(3), members of Indian tribes.

24   Members of Indian tribes are exempt only

25   from the penalty as a formal matter under the structure

1   of the statute here; but, the reason for that is because

2   members of Indian tribes obtain their healthcare through

3   the Indian Health Service, which is a clinic-based

4   system that doesn't involve insurance at all. It's an

5   entirely different system.

6   They were taken out of this statute because

7   they get their healthcare through a different system.

8   And it doesn't make any sense to think that persons

9   getting their health care through the Indian Health

10   Service are violating the law because -- exempt only

11   from the penalty, but still under a legal obligation to

12   have insurance, when the whole point of this is that

13   they're supposed to be in a clinic-based system.

14   JUSTICE SOTOMAYOR: Is your whole point that

15   this was inartful drafting by Congress, that, to the

16   extent that there is an exemption under the penalty,

17   it's an exemption from the legal obligation?

18   GENERAL VERRILLI: I guess what I would say

19   about it, Your Honor, is that the way in which this

20   statute is drafted doesn't permit the inference that my

21   friends from the NFIB are trying to draw from it.

22   And there is an additional textual

23   indication of that, which one can find at page 13 of our

24   reply brief. This is a provision that is 42 U.S.C. A,

25   section 18022(e). This is a provision that provides for

1   a certification that certain individuals can get. And

2   it's the paragraph starting with the words "other

3   provisions," contains the quote.

4   And it says, an individual with a

5   certification that the individual is exempt from the

6   requirement under section 5000A, by reason of section

7   5000A(e)(1) of such code, is entitled to a certificate

8   that allows for enrollment in a particular program for

9   this category of people.

10   But you can see here, Congress is saying

11   it's an exemption under 5000A(e)(1), which is the

12   exemption from the penalty, and not the underlying

13   requirement is, as Congress says, an exemption from the

14   requirement of section 5000A.

15   JUSTICE ALITO: Subsection A says directly,

16   "an applicable individual shall ensure that the

17   individual has the minimum essential coverage." And you

18   are saying it doesn't really mean that, that if you're

19   not subject to the penalty, you're not under an

20   obligation to maintain the minimum essential coverage?

21   GENERAL VERRILLI: That's correct. And we

22   think that is what Congress is saying, both in the

23   provision I just pointed to, Your Honor, and by virtue

24   of the fact -- by virtue of the way the exemptions work.

25   I just think that's the -- reading this in context, that

1   is the stronger reading of the statute.

2   CHIEF JUSTICE ROBERTS: It makes it easy for

3   the Government to drop the other shoe in the future,

4   right? You have been under the law subject to this

5   mandate all along. You have been exempt from the

6   penalty, so all they have to do is take away the

7   penalty.

8   GENERAL VERRILLI: I don't -- I don't think

9   so, Mr. Chief Justice. I don't think it makes it easy

10   for the Government in the future. We think this is the

11   fairest reading of the statute, that the -- that the --

12   you cannot infer from the fact that someone is exempt

13   from the penalty, that they are still under an

14   obligation to have insurance. That's just not the

15   fairest reading of the statute.

16   JUSTICE KAGAN: Could I --

17   JUSTICE ALITO: I'm sorry, go ahead.

18   JUSTICE KAGAN: The nature of the

19   representation you made, that the only consequence is

20   the penalty, suppose a person does not purchase

21   insurance, a person who is obligated to do so under the

22   statute, doesn't do it, pays the penalty instead, and

23   that person finds herself in a position where she is

24   asked the question, have you ever violated any federal

25   law, would that person have violated a federal law?

1   GENERAL VERRILLI: No. Our position is that

2   person should give the answer "no."

3   JUSTICE KAGAN: And that's because --

4   GENERAL VERRILLI: That if they don't pay

5   the tax, they violated a federal law.

6   JUSTICE KAGAN: But as long as they pay the

7   penalty --

8   GENERAL VERRILLI: If they pay the tax, then

9   they are in compliance with the law.

10   JUSTICE BREYER: Why do you keep saying it's

11   a tax?

12   GENERAL VERRILLI: If they pay the tax

13   penalty, they're in compliance with the law.

14   JUSTICE BREYER: Thank you.

15   GENERAL VERRILLI: Thank you,

16   Justice Breyer.

17   JUSTICE BREYER: The penalty.

18   GENERAL VERRILLI: Right. That's right.

19   JUSTICE ALITO: Suppose a person who has

20   been receiving medical care in an emergency room -- has

21   no health insurance but, over the years, goes to the

22   emergency room when the person wants medical care --

23   goes to the emergency room, and the hospital says, well,

24   fine, you are eligible for Medicaid, enroll in Medicaid.

25   And the person says, no, I don't want that. I want to

1   continue to get -- just get care here from the emergency

2   room. Will the hospital be able to point to the mandate

3   and say, well, you're obligated to enroll?

4   GENERAL VERRILLI: No, I don't think so,

5   Justice Alito, for the same reason I just gave. I think

6   that the -- that the answer in that situation is that

7   that person, assuming that person -- well, if that

8   person is eligible for Medicaid, they may well not be in

9   a situation where they are going to face any tax penalty

10   and therefore --

11   JUSTICE ALITO: No, they are not facing the

12   tax penalty.

13   GENERAL VERRILLI: Right, right.

14   JUSTICE ALITO: So the hospital will have to

15   continue to give them care and pay for it themselves,

16   and not require them to be enrolled in Medicaid.

17   GENERAL VERRILLI: Right.

18   JUSTICE ALITO: Will they be able to take

19   this out and say, well, you really should -- you have a

20   moral obligation to do it; the Congress of the United

21   States has said, you have to enroll? No, they can't say

22   that?

23   GENERAL VERRILLI: I do think it's -- I

24   think it's certainly fair to say that Congress wants

25   people in that position to sign up for Medicaid. I

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1   think that's absolutely right. And I think the statute

2   is structured to accomplish that objective; but, the

3   reality still is that the only consequence of

4   noncompliance is the penalty.

5   JUSTICE SOTOMAYOR: General, but I thought

6   the people who were eligible for Medicaid weren't

7   subject to the penalty. Am I wrong? I could be just

8   factually wrong.

9   GENERAL VERRILLI: Well, it all -- the

10   penalty is keyed to income.

11   JUSTICE SOTOMAYOR: Yes.

12   GENERAL VERRILLI: And the -- it's keyed to

13   a number of things. One is are -- are you making so

14   little money that you aren't obligated to file a tax

15   return. And if you're in that situation, you're not

16   subject to the penalty. It's also if the cost of

17   insurance would be more than 8 percent of your income,

18   you aren't subject to the penalty.

19   So, there isn't necessarily a precise

20   mapping between somebody's income level and their

21   Medicaid eligibility at the present moment. That will

22   depend on where things are and what the eligibility

23   requirements are in the State.

24   JUSTICE SOTOMAYOR: But those people

25   below --

1   GENERAL VERRILLI: But, as a general matter,

2   for people below the poverty line, it's almost

3   inconceivable that they're ever going to be subject to

4   the penalty, and they would, after the Act's Medicaid

5   reforms go into place, be eligible for Medicaid.

6   JUSTICE BREYER: So, is your point that the

7   tax -- what we want to do is get money from these

8   people. Most of them will bet -- get the money by

9   buying the insurance, and that will help pay. But if

10 they don't, they're going to pay this penalty, and that

11 will help, too. And the fact that we put the latter in

12 brings it within the taxing power. But as far as this

13 Act is concerned, about the injunction, they called it a

14 penalty and not a tax for a reason. They wanted it to

15 fall outside that --

16   GENERAL VERRILLI: Yes.

17   JUSTICE BREYER: -- it's in a different

18 chapter, et cetera.

19   Is that what the heart of what you're

20 saying?

21   GENERAL VERRILLI: That's the essence of it.

22 They called it a penalty. They didn't give any other

23 textural instruction in the Affordable Care Act or in

24 the Internal Revenue Code that that penalty should be

25 treated as a tax --

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 1   CHIEF JUSTICE ROBERTS: Well, except you --

 2   GENERAL VERRILLI: -- for Anti-Injunction

 3   Act purposes.

 4   CHIEF JUSTICE ROBERTS: You agree with

 5   Mr. Long, isn't -- I mean, I thought you just agreed

 6   with Justice Breyer that one of the purposes of the

 7   provision is to raise revenue.

 8   GENERAL VERRILLI: It will -- well, it

 9   will raise revenue. It has been predicted by the CBO

10   that it will raise revenue, Your Honor. But even though

11   that's the case -- and I think that would be true of

12   any -- of any penalty, that it will raise some revenue,

13   but even though that's the case, there still needs to be

14   textual instruction in the statute that this penalty

15   should be treated as a tax for Anti-Injunction Act

16   purposes, and that's what's lacking here.

17   JUSTICE ALITO: After this takes effect,

18   there may be a lot of people who are assessed the

19   penalty and disagree either with whether they should be

20   assessed the penalty at all or with the calculation of

21   the amount of their penalty. So, under your

22   interpretation of the Act, all of them can now go to

23   court? None of them are barred by the Anti-Injunction

24   Act?

25   GENERAL VERRILLI: Those are two different

1   things, Justice Alito. I think for reasons that

2   Justice Kennedy, I think, suggested in one of his

3   questions to Mr. Long, all of the other doctrines,

4   exhaustion of remedies and related doctrines, would

5   still be there, and the United States would rely on them

6   in those circumstances. And -- and so, I don't think

7   the answer is that they can all go to court, no.

8   JUSTICE SOTOMAYOR: Well, why isn't --

9   JUSTICE ALITO: Two former -- two former

10   commissioners of the IRS have filed a brief saying that

11   your interpretation is going to lead to a flood of

12   litigation. Are they wrong on that?

13   GENERAL VERRILLI: Yes. We don't -- you

14   know -- we've taken this position after very careful

15   consideration, and we've assessed the institutional

16   interests of the United States, and we think we're in

17   the right place.

18   JUSTICE SOTOMAYOR: But tell me something,

19   why isn't this case subject to the same bars that --

20   that you list in your brief? The Tax Court, at least so

21   far, considers constitutional challenges to statutes.

22   So, why aren't we -- why isn't this case subject to a

23   dismissal for failure to exhaust?

24   GENERAL VERRILLI: Because we don't --

25   because the exhaustion would go to the individual amount

1   owed, we think, and that's a different situation from

2   this case.

3   If the Court has no further questions.

4   CHIEF JUSTICE ROBERTS: Thank you, General.

5   GENERAL VERRILLI: Thank you.

6   CHIEF JUSTICE ROBERTS: Mr. Katsas.

7   ORAL ARGUMENT OF GREGORY G. KATSAS

8   ON BEHALF OF THE RESPONDENTS

9   MR. KATSAS: Mr. Chief Justice, and may it

10   please the Court:

11   Let me begin with the question whether the

12   Anti-Injunction Act is jurisdictional.

13   Justice Ginsburg, for reasons you suggested,

14   we think the text of the Anti-Injunction Act is

15   indistinguishable from the text of the statute that was

16   unanimously held to be non-jurisdictional in Reed

17   Elsevier. That statute said no suit shall be

18   instituted. This statute says no suit shall be

19   maintained. No --

20   JUSTICE GINSBURG: They are different

21   things.

22   JUSTICE SOTOMAYOR: Big difference,

23   though --

24   JUSTICE GINSBURG: This says

25   "immediately" -- the Reed Elsevier statute says

1   immediately after instituted unless a copyright is

2   registered.

3   MR. KATSAS: Unless the copyright is

4   registered. And this goes -- this goes to the character

5   of the lawsuit. The statute in Reed Elsevier says

6   register your copyright and then come back to court.

7   JUSTICE GINSBURG: So, why isn't that like a

8   filing fee? Before you can maintain a suit for

9   copyright infringement, you have to register your

10   copyright?

11   MR. KATSAS: It -- it's a precondition to

12   filing suit. The -- the analogous precondition here is

13   pay your taxes and then come back to court. The point

14   is --

15   JUSTICE SOTOMAYOR: No, that -- that's not

16   true. The suit here has nothing to do with hearing the

17   action. It has to do with the form of relief that

18   Congress is barring. It's not permitting -- it is not a

19   tax case; you can come in afterwards. It's not

20   permitting the court to exercise what otherwise would be

21   one of its powers.

22   MR. KATSAS: It has to be the same

23   challenge, Justice Sotomayor, or else South

24   Carolina v. Regan would say the Anti-Injunction Act

25   doesn't apply. You are right that once you file -- once

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1   you pay your taxes and then file the refund action, the

2   act of filing the taxes converts the suit from one

3   seeking prospective relief into one seeking money

4   damages. And in that sense, you could think of the

5   statute as a remedial limitation on the courts.

6   But whether you think of it as an exhaustion

7   requirement or a remedial limitation, neither of those

8   characterizations is jurisdictional. In

9   Davis v. Passman you said that a remedial limitation

10   doesn't go --

11   JUSTICE SOTOMAYOR: It does seem strange to

12   think of a -- a law that says no court can entertain a

13   certain action and give a certain remedy as merely a

14   claim-processing rule. What the -- the court is being

15   ousted from -- from what would otherwise be its power to

16   hear something.

17   MR. KATSAS: The suit is being delayed, I

18   think is the right way of looking at it. The

19   jurisdictional apparatus in the district court is

20   present. Prospective relief under 1331, money damages

21   action under 1346. If the Anti-Injunction Act were

22   jurisdiction-ousting, one might have expected it to be

23   in Title 28 and to qualify those statutes and to use

24   jurisdictional limits.

25   JUSTICE SOTOMAYOR: So, how do you deal with

1   this case and our Gonzalez -- our recent Gonzalez case,

2   where we talked about --

3   MR. KATSAS: Right.

4   JUSTICE SOTOMAYOR: -- the language of the

5   COA statute that no appeal will be heard absent the

6   issuance of?

7   MR. KATSAS: Gonzalez -- Gonzalez v. Thaler

8   rests on a special rule that applies with respect to

9   appeals from one Article III court to another.

10   That's -- that explains Gonzalez, and it explains Bowles

11   before it.

12   You have five unanimous opinions in the last

13   decade in which you have strongly gone the other

14   direction on what counts as jurisdictional.

15   JUSTICE SOTOMAYOR: There is an argument

16   that we should just simply say that Bowles applies only

17   to appeals, but we haven't said that.

18   MR. KATSAS: No, you came very close. In

19   Henderson, Justice Sotomayor, you said that Bowles,

20   which is akin to Thaler, is explained by the special

21   rule and understandings governing appeals from one

22   Article III court to another. And you specifically said

23   that it does not apply to situations involving a party

24   seeking initial judicial review of agency action, which

25   is what we have here.

1   So, while you're right, the texts in Bowles

2   and Thaler are not terribly different, those cases are

3   explained by that principle. Under Henderson, it

4   doesn't apply to this case.

5   The text in this case speaks to the suit,

6   the cause of action of the litigant. It doesn't speak

7   to the jurisdiction or power of the court. The

8   Anti-Injunction Act is placed in a section of the tax

9   code governing procedure. It's not placed in --

10   JUSTICE SOTOMAYOR: Counsel, all of those --

11   all of that in particular --

12   MR. KATSAS: You did rely on that in Reed

13   Elsevier as one consideration.

14   JUSTICE SOTOMAYOR: And we haven't relied on

15   it in other cases.

16   MR. KATSAS: Another -- another

17   consideration in Reed Elsevier that cuts in our favor is

18   the presence of exceptions. You said three in Reed

19   Elsevier cut against jurisdictional characterization.

20   Here, there are 11. And --

21   JUSTICE SOTOMAYOR: Many of which themselves

22   speak in very clear jurisdictional language.

23   MR. KATSAS: Well, some of them have no

24   jurisdictional language at all, and not a single one of

25   them uses the word "jurisdiction" to describe the

1   ability of the court to restrain the assessment and

2   collection of taxes, which is what one would have

3   expected --

4   JUSTICE BREYER: Basically, it begs the

5   difference -- language is relevant. There are a lot of

6   relevant things. But one thing that's relevant in my

7   mind is that taxes are, for better or for worse, the

8   life's blood of government.

9   MR. KATSAS: Yes.

10   JUSTICE BREYER: And so what Congress is

11   trying to do is to say there is a procedure here that

12   you go through. You can get your money back, or you go

13   through the Tax Court, but don't do this in advance for

14   the reason that we don't want 500 Federal judge --

15   judges substituting their idea of what is a proper

16   equitable defense, of when there is going to be an

17   exception made about da, da, da, for the basic rule.

18   No. Okay?

19   And so there is strong reason that is there.

20   You tried to apply that reason to the copyright law.

21   You can't find it. Registration for the copyright

22   register is not the life's blood of anything. Copyright

23   exists regardless. So the reasoning isn't there.

24   The language -- I see the similarity of

25   language. I've got that. But it's the reasoning, the

1 sort of underlying reason for not wanting a waiver here

2 that --that is -- has a significant role in my mind of

3 finding that it is jurisdictional. Plus the fact that

4 we have said it nonstop since that Northrop or whatever

5 that other case is.

6   MR. KATSAS: Justice Breyer, as to

7 reasoning, you -- you give an argument -- you give an

8 argument why, as a policy matter, it might make sense to

9 have a non-jurisdictional statute. But of course, this

10 Court's recent cases time and again say Congress has to

11 clearly rank the statute as non-jurisdictional in its

12 text and structure. It seems to me a general appeal to

13 statutory policies doesn't speak with sufficient

14 clarity --

15   JUSTICE BREYER: That's fine. I just wanted

16 to ask the question in case you wanted to answer the

17 policy question.

18   MR. KATSAS: As to policy -- as to policy, I

19 think Helvering against Davis is the refutation of this

20 view. It is true that in most cases, the Government

21 doesn't want and Congress doesn't want people coming

22 into court. But Davis shows there may be some cases

23 including, for instance, constitutional challenges to

24 landmark Federal statutes where the Government sensibly

25 decides that its revenue-raising purposes are better

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1 served by allowing a party to come into court and

2 waiving its defense. That's what the Solicitor General

3 did in Davis, and this Court accepted that waiver.

4   As for prior cases, we have the holding in

5 Davis and the holding in all of the equitable exception

6 cases like Williams Packing, the Government --

7   JUSTICE SOTOMAYOR: So why don't we say --

8 why don't we say it's jurisdictional except when the

9 Solicitor General waives?

10   MR. KATSAS: You have used --

11   JUSTICE SOTOMAYOR: Why would that not

12 promote Congress's policy of ensuring -- or Congress,

13 explicitly says --

14   MR. KATSAS: It's jurisdictional except when

15 the Solicitor General waives it?

16   JUSTICE SOTOMAYOR: Yes. It's a

17 contradiction in terms. I don't disagree. I don't

18 disagree.

19   MR. KATSAS: It is a contradiction in terms.

20 All of your cases analyze the situation as if the

21 statute is jurisdictional, then it's not subject to

22 waiver. If you were to construe this as such a one-of

23 unique statute, it seems to me we would still win

24 because the Solicitor General with full knowledge of the

25 Anti-Injunction Act argument available to him

1   affirmatively gave it up. This is not just a forfeiture

2   where a Government lawyer is -- through inadvertence

3   fails to raise an argument. This is a case where the

4   Government --

5   JUSTICE SOTOMAYOR: They raised it and then

6   gave it up.

7   MR. KATSAS: They made it below. They know

8   what it is; and not only are they not pursuing it here,

9   they are affirmatively pursuing an argument on the other

10   side.

11   JUSTICE KAGAN: Mr. Katsas, is your basic

12   position that when we are talking about the jurisdiction

13   of the district courts, a statute has to say it's

14   jurisdictional to be jurisdictional?

15   MR. KATSAS: I wouldn't go quite that far.

16   I think at a minimum, it has -- it has to either say

17   that or at least be directed to the courts which is a

18   formulation you have used in your cases and which is the

19   formulation that Congress used in the Tax Injunction

20   Act, but did not use in this Statute.

21   JUSTICE KAGAN: Well, how would -- I mean, I

22   suppose one could try to make a distinction between this

23   case and Reed Elsevier by focusing on the difference

24   between instituting something and maintaining something,

25   and suggesting that instituting is more what a litigant

1   does, and maintaining, as opposed to dismissing, is more

2   of what judge does.

3   MR. KATSAS: I don't think so, Justice

4   Kagan, because we have an adversarial system, not an

5   inquisitorial one. The parties maintain their lawsuits,

6   I think, is the more natural way of thinking of it.

7   If I could turn -- if I could turn to the

8   merits question on the AIA before my time runs out.

9   The purpose of this lawsuit is to challenge

10   a requirement -- a Federal requirement to buy health

11   insurance. That requirement itself is not a tax. And

12   for that reason alone, we think the Anti-Injunction Act

13   doesn't apply.

14   What the amicus effectively seeks to do is

15   extend the Anti-Injunction Act, not just to taxes which

16   is how the statute is written, but to free-standing

17   nontax legal duties. And it's just --

18   CHIEF JUSTICE ROBERTS: The whole point --

19   the whole point of the suit is to prevent the collection

20   of penalties.

21   MR. KATSAS: Of taxes, Mr. Chief Justice.

22   CHIEF JUSTICE ROBERTS: Well, prevent the

23   collection of taxes. But the idea that the mandate is

24   something separate from whether you want to call it a

25   penalty or tax just doesn't seem to make much sense.

 1   MR. KATSAS: It's entirely separate, and let

 2   me explain to you why.

 3   CHIEF JUSTICE ROBERTS: It's a command. A

 4   mandate is a command. Now, if there is nothing behind

 5   the command, it's sort of, well, what happens if you

 6   don't follow the mandate? And the answer is nothing, it

 7   seems very artificial to separate the punishment from

 8   the crime.

 9   MR. KATSAS: I'm not sure the answer is

10   nothing, but even assuming it were nothing, it seems to

11   me there is a difference between what the law requires

12   and what enforcement consequences happen to you. This

13   statute was very deliberately written to separate

14   mandate from penalty in several different ways.

15   They are put in separate sections. The

16   mandate is described as a "legal requirement" no fewer

17   than 20 times, three times in the operative text and 17

18   times in the findings. It's imposed through use of a

19   mandatory verb "shall." The requirement is very well

20   defined in the statute, so it can't be sloughed off as a

21   general exhortation, and it's backed up by a penalty.

22   Congress then separated out mandate

23   exceptions from penalty exceptions. It defined one

24   category of people not subject to the mandate. One

25   would think those are the category of people as to whom

 1   Congress is saying: You need not follow this law. It

 2   then defined a separate category of people not subject

 3   to the penalty, but subject to the mandate. I don't

 4   know what that could mean other than --

 5   CHIEF JUSTICE ROBERTS: Why would you have a

 6   requirement that is completely toothless? You know, buy

 7   insurance or else. Or else what? Or else nothing.

 8   MR. KATSAS: Because Congress reasonably

 9   could think that at least some people will follow the

10   law precisely because it is the law. And let me give

11   you an example of one category of person that might

12   be -- the very poor, who are exempt from the penalty but

13   subject to the mandate. Mr. Long says this must be a

14   mandate exemption because it would be wholly harsh and

15   unreasonable for Congress to expect people who are very

16   poor to comply with the requirement to obtain health

17   insurance when they have no means of doing so.

18   That gets things exactly backwards. The

19   very poor are the people Congress would be most

20   concerned about with respect to the mandate to the

21   extent one of the justifications for the mandate is to

22   prevent emergency room cost shifting when people receive

23   uncompensated care. So they would have had very good

24   reason to make the very poor subject to the mandate, and

25   then they didn't do it in a draconian way; they gave the

1   very poor a means of complying with the insurance

2   mandate, and that is through the Medicaid system.

3   JUSTICE KAGAN: Mr. Katsas, do you think a

4   person who is subject to the mandate but not subject to

5   the penalty would have standing?

6   MR. KATSAS: Yes, I think that person would,

7   because that person is injured by compliance with the

8   mandate.

9   JUSTICE KAGAN: What would that look like?

10   What would the argument be as to what the injury was?

11   MR. KATSAS: The injury -- when that subject

12   to the mandate, that person is required to purchase

13   health insurance. That is a forced acquisition of an

14   unwanted good. It's a classic pocketbook injury.

15   But even if I'm wrong about that question,

16   Justice Kagan, the question of who has standing to bring

17   the challenge that we seek to bring seems to me very

18   different -- your hypothetical plaintiff is very

19   different from the actual plaintiffs. We have

20   individuals who are planning for compliance in order to

21   avoid a penalty, which is what their affidavits say.

22   And we have the States, who will be subject no doubt to

23   all sorts of adverse ramifications if they refuse to

24   enroll in Medicaid the people who are forced into

25   Medicaid by virtue of the mandate.

1   So we don't have the problem of no adverse

2   consequences in the case.

3   And then, we have the separate distinction

4   between the question of who has Article III standing in

5   order to maintain a suit and the question of who is

6   subject to a legal obligation. And you've said in your

7   cases that even if there may be no one who has standing

8   to challenge a legal obligation like the incompatibility

9   clause or something, that doesn't somehow convert the

10   legal obligation into a legal nullity.

11   Finally, with respect to the States, even if

12   we are wrong about everything I've said so far, the

13   States clearly fall within the exception recognized in

14   South Carolina against Regan. They are injured by the

15   mandate because the mandate forces 6 million new people

16   onto their Medicaid rolls. But they are not directly

17   subject to the mandate, nor could they violate the

18   mandate and incur a penalty.

19   JUSTICE KAGAN: Could I just understand, Mr.

20   Katsas, when the States say that they are injured, are

21   they talking about the people who are eligible now, but

22   who are not enrolled? Or are they also talking about

23   people who will become newly eligible?

24   MR. KATSAS: It's people who will enroll --

25   people who wouldn't have enrolled had they been given a

 1   voluntary choice.

 2   JUSTICE KAGAN: But who are eligible now.

 3   MR. KATSAS: That's the largest category. I

 4   think there could be future eligibles who would enroll

 5   because they are subject to a legal obligation but

 6   wouldn't have enrolled if given a voluntary choice.

 7   But I'm happy to -- I'm happy to focus on

 8   currently eligible people who haven't enrolled in

 9   Medicaid. That particular class is the one that gives

10   rise to, simply in Florida alone, a pocketbook injury on

11   the order of 500 to $600 million per year.

12   JUSTICE KAGAN: But that does seem odd, to

13   suggest that the State is being injured because people

14   who could show up tomorrow with or without this law

15   will -- will show up in greater numbers. I mean,

16   presumably the State wants to cover people whom it has

17   declared eligible for this benefit.

18   MR. KATSAS: They -- they could, but they

19   don't. What the State wants to do is make Medicaid

20   available to all who are eligible and choose to obtain

21   it. And in any event --

22   JUSTICE GINSBURG: Why would somebody not

23   choose to obtain it? Why -- that's one puzzle to me.

24   There's this category of people who are Medicaid

25   eligible; Medicaid doesn't cost them anything. Why

                              70

1   would they resist enrolling?

2   MR. KATSAS: I -- I don't know, Justice

3   Ginsburg. All I know is that the difference between

4   current enrollees and people who could enroll but have

5   not is, as I said, on the -- is a $600 million delta.

6   And --

7   JUSTICE GINSBURG: But it may be just that

8   they haven't been given sufficient information to

9   understand that this is a benefit for them.

10   MR. KATSAS: It's possible, but all we're

11   talking about right now is the standing of the States.

12   And the only arguments made against the standing of the

13   States -- I mean, there is a classic pocketbook injury

14   here. The only arguments made about -- against the

15   standing of the States are, number one, this results

16   from third-party actions. That doesn't work, because

17   the third-party actions are not unfettered in -- in the

18   sense of Lujan; they are coerced in the sense of

19   Bennett v. Spear. Those people are enrolling because

20   they are under a legal obligation to do so.

21   The second argument made against the States'

22   standing is that the States somehow forfeit their

23   ability to challenge the constitutionality of a

24   provision of Federal law because they voluntarily choose

25   to participate --

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1   JUSTICE SOTOMAYOR: I'm -- I'm a little bit

2   confused. And this is what I'm confused about.

3   There -- there is a challenge to the individual mandate.

4   MR. KATSAS: Yes.

5   JUSTICE SOTOMAYOR: All right. What is --

6   the fact that the State is challenging Medicaid, how

7   does it give the State standing to challenge an

8   obligation that is not imposed on the State in any way?

9   MR. KATSAS: The -- the principal theory for

10   State standing is that States are challenging the

11   mandate because the mandate injures them when people are

12   forced to enroll in Medicaid.

13   Now, it is true they are not directly

14   subject to the mandate, but --

15   JUSTICE SOTOMAYOR: Yes. That's what I'm --

16   MR. KATSAS: Okay. Let me -- let me try

17   to --

18   JUSTICE SOTOMAYOR: -- a little confused by.

19   MR. KATSAS: Let me try it this way -- may I

20   finish the thought?

21   CHIEF JUSTICE ROBERTS: Go ahead.

22   MR. KATSAS: In South Carolina v. Regan, the

23   State was not subject to the tax at issue. The State

24   was harmed because -- as the issuer of the bonds, and

25   the bond holders were the ones subject to the tax. So

1   the State is injured not because it is the direct object

2   of the Federal tax, but because of its relationship to

3   the regulated party as issuer/bond holder.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   Mr. Katsas.

6   MR. KATSAS: Thank you, Mr. Chief Justice.

7   CHIEF JUSTICE ROBERTS: Mr. Long, you have 5

8   minutes remaining.

9   REBUTTAL ARGUMENT OF ROBERT A. LONG

10   FOR COURT-APPOINTED AMICUS CURIAE

11   MR. LONG: Everyone agrees that the section

12   5000A penalty shall be assessed and collected in the

13   same manner as taxes. And the parties' principal

14   argument why that does not make the Anti-Injunction Act

15   applicable is that, well, that simply goes to the

16   Secretary's activities.

17   And I would simply ask, if -- if you look at

18   chapters 63 and 64 of the Internal Revenue Code, which

19   are the chapters on assessment and collection, they are

20   not just addressed to the Secretary. There are many

21   provisions in there that are addressed to courts and

22   indeed talk about this interaction, the very limited

23   situations in which courts are permitted to restrain the

24   assessment and collection of taxes.

25   There was a statement made that there

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1   aren't -- and many of the exceptions to the

2   Anti-Injunction Act are in the assessment and collection

3   provisions -- there was a statement made that none of

4   these directly confer jurisdiction to restrain the

5   assessment and collection of taxes. That's not true.

6   In footnote 11 of our opening brief, we cite several.

7   I'll simply mention section 6213 as an example.

8   That says -- I quote: "Notwithstanding the

9   provisions of section 7421(a), the making of such

10   assessment or the beginning of such proceeding or levy

11   during the time such prohibition is in force may be

12   enjoined by a proceeding in the proper court, including

13   the Tax Court. The Tax Court shall have no jurisdiction

14   to enjoin any action or proceeding or order any refund

15   under this subsection unless a timely petition for

16   redetermination of the deficiency has been filed, and

17   then only in respect of the deficiency that is the

18   subject of such petition."

19   JUSTICE BREYER: And all that's going to

20   really what I think Congress's intent was meant to be in

21   sticking the collection thing into chapter 68, and --

22   and it's certainly an argument in your favor.

23   The -- the over-arching thing in my mind is

24   it's -- it's up to Congress, within leeway. And they

25   did not use that word "tax," and they did have a couple

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1   of exceptions. And it is true that all this language

2   that you quote -- you know, the first two sentences and

3   so forth, it talks about the use of tax in the IRC. It

4   talks about the penalties and liabilities provided by

5   this subchapter. And we look over here and it's a

6   penalty and liability provided by a different law, which

7   says collect it through the subchapter, and it has

8   nothing to do with the IRC. See?

9   So we've got it in a separate place, we can

10   see pretty clearly what they're trying to do. They

11   couldn't really care very much about interfering with

12   collecting this one. That's all the statutory argument.

13   Are you following me?

14   You see? I'm trying to get you to focus on

15   that kind of argument.

16   MR. LONG: I mean, I think I'm following

17   you, but -- but the fact that it's not in the particular

18   subchapter for assessable penalties in my view makes no

19   difference, because they said it's still clearly -- it's

20   assessed and collected in the same manner --

21   JUSTICE BREYER: Yes, it is.

22   MR. LONG: -- as the penalty in that

23   subchapter, and those penalties are collected in the

24   same manner as taxes.

25   JUSTICE BREYER: Yes, yes.

1   MR. LONG: And so that's -- I think it's --

2   it's rather detailed, but I think it's a rather clear

3   indication that the Anti-Injunction Act applies.

4   The -- the refund statute that does

5   specifically refer to penalties, that has nothing to do

6   with this argument that it's assessed and collected in

7   the same manner as a tax. That would simply go to the

8   point that well, you can't just call it a tax, because

9   they've referred to it as a penalty.

10   And finally, on jurisdiction, you know, I

11   think the key point is we have a long line of this

12   Court's decisions that's really been ratified by

13   Congress, with all these exceptions in jurisdictional

14   terms.

15   As I read Bowles and John R. Sand & Gravel,

16   the -- the gist of those decisions was not any special

17   sort of rule about appeals, it's that when we have that

18   situation, which I would submit applies as much to the

19   collection of Federal taxes as it does to appeals from

20   Federal district courts when we have this degree of --

21   of precedent, including precedent from Congress in the

22   form of amendments to this Anti-Injunction Act, that

23   should be -- the presumption should be that this is

24   jurisdictional.

25   If there are no further questions.

 1   CHIEF JUSTICE ROBERTS: Mr. Long, you were

 2   invited by this Court to defend the proposition that the

 3   Anti-Injunction Act barred this litigation. You have

 4   ably carried out that responsibility, for which the

 5   Court is grateful.

 6   MR. LONG: Thank you.

 7   CHIEF JUSTICE ROBERTS: We will continue

 8   argument in this case tomorrow.

 9   (Whereupon, at 11:41 a.m., the case in the

10   above-entitled matter was submitted.)

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