

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.; as

17   Court-appointed amicus curiae.

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

19   Department of Justice, Washington, D.C.; for

20   Petitioners.

21   GREGORY G. KATSAS, ESQ., Washington, D.C.; for

22   Respondents.

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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 AS THE 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 a 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

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. I mean, that's -- many  
5 of these provisions are extremely specific, with very  
6 specific time limits.

7 CHIEF JUSTICE ROBERTS: But 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

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  
12 be instituted." And that formulation, "no suit may be  
13 maintained," contrasts with the Tax Injunction Act. It  
14 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 at 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  
4 shall 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 active  
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's certainly a number of  
10 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, it --

17 JUSTICE ALITO: Well, the clearest -- the  
18 clearest way of distinguishing between the  
19 jurisdictional provision and a mandatory  
20 claims-processing rule is whether it can be waived and  
21 whether the court feels that it has an obligation to  
22 raise the 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's 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 had doubt about  
20 simply the cases, there's more than that because  
21 Congress has not only not disturbed this Court's  
22 decisions 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 --

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 the brief that we've kind of gone  
5 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  
12 the statute was enacted in 1867, and there was a period,  
13 as 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've 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 it's 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 --

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  
6 claim-processing rule in many circumstances, and so, in  
7 those in which it specifically doesn't want the court  
8 to, it has to be clearer?

9 MR. LONG: Well, but Congress says,  
10 notwithstanding 7421, the court "shall have  
11 jurisdiction" to restrain the assessment and collection  
12 of taxes in 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's the parade of  
16 horrors 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'd be saying that for the refund statute as  
21 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 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 can litigate --

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 --

14 JUSTICE SOTOMAYOR: -- what -- where can a  
15 court then reach the question, despite --

16 MR. LONG: That would certainly be the first  
17 class of cases that 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 it --

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

1   you're going to come up with any, but I think your  
2   response is you could say that about any jurisdictional  
3   rule.  If it's not jurisdictional, what's going to  
4   happen is you're going to have an intelligent Federal  
5   court deciding whether you're going to make an  
6   exception, and there will be no parade of horrors  
7   because all Federal courts are intelligent.

8                   (Laughter.)

9                   JUSTICE SCALIA:  So, it seems to me it's a  
10   question you can't answer.  It's a question which asks  
11   why should there be any jurisdictional rules?  And you  
12   think there should be.

13                  MR. LONG:  And, Justice Scalia, I mean,  
14   honestly, I can't predict what would happen, but I would  
15   say that not all people who litigate about Federal taxes  
16   are necessarily rational.  And I think there would be a  
17   great --

18                  JUSTICE GINSBURG:  Mr. Long --

19                  JUSTICE BREYER:  I just don't want to lose  
20   the second half of your argument.  And we've spent all  
21   the time so far on jurisdiction.  And I accept pretty  
22   much -- I'm probably leaning in your favor on  
23   jurisdiction, but where I see the problem is in the  
24   second part, because the second part says "restraining  
25   the assessment or collection of any tax."



1                   Now, here, Congress has nowhere used the  
2 word "tax." What it says is "penalty." Moreover, this  
3 is not in the Internal Revenue Code but for purposes of  
4 collection.

5                   And so, why is this a tax? And I know you  
6 point to certain sentences that talk about taxes within  
7 the code --

8                   MR. LONG: Right.

9                   JUSTICE BREYER: -- and this is not attached  
10 to a tax. It is attached to a health care requirement.

11                  MR. LONG: Right.

12                  JUSTICE BREYER: So, why does it fall within  
13 that word?

14                  MR. LONG: Well, I mean, the first point  
15 is our -- our initial submission is you don't have to  
16 determine that this is a tax in order to find that the  
17 Anti-Injunction Act applies, because Congress very  
18 specifically said that it shall be assessed and  
19 collected in the same manner as a tax, even if it's a  
20 tax penalty and not a tax. So, that's one argument --

21                  JUSTICE BREYER: But that doesn't mean the  
22 AIA applies. I mean -- and then they provide some  
23 exceptions, but it doesn't mean the AIA applies.

24                  It says "in the same manner as." It is then  
25 attached to chapter 68, when that -- it references that

1 as being "the manner of." Well, that it's being applied  
2 or if it's being collected in the same manner as a tax  
3 doesn't automatically make it a tax, particularly since  
4 the reasons for the AIA are to prevent interference with  
5 revenue sources. And here, an advance attack on this  
6 does not interfere with the collection of revenues.

7 I mean, that's -- you've read the arguments,  
8 as have I. But I'd like to know what you say succinctly  
9 in response to those arguments.

10 MR. LONG: So, specifically on the argument  
11 that it is actually a tax, even setting aside the point  
12 that it should be assessed and collected in the same  
13 manner as a tax, the Anti-Injunction Act uses the term  
14 "tax"; it doesn't define it. Somewhat to my surprise,  
15 "tax" is not defined anywhere in the Internal Revenue  
16 Code. In about the time that Congress passed the  
17 Anti-Injunction Act, "tax" had a very broad definition.  
18 It's broad enough to include this exaction, which is  
19 codified in the Internal Revenue Code. It's part of the  
20 taxpayer's annual income tax return. The amount of the  
21 liability and whether you owe the liability is based in  
22 part on your income. It's assessed and collected by the  
23 IRS.

24 JUSTICE SCALIA: There's at least some doubt  
25 about it, Mr. Long, for the reasons that Justice Breyer

1 said, and I thought that we had a -- a principle that  
2 ousters of jurisdiction are narrowly construed; that,  
3 unless it's clear, courts are not deprived of  
4 jurisdiction. And I find it hard to think that this is  
5 clear. Whatever else it is, it's easy to think that  
6 it's not clear.

7 MR. LONG: Well, I mean, the Anti-Injunction  
8 Act applies not only to every tax in the code but, as  
9 far as I can tell, to every tax penalty in the code.  
10 And --

11 JUSTICE GINSBURG: Mr. Long, you said  
12 before -- and I think you were quite right -- that the  
13 Tax Injunction Act is modeled on the Anti-Injunction  
14 Act. And, under the Tax Injunction Act, what -- what  
15 can't be enjoined is an assessment for the purpose of  
16 raising revenue. The Tax Injunction Act does not apply  
17 to penalties that are designed to induce compliance with  
18 the law, rather than to raise revenue. And this is not  
19 a revenue-raising measure because, if it's successful,  
20 they -- nobody will pay the penalty, and there will be  
21 no revenue to raise.

22 MR. LONG: Well, in Bob Jones, the Court  
23 said that they had gotten out of the business of trying  
24 to determine whether an exaction is primarily  
25 revenue-raising or primarily regulatory. And this one

1 certainly raises -- is expected to raise very  
2 substantial amounts of revenues, at least \$4 billion a  
3 year by the --

4 JUSTICE SOTOMAYOR: But Bob Jones involved a  
5 statute where it denominated the exaction as a tax.

6 MR. LONG: That's -- yes.

7 JUSTICE SOTOMAYOR: Here we have one where  
8 the Congress is not denominating it a -- as a tax; it's  
9 denominating it as a penalty.

10 MR. LONG: That's -- that's absolutely  
11 right, and that's obviously why -- if it were called a  
12 tax, there would be absolutely no question that the  
13 Anti-Injunction Act applies.

14 JUSTICE SOTOMAYOR: Absolutely. But even  
15 the section of the code that you referred to previously,  
16 the one following 7421, the AIA, it does very clearly  
17 make a difference -- 7422 -- make a difference between  
18 tax and penalties. It's very explicit.

19 MR. LONG: Yes, that's -- it does; that is  
20 correct. And there are many other places in the code  
21 where tax --

22 JUSTICE BREYER: The best collection I've  
23 found in your favor, I think, is in Mortimer Caplin's  
24 brief on page 16, 17. He has a whole list. All right?  
25 So -- I let my law clerk to look all those up. And it

1 seems to me that they all fall into the categories of  
2 either, one, these are penalties that were penalties  
3 assessed for not paying taxes; or, two, they involve  
4 matters that were called by the court taxes; or, three,  
5 in some instances, they were deemed by the code to be  
6 taxes.

7 Now, what we have here is something that's  
8 in a different statute that doesn't use the word "tax"  
9 once, except for a collection device and, in fact, in  
10 addition, the underlying AIA reason, which is to say to  
11 the Solicitor General: We don't care what you think;  
12 we, in Congress, don't want you in court where the  
13 revenue of a State -- Tax Injunction Act -- or the  
14 revenue of the Federal Government is at stake, and,  
15 therefore, you can't waive it.

16 Now, I got that. Here it's not at stake,  
17 and here there are all the differences I just mentioned.  
18 So, I ask that because I want to hear your response.

19 MR. LONG: Well, I mean, there are penalties  
20 in the Internal Revenue Code that you really couldn't  
21 say are related in any -- in any close way to some other  
22 tax provision. There's a penalty -- it's discussed in  
23 the briefs -- for selling diesel fuel that doesn't  
24 comply with EPA's regulations, you know. So, there are  
25 all kinds of penalties in the code, and I think it's --

1     that it's reliable.

2                   JUSTICE KAGAN:   Mr. Long, aren't there  
3     places in this Act -- fees and penalties -- that were  
4     specifically put under the Anti-Injunction Act?  There's  
5     one on health care plans, there's one on pharmaceutical  
6     manufacturers, where Congress specifically said the  
7     Anti-Injunction Act is triggered for those.  It does not  
8     say that here.  Wouldn't that suggest that Congress  
9     meant for a different result to obtain?

10                  MR. LONG:   Well, I mean, Congress didn't use  
11     the language the Anti-Injunction Act "shall apply" --

12                  JUSTICE KAGAN:   No, but it -- in section  
13     9008 and in section 9010, it specifically referred --

14                  MR. LONG:   Right.

15                  JUSTICE KAGAN:   -- to the part of the code  
16     where the Anti-Injunction Act is.

17                  MR. LONG:   All of subtitle F, which picks up  
18     lots of administration and procedure provisions, but  
19     those are fees, and they're not -- Congress did not  
20     provide, you know, in the sections themselves that they  
21     should be paid as part of a tax return.  So, they were  
22     free-standing fees.  And by using that subtitle F  
23     language, Congress plugged in a whole set of rules for  
24     how to collect and administer the fees, and it went not  
25     just to assessment and collection -- and the IRS has

1 recognized this -- but to examination, privacy, a whole  
2 series of additional things.

3 So, I think it would be a mistake to look at  
4 that language and say, oh, here's Congress saying they  
5 want the Anti-Injunction Act to apply. They're actually  
6 doing more than that.

7 And, yes, I grant you, you could look at  
8 section 5000A, the individual coverage requirement, and  
9 say, well, they could have been clearer about saying the  
10 Anti-Injunction Act applied. And that's certainly true,  
11 but, again, they were trying to accomplish a lot. And  
12 it's --

13 JUSTICE KENNEDY: It's easier to talk about  
14 this case if we just forget the words "for the purpose  
15 of restraining assessment or collection." In a sense,  
16 that brings the jurisdictional question and  
17 Justice Breyer's question together.

18 It seems to me -- maybe you could just  
19 comment on that language. Is that sort of language  
20 usually contained in a jurisdictional provision? I  
21 mean, you often don't know the purpose of a suit until  
22 after the thing is under way. I can see it with  
23 malicious prosecution and some civil rights cases. Does  
24 it strike you as somewhat unusual to have this provision  
25 in a jurisdictional sense?

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

2           JUSTICE KENNEDY: Yes. Excuse me.

3           MR. LONG: -- as a bit unusual, but this is  
4 an old statute. I mean, this -- the core language is  
5 essentially unchanged since 1867, and it -- you know, I  
6 think that's part of the explanation for it. And,  
7 again, it's, you know, become the center of a series of  
8 provisions that very carefully control the circumstances  
9 in which litigation about Federal taxes can take place.

10          JUSTICE GINSBURG: Mr. Long, there's another  
11 argument that has been made that I would like you to  
12 address, and that is all this talk about tax penalty --  
13 it's all beside the point because this suit is not  
14 challenging the penalty. This is a suit that is  
15 challenging the must-buy provision, and the argument is  
16 made that, if, indeed, "must-buy" is constitutional,  
17 then these complainants will not resist the penalty.

18          So, what they're seeking is a determination  
19 that the "must-buy" requirement, stated separately from  
20 the penalty, that the "must-buy" is unconstitutional.  
21 And, if that's so, that's the end of the case; if it's  
22 not so, they're not resisting the penalty.

23          MR. LONG: Well, I think that argument  
24 doesn't work for two reasons. I mean, first, if you  
25 look at the plaintiffs' own complaint, they clearly



1 challenge both the minimum coverage requirement and the  
2 penalty. At page 122 of the Joint Appendix, they  
3 challenge the requirement that the individuals obtain  
4 health care coverage or pay a penalty.

5 JUSTICE ALITO: Well, why is that?

6 JUSTICE GINSBURG: If that's -- if that's  
7 the problem, it's easy to amend a complaint. They can  
8 just take that out of the complaint. So, it can't turn  
9 on that.

10 MR. LONG: Well -- and -- yes, I mean, it's  
11 -- or another complaint would be filed, but, still, I  
12 think that's a serious problem. But even if they had  
13 filed a different complaint, I don't think you -- in  
14 this case, I don't think you can separate the minimum  
15 coverage requirement from the penalty, because the  
16 penalty is the sole means of enforcing the minimum  
17 coverage requirement.

18 So, first, I mean, I think these plaintiffs  
19 would not be satisfied if the Court were to render a  
20 judgment saying the minimum coverage requirement is  
21 invalidated; the penalty, however, remains standing.  
22 Anybody who doesn't have insurance has to pay the  
23 penalty. Then they'd have to pay a penalty equal to the  
24 cost of insurance and they wouldn't even have insurance.  
25 So, I don't think that would be --

1 JUSTICE ALITO: Well, they say they want to  
2 obey the law --

3 MR. LONG: Right.

4 JUSTICE ALITO: -- and they say that your  
5 argument puts them in the position of having to disobey  
6 the law in order to obtain review of their claim. And  
7 what is your answer to that?

8 MR. LONG: Well, I mean, first of all, I  
9 can't find that in the record, in their declarations. I  
10 don't see a statement that they will, you know, never  
11 incur a penalty under any circumstances. But -- but  
12 even if that were so, what this Court has said in  
13 Americans United is the Anti-Injunction Act bars any  
14 suit, not just to enjoin the collection of your own  
15 taxes, but to enjoin the collection of anyone's taxes.

16 And so, even if it were really true that  
17 these plaintiffs were not interested in the penalty and  
18 would never pay the penalty, if they were to succeed in  
19 this case in striking down the minimum coverage  
20 requirement, the inevitable result would be that the  
21 penalty would fall as well, because the government  
22 couldn't collect a penalty for failing to follow an  
23 unconstitutional requirement. And so, it would still be  
24 barred because it would be a suit that would prevent the  
25 collection of some of the --

1 JUSTICE ALITO: Well, let me take us back to  
2 Justice Kennedy's question about the "for the purpose  
3 of" language. I take it you interpret the statute to  
4 mean the following: "For the purpose of" means having  
5 the effect of. Is that correct?

6 MR. LONG: Well, I mean, this Court in the  
7 Bob Jones case, where a similar kind of argument was  
8 being made by the plaintiff in that case, said, you  
9 know, look, you know, where the -- where it's inevitable  
10 that this is what the suit is about, they're sort of two  
11 sides of the same coin, that clearly is a primary  
12 purpose of the suit. And it's -- and you can't by  
13 clever pleading get away from that. That's just the  
14 nature of the situation.

15 JUSTICE KAGAN: But, Mr. Long, aren't you  
16 trying to rewrite the statute, in a way? The statute  
17 has two sections. One is the "you have to have  
18 insurance" section and the other is the sanction. The  
19 statute has two different sets of exceptions  
20 corresponding to those two different sections. You're  
21 trying to suggest that the statute says, well, it's your  
22 choice, either buy insurance or pay a -- or pay a fee.

23 But that's not the way the statute reads.  
24 And Congress, it must be supposed, you know, made a  
25 decision that that shouldn't be the way the statute

1 reads, that it should instead be a regulatory command  
2 and a penalty attached to that command.

3 MR. LONG: Well, I would not argue that this  
4 statute is a perfect model of clarity, but I do think  
5 the most reasonable way to read the entire statute is  
6 that it does impose a single obligation to pay a penalty  
7 if you are an applicable individual and you're not  
8 subject to an exemption.

9 And the reason I say that, if you look at  
10 the exemptions from the penalty, I mean, the very first  
11 one is you're exempt from the penalty because you can't  
12 afford to purchase insurance. And it just doesn't seem  
13 reasonable to me to interpret the statute as Congress  
14 having said, well, you know, this person is exempt from  
15 paying a penalty because we find they can't afford to  
16 buy insurance; however, they still have a legal  
17 obligation to buy insurance. That just doesn't seem  
18 reasonable.

19 So, I do think, although it's -- I certainly  
20 wouldn't argue it's clear, that that's the best way to  
21 understand the statute as a whole.

22 But, again, I would say, you know, that's  
23 not essential to the question we're discussing now, of  
24 whether the Anti-Injunction Act applies. Again, you  
25 know, I think --

1 JUSTICE SOTOMAYOR: Could you tell me why  
2 you think the Solicitor General's reading creates a  
3 problem? He --

4 MR. LONG: Well, in going back to -- so if,  
5 so if the result were to say simply, this is not -- oh,  
6 I'm sorry. The Solicitor General's reading. So, now  
7 it's not --

8 JUSTICE SOTOMAYOR: That it is a  
9 jurisdictional bar, but there's an exemption for those  
10 items that Congress has designated solely as penalties  
11 that are not like taxes.

12 MR. LONG: Right. Well, I mean, I think the  
13 Solicitor General's reading would probably create the  
14 fewest problems, as I understand it. I mean, my -- my  
15 main objection to the Solicitor General's reading is I  
16 don't think it makes a whole lot of sense. I mean,  
17 basically, the Solicitor General says every penalty in  
18 the Internal Revenue Code, every other penalty in the  
19 Affordable Care Act is --

20 JUSTICE SOTOMAYOR: Oh that's not -- that's  
21 carrying it too far, because he says if a penalty is  
22 designated as a tax by Congress, then it's subject to  
23 the AIA, and that's most of the code, the tax code. And  
24 he says for those portions of the Affordable Care Act  
25 that designate things as taxes, the AIA applies. So,

1 it's only -- and I haven't found another statute. I'm  
2 going to ask him if there's another one. It's only for  
3 those statutes in which Congress has designated  
4 something solely as a penalty.

5 MR. LONG: Right. Right.

6 JUSTICE SOTOMAYOR: And not indicated that  
7 it is a tax.

8 MR. LONG: Right.

9 JUSTICE SOTOMAYOR: They don't fall within  
10 the AIA.

11 MR. LONG: I think my -- my take on it is if  
12 you adopted the Solicitor General's approach, there are  
13 probably three penalties for alcohol- and  
14 tobacco-related offenses at 5114(c), 5684, and 5761 that  
15 I think would be very difficult to distinguish from this  
16 one, and possibly the 527(j) penalty for failure to  
17 disclose political contributions.

18 If there are no further questions, I'd like  
19 to reserve.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.  
21 General Verrilli.

22 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
23 ON BEHALF OF THE PETITIONERS

24 GENERAL VERRILLI: Mr. Chief Justice, and  
25 may it please the Court

1           This case presents issues of great moment,  
2   and the Anti-Injunction Act does not bar the Court's  
3   consideration of those issues. That is so even though  
4   the Anti-Injunction Act is a jurisdictional limit that  
5   serves what this Court described in *Clintwood Elkhorn* as  
6   an exceedingly strong interest in protecting the  
7   financial stability of the Federal Government, and even  
8   though the minimum coverage provision of the Affordable  
9   Care Act is an exercise of Congress's taxing power as  
10  well as its commerce power.

11           Congress has authority under the taxing  
12  power to enact a measure not labeled as a tax, and it  
13  did so when it put section 5000A into the Internal  
14  Revenue Code. But for purposes of the Anti-Injunction  
15  Act, the precise language Congress used is  
16  determinative. And there is no language in the  
17  Anti-Injunction Act -- excuse me -- no language in  
18  section 5000A of the Affordable Care Act or in the  
19  Internal Revenue Code generally that provides a textual  
20  instruction that --

21           JUSTICE ALITO: Well, General Verrilli,  
22  today you're arguing that the penalty is not a tax.  
23  Tomorrow you're going to be back and you'll be arguing  
24  that the penalty is a tax.

25           Has the Court ever held that something that

1 is a tax for purposes of the taxing power under the  
2 Constitution is not a tax under the Anti-Injunction Act?

3 GENERAL VERRILLI: No, Justice Alito, but  
4 the Court has held in the license tax cases that  
5 something can be a constitutional exercise of the taxing  
6 power whether or not it is called a tax. And that's  
7 because the nature of the inquiry that we will conduct  
8 tomorrow is different from the nature of the inquiry  
9 that we will conduct today.

10 Tomorrow, the question is whether Congress  
11 has the authority under the taxing power to enact it,  
12 and the form of words doesn't have a dispositive effect  
13 on that analysis. Today, we're construing statutory  
14 text where the precise choice of words does have a  
15 dispositive effect on the analysis.

16 JUSTICE SOTOMAYOR: Well, General, you also  
17 have the Bailey child labor tax cases, 'cause there the  
18 Court said that the tax, which was a prohibitory tax  
19 alone, was a tax subject to the AIA, and then it said it  
20 was beyond the Court's taxing power in a separate case,  
21 correct?

22 GENERAL VERRILLI: Yes. I do think, Justice  
23 Sotomayor, that with respect to one of the arguments  
24 that my friend from the NFIB has made in the brief, that  
25 Bailey v. George is a significant problem because I



1 think their argument on the constitutionality under the  
2 taxing power is essentially that the Affordable Care Act  
3 provision is the same thing as the provision that was  
4 held unconstitutional in *Bailey v. Drexel Furniture*.

5 JUSTICE SOTOMAYOR: That's a different  
6 issue. The question Justice --

7 GENERAL VERRILLI: But on the same day --  
8 right, but on the same day as *Bailey v. Drexel*  
9 *Furniture*, the Court issued *Bailey v. George*, which held  
10 that the Anti-Injunction Act did bar a challenge to that  
11 provision, even though the Court had concluded that it  
12 was invalid under the tax power.

13 So -- and I think the reason for that has  
14 been -- is clear now after *Williams Packing* and *Bob*  
15 *Jones*, in that, in order to find that the  
16 Anti-Injunction Act doesn't apply to something that  
17 otherwise would be a tax that triggers it, you have to  
18 conclude essentially that there's no substantial  
19 argument that can be made in defense of it as a tax. We  
20 don't have that here. So, I don't think you can get  
21 around the Anti-Injunction Act if the Court were to read  
22 it, as the amicus suggest it should be read, on that  
23 theory, but --

24 JUSTICE GINSBURG: Mr. Verrilli, a basic  
25 question about your argument: If you're right about the

1 second part, that is, for purposes of the statute, the  
2 Anti-Injunction statute, this penalty does not  
3 constitute a tax, then does the Court need to decide  
4 whether the Anti-Injunction Act in other cases, where it  
5 does involve a tax, is jurisdictional?

6 GENERAL VERRILLI: No. I apologize if I'm  
7 creating any confusion about that, Justice Ginsburg. We  
8 think by far the better route here is to understand the  
9 statute as we have proposed that it be construed as not  
10 applying here. From the perspective of the United  
11 States -- and if I could, I'd like to take a minute on  
12 this -- the idea that the Anti-Injunction Act would be  
13 construed as not being a jurisdictional provision is  
14 very troubling, and we don't think it's correct.

15 And I would, if I could, follow up on a  
16 question, Justice Ginsburg, that you asked Mr. Long in  
17 terms of the language of the Anti-Injunction Act,  
18 7421(a), which can be found at page 16a of the appendix  
19 to our brief.

20 I'd ask the Court to compare that to the  
21 language of the very next provision in the code, which  
22 is on the next page of our statutory appendix, 17a,  
23 which is the refund statute, which we've talked about a  
24 little bit so far this morning, 7422(a).

25 The refund statute this Court held in Dolan

1 was jurisdictional, and the Court in both Dolan and  
2 Brockamp held that the statute of limitations that  
3 applies to the refund statute cases is jurisdictional.

4 The language in 7422(a) is virtually  
5 identical to the language in 7421(a) --

6 JUSTICE KENNEDY: That is correct, although  
7 in the refund context, you have the sovereign immunity  
8 problem, in which we presume that that has not been  
9 waived.

10 GENERAL VERRILLI: Right. But I --  
11 7421(a) --

12 JUSTICE KENNEDY: But you're correct on --

13 GENERAL VERRILLI: -- and 7422(a) were the  
14 same --

15 JUSTICE KENNEDY: The language is quite  
16 parallel.

17 GENERAL VERRILLI: And, originally, they  
18 were the same statutory provision.

19 JUSTICE KENNEDY: Yes.

20 GENERAL VERRILLI: They were only separated  
21 out later. So, I do think that's the strongest textual  
22 indication, Justice Ginsburg, that -- that 7421(a) is  
23 jurisdictional.

24 JUSTICE KAGAN: General --

25 JUSTICE GINSBURG: But the question that I

1 asked you is, if you're right that this penalty is not  
2 covered by section 7421, if you're right about that, why  
3 should we deal with the jurisdictional question at all?  
4 Because this statute, correct, the way you're reading --  
5 read it doesn't involve a tax that's subject to the  
6 Anti-Injunction Act.

7 GENERAL VERRILLI: Yes, that is exactly our  
8 position. And the reason we don't --

9 JUSTICE GINSBURG: So -- so, you agree that  
10 we would not -- if we agree with you about the correct  
11 interpretation of the statute, we need not decide the  
12 jurisdiction.

13 GENERAL VERRILLI: There would be no reason  
14 to decide the jurisdictional issue.

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

17 (Laughter.)

18 GENERAL VERRILLI: Justice Kennedy, I think  
19 we all want to know the answer to a lot of things in  
20 this case. But -- but I do -- but I do think that the  
21 prudent course here is to construe the statute in the  
22 manner that we read it.

23 JUSTICE KENNEDY: But you indicated -- there  
24 was a discussion earlier about why does the government  
25 really care, they have competent attorneys, et cetera.

1 But -- and you began your argument by saying it would be  
2 very troubling to say that it's not jurisdictional.

3 I'd like you to comment on that. It's not  
4 for us to tell a party what's in its best interests. It  
5 would seem to me that there might be some instances in  
6 which the government would want to litigate the validity  
7 of a tax right away and would want to waive. But you  
8 say it's -- that's not true; that it's very troubling.

9 GENERAL VERRILLI: I think there are two  
10 problems. One is the problem that Justice Scalia  
11 identified, that if it's not jurisdictional, then courts  
12 have authority to craft equitable exceptions. And it  
13 may seem from where we stand now that that authority is  
14 or could be very, very tightly cabined. But if -- if  
15 this Court were to conclude that it isn't  
16 jurisdictional, that does empower courts to find other  
17 circumstances in which they might find it equitable to  
18 allow cases to go forward in the absence of -- despite  
19 the existence of the Anti-Injunction Act.

20 And, second, although I certainly am not  
21 going to stand up here and disparage the attorneys for  
22 the United States in the slightest, the reality is that  
23 if this isn't jurisdictional, then it's -- the argument  
24 -- it's open to the argument that it's subject to  
25 forfeiture by a simple omission in failing to raise it

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

3 JUSTICE KAGAN: General, can I ask --

4 JUSTICE GINSBURG: How likely is it --

5 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

6 JUSTICE GINSBURG: How likely is it -- I  
7 mean, the government is going to be defending these  
8 suits. How likely is it that the government will  
9 overlook the Anti-Injunction Act? So, it seems to me  
10 that this is arming the government by saying it's  
11 waivable at the government's option.

12 GENERAL VERRILLI: That's -- that is not our  
13 assessment of the institutional interests of the United  
14 States, Justice Ginsburg. And we do think that the --  
15 the right way to go in this case is to read the statute  
16 as not applying to the minimum coverage provision of --  
17 of the Affordable Care Act.

18 CHIEF JUSTICE ROBERTS: It was -- it was the  
19 calculation of the interests of the United States that  
20 your predecessor made in the Davis case.

21 There, the Solicitor General exercised  
22 authority that we sanctioned to waive the  
23 Anti-Injunction Act. And, of course, that couldn't be  
24 done if it were jurisdictional.

25 GENERAL VERRILLI: That's true,

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

2 We do agree with Mr. Long's analysis that  
3 Davis occurred in -- during a time in -- in which under  
4 the Standard Nut case, the Court had interpreted the  
5 Anti-Injunction Act as doing no more than codifying the  
6 traditional equitable principles which allowed courts  
7 discretion to conclude that in certain circumstances, a  
8 case could go forward.

9 Williams Packing repudiated that analysis,  
10 and Bob Jones v. Simon again repudiated that analysis  
11 and said, no, we're no longer abiding by that. It is  
12 true that the Davis case has not formally been  
13 overruled, but we do think it's fundamentally  
14 inconsistent with the Court's understanding now of --

15 JUSTICE BREYER: I thought Davis was the  
16 case that -- where a shareholder sues the corporation.

17 GENERAL VERRILLI: Yes.

18 JUSTICE BREYER: And the remedy is that the  
19 corporation shouldn't pay the money to the tax  
20 authority. Now, it's a little technical, but that isn't  
21 actually an injunction against the tax authority  
22 collecting. He's not -- they're not restraining the  
23 collection of the tax. They're saying to the taxpayer,  
24 don't pay it.

25 GENERAL VERRILLI: Yes. And --

1 JUSTICE BREYER: I don't know how far that  
2 gets you.

3 GENERAL VERRILLI: Well, in fairness,  
4 Justice Breyer, the United States did intervene in the  
5 -- in the Davis case and was a party, and so -- not as  
6 far as I'd like, I guess, is the answer.

7 JUSTICE SCALIA: Don't do it again, because  
8 I think that goes too far. I don't think that's  
9 restraining the collection of the tax. It's restraining  
10 the payment of the tax.

11 GENERAL VERRILLI: Well --

12 JUSTICE SCALIA: You don't want to let that  
13 bone go, right?

14 (Laughter.)

15 GENERAL VERRILLI: Our view here is that it  
16 is jurisdictional. Because it's jurisdictional as this  
17 Court understands jurisdiction now, it's not waivable.  
18 And, therefore, we don't think that -- that that part of  
19 the Davis decision is good law.

20 JUSTICE KAGAN: General, can I ask you about  
21 Reed Elsevier? Justice Ginsburg suggested that the  
22 language was very similar in Reed Elsevier as it is  
23 here, but there are even further similarities. Reed  
24 Elsevier pointed out that the provision in question  
25 wasn't in Title 28. Here, too, it's not in Title 28.



1 In Reed Elsevier, it was pointed out that the provision  
2 there had numerous exceptions to it. Here, too, there  
3 are numerous exceptions that we find that have been  
4 created by the courts over the years.

5 In Reed Elsevier, the question was  
6 essentially one about timing. Come to court after you  
7 file your registration. Here, too, the question is one  
8 about timing. Come to court after you make -- after you  
9 pay your taxes.

10 So, Reed Elsevier seems in multiple respects  
11 on all fours with this case.

12 Why is that wrong?

13 GENERAL VERRILLI: I don't think so, Justice  
14 Kagan. First, we think -- I guess I'm repeating myself  
15 and I apologize. But we think the closest analogue is  
16 the very next provision in the United States Code,  
17 7422(a), which this Court has held is jurisdictional,  
18 and is phrased in exactly the same way as 7421(a). In  
19 fact, as I said, they were the same provision back in  
20 the earlier days. That's the closest analogue.

21 This isn't -- and it's actually 7422 that's  
22 a statute that says do something first. But this  
23 statute is just a flat-out command that no suit shall be  
24 maintained to restrain --

25 JUSTICE KAGAN: I take the point --

1                   GENERAL VERRILLI:  -- the assessment or  
2   collection.

3                   JUSTICE KAGAN:  -- but if you would comment  
4   on the similarities of Reed Elsevier to this case.  How  
5   do you think it's different, at all?

6                   GENERAL VERRILLI:  Well, because the -- I  
7   think the best answer to that is that there are no magic  
8   words, and that history and context matter, as the Court  
9   said in Henderson.  And the history and context here is  
10  that 7422 and 7421 function together to protect an  
11  exceedingly strong interest that the Court has held with  
12  respect to 7422, sufficiently strong that it explains  
13  the jurisdictional nature of that.  The same interest  
14  applies here.

15                   This isn't just a matter of do X and then  
16  you can -- and then you can come to court.  It's just a  
17  fundamentally different set of interests at stake.

18                   So, we do think that that makes a big  
19  difference.  And --

20                   JUSTICE GINSBURG:  Why isn't Reed  
21  Elsevier -- if you're dividing jurisdiction from claims  
22  processing -- it says you have to register before you  
23  can sue.  There are a lot of things you have to do  
24  before you can sue.  So, why isn't Reed Elsevier like  
25  you have to pay a filing fee before you can file a

1 complaint?

2                   GENERAL VERRILLI: It is -- we do think it's  
3 very much in that nature and different from this case,  
4 Your Honor.

5                   And one way I think it's helpful to get at  
6 this is to look at the history. We've cited a string of  
7 court of appeals cases in a footnote in our opening  
8 brief, and over time, it's been very consistent that the  
9 courts of appeals have treated the Anti-Injunction Act  
10 as a jurisdictional provision.

11                   Again, if the Court agrees with our  
12 statutory construction, we don't need to reach this  
13 issue. But they have -- in fact, one of those cases,  
14 the Hansen case, the district court in that case had  
15 dismissed the complaint under Federal Rule of Civil  
16 Procedure 12(b)(6). The court of appeals vacated and  
17 sent it back with instructions to dismiss under  
18 12(b)(1), which is the subject-matter jurisdiction  
19 provision.

20                   So, I do think that, to the extent this  
21 issue is before the Court, it is jurisdictional, but it  
22 doesn't need to be before the Court because of the  
23 statutory construction argument that we had offered.

24                   JUSTICE GINSBURG: On your statutory  
25 construction argument, is there any other exaction

1 imposed under the Internal Revenue Code that would not  
2 qualify as a tax for Anti-Injunction Act purposes, or is  
3 5000A just out there all by itself?

4 GENERAL VERRILLI: It's -- it's not quite  
5 out there all by itself. There are other provisions  
6 that fall outside of subchapter B of chapter 68 and,  
7 therefore, wouldn't be governed by the instruction in  
8 section 6671(a), which answers the question about the  
9 applicability of the Act for most penalties.

10 The ones that we've identified -- I may be  
11 overlapping a little bit with Mr. Long here -- one is 26  
12 U.S.C. 857, which imposes certain penalties in  
13 connection with the administration of real estate  
14 investment trusts.

15 There are provisions that Mr. Long  
16 identified in his brief, sections 6038(a) through (c) of  
17 the code, which impose certain penalties with respect to  
18 reporting requirements for foreign corporations.

19 We have, in addition, in footnote 22 at page  
20 36 of our brief, identified three provisions that Mr.  
21 Long also identified about -- about alcohol and tobacco.  
22 Now --

23 JUSTICE SOTOMAYOR: Could we -- could we  
24 address, General, the question of whether there are any  
25 collateral consequences for the failure to buy -- to not

1 buy health insurance? Is the only consequence the  
2 payment of the penalty?

3 The Private Respondents argue that there are  
4 other collateral consequences such as for people on  
5 probation who are disobeying the law. If they don't buy  
6 health insurance, they'd be disobeying the law and could  
7 be subject to having their supervised release revoked.

8 GENERAL VERRILLI: Yes. That is not a  
9 correct reading of the statute, Justice Sotomayor. The  
10 only consequence that ensues is the tax penalty. And  
11 the -- we have made a representation, and it was a  
12 carefully made representation, in our brief that it is  
13 the interpretation of the agencies charged with  
14 interpreting this statute, the Treasury Department and  
15 the Department of Health and Human Services, that there  
16 is no other consequence apart from the tax penalty.

17 And I do think, if I could talk for a couple  
18 of minutes about the argument that was discussed as to  
19 whether this can be conceived of as a suit just  
20 challenging the requirement, which is entirely  
21 stand-alone based on inferences drawn from the  
22 exemptions, I really don't think that's right. And if I  
23 could spend a minute on it, I think it's important.

24 The exemptions in section 5000A -- it is  
25 true that there are two categories of exemptions. There

1 are exemptions to the penalty and exemptions to the  
2 subsection (a) requirement. But the -- but I think, not  
3 only as a practical matter, but I think there's a  
4 textual indication and even as a legal matter,  
5 they are -- they both function as exceptions to the  
6 requirement.

7 First, as a practical matter, one of those  
8 exemptions is a hardship exemption. And if the Court  
9 will just bear with me for one minute here, it's at page  
10 11a of the appendix to our brief. It provides that a  
11 person can go to the Secretary of HHS and obtain a  
12 hardship exemption for -- which would, as a formal  
13 matter here, excuse compliance with the penalty.

14 It seems to me to make very little sense to  
15 say that someone who has gone to an official of the  
16 United States and obtained an exemption would,  
17 nonetheless, be in the position of being a law breaker.

18 We think another way in which you can get to  
19 the same conclusion slightly differently is by  
20 considering the provision on the prior page, 10a, which  
21 is 5000A -- 5000A(e)(3), members of Indian tribes.  
22 Members of Indian tribes are exempt only from the  
23 penalty as a formal matter under the structure of the  
24 statute here, but the reason for that is because members  
25 of Indian tribes obtain their health care through the

1 Indian Health Service, which is a clinic-based system  
2 that doesn't involve insurance at all, and it's an  
3 entirely different system.

4           They were taken out of this statute because  
5 they get their health care through a different system.  
6 And it doesn't make any sense to think that persons  
7 getting their health care through the Indian Health  
8 Service are violating the law because -- because exempt  
9 only from the penalty but still under a legal obligation  
10 to have insurance, when the whole point of this is that  
11 they're supposed to be in a clinic-based system.

12           JUSTICE SOTOMAYOR: Is your whole point that  
13 this was inartful drafting by Congress, that, to the  
14 extent that there is an exemption under the penalty,  
15 it's an exemption from the legal obligation?

16           GENERAL VERRILLI: I guess what I would say  
17 about it, Your Honor, is that the way in which this  
18 statute is drafted doesn't permit the inference that my  
19 friends from the NFIB are trying to draw from it.

20           And there is an additional textual  
21 indication of that, which one can find at page 13 of our  
22 reply brief. This is a provision that is 42 U.S.C.A.  
23 section 18022(e). This is a provision that provides for  
24 a certification that certain individuals can get. And  
25 this is the paragraph starting with the words "Other

1 provisions" contains the quote.

2           And it says, "an individual with a  
3 'certification' ... that the individual is exempt from  
4 the requirement under Section 5000A ... by reason of  
5 section 5000A(e)(1) of such Code," is entitled to a  
6 certificate that allows for enrollment in a particular  
7 program for this category of people.

8           But you can see here, Congress is saying an  
9 exemption under 5000A(e)(1), which is the exemption from  
10 the penalty, and not the underlying requirement, is, as  
11 Congress says, an exemption from the requirement of  
12 section 5000A.

13           JUSTICE KAGAN: General --

14           JUSTICE ALITO: 5000A says, directly, "an  
15 applicable individual shall ensure that the individual  
16 has the minimum essential coverage." And you're saying  
17 it doesn't really mean that, that if you're not subject  
18 to the penalty, you're not under an obligation to  
19 maintain the minimum essential coverage.

20           GENERAL VERRILLI: That's correct. And we  
21 think that's what Congress is saying, both in the  
22 provision I just pointed to, Your Honor, and by virtue  
23 of the fact -- by virtue of the way the exemptions work.  
24 I just think that's the -- reading this in context, that  
25 is the stronger reading of the statute.



1 JUSTICE ALITO: Suppose somebody --

2 CHIEF JUSTICE ROBERTS: It makes it easy for  
3 the government to drop the other shoe in the future,  
4 right? You've been under the law subject to this  
5 mandate all along. You've been exempt from the penalty.  
6 So, all they have to do is take away the penalty.

7 GENERAL VERRILLI: I don't -- I don't think  
8 so, Mr. Chief Justice. I don't think it makes it easy  
9 for the government in the future. We think this is the  
10 fairest reading of the statute, that the -- that the --  
11 you cannot infer from the fact that someone is exempt  
12 from the penalty, that they're still under an obligation  
13 to have insurance. That's just not the fairest reading  
14 of the statute.

15 JUSTICE KAGAN: Could I --

16 JUSTICE ALITO: Suppose -- go ahead.

17 JUSTICE KAGAN: Sorry.

18 JUSTICE ALITO: No, go ahead.

19 JUSTICE KAGAN: The nature of the  
20 representation you made, that the only consequence is  
21 the penalty, suppose a person does not purchase  
22 insurance, a person who is obligated to do so under the  
23 statute, doesn't do it, pays the penalty instead, and  
24 that person finds herself in a position where she is  
25 asked the question, have you ever violated any Federal

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

2 GENERAL VERRILLI: No. Our position is that  
3 person should give the answer "no."

4 JUSTICE KAGAN: And that's because --

5 GENERAL VERRILLI: That if they don't pay  
6 the tax, they've violated a Federal law.

7 JUSTICE KAGAN: But as long as they've paid  
8 the penalty --

9 GENERAL VERRILLI: If they've paid the tax,  
10 then they're in compliance with the law.

11 JUSTICE BREYER: Why do you keep saying it's  
12 a tax?

13 (Laughter.)

14 GENERAL VERRILLI: If they pay the tax  
15 penalty --

16 JUSTICE BREYER: Thank you.

17 GENERAL VERRILLI: -- they're in compliance  
18 with the law. Thank you, Justice Breyer.

19 JUSTICE BREYER: The penalty.

20 GENERAL VERRILLI: Right. That's right.

21 JUSTICE ALITO: Suppose a person who has  
22 been receiving medical care in an emergency room -- has  
23 no health insurance but, over the years, goes to the  
24 emergency room when the person wants medical care --  
25 goes to the emergency room, and the hospital says, well,

1 fine, you're eligible for Medicaid, enroll in Medicaid.  
2 And the person says, no, I don't want that. I want to  
3 continue to get -- just get care here from the emergency  
4 room. Will the hospital be able to point to the mandate  
5 and say, well, you're obligated to enroll?

6 GENERAL VERRILLI: No, I don't think so,  
7 Justice Alito, for the same reason I just gave. I think  
8 that the -- that the answer in that situation is that  
9 that person, assuming that person -- well, if that  
10 person is eligible for Medicaid, they may well not be in  
11 a situation where they're going to face any tax penalty  
12 and therefore --

13 JUSTICE ALITO: No, they're not facing the  
14 tax penalty.

15 GENERAL VERRILLI: Right. Right.

16 JUSTICE ALITO: So, the hospital will have  
17 to continue to give them care and pay for it themselves,  
18 and not --

19 GENERAL VERRILLI: Right.

20 JUSTICE ALITO: -- require them to be  
21 enrolled in Medicaid.

22 GENERAL VERRILLI: Right.

23 JUSTICE ALITO: Will they be able to take  
24 this out and say, well, you really should -- you have a  
25 moral obligation to do it; the Congress of the United

1 States has said you have to enroll?

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

3 JUSTICE ALITO: No, they can't say that?

4 GENERAL VERRILLI: I think it's certainly  
5 fair to say that the Congress wants people in that  
6 position to sign up for Medicaid. I think that's  
7 absolutely right. And I think the statute is structured  
8 to accomplish that objective, but the reality still is  
9 that the only consequence of noncompliance is the  
10 penalty.

11 JUSTICE SOTOMAYOR: General, but I thought  
12 that people who were eligible for Medicaid weren't  
13 subject to the penalty. Am I wrong? I could be just  
14 factually wrong.

15 GENERAL VERRILLI: Well, it all -- the  
16 penalty is keyed to income.

17 JUSTICE SOTOMAYOR: Yes.

18 GENERAL VERRILLI: And the -- it's keyed to  
19 a number of things. One is, are you making so little  
20 money that you aren't obligated to file a tax return?  
21 And if you're in that situation, you're not subject to  
22 the penalty. It's also if the cost of insurance would  
23 be more than 8 percent of your income, you're not  
24 subject to the penalty.

25 So, there isn't necessarily a precise

1 mapping between somebody's income level and their  
2 Medicaid eligibility at the present moment. That will  
3 depend on where things are and what the eligibility  
4 requirements are in the State.

5 JUSTICE SOTOMAYOR: But for those people  
6 below --

7 GENERAL VERRILLI: Right. As a general  
8 matter, for people below the poverty line, it's almost  
9 inconceivable that they're ever going to be subject to  
10 the penalty, and they would, after the Act's Medicaid  
11 reforms go into place, be eligible for Medicaid at that  
12 point.

13 JUSTICE BREYER: So, is your point that the  
14 tax and authority -- what we want to do is get money  
15 from these people. Most of them will bet -- that the  
16 money by buying the insurance, and that will help pay.  
17 But if they don't, they're going to pay this penalty,  
18 and that will help, too. And the fact that we put the  
19 latter in brings it within the taxing power. But as far  
20 as this Act is concerned, about the injunction, they  
21 called it a penalty and not a tax for a reason. They  
22 wanted it to fall outside that.

23 GENERAL VERRILLI: Yes.

24 JUSTICE BREYER: It's in a different  
25 chapter, et cetera.

1                   Is that what the heart of what you're  
2   saying?

3                   GENERAL VERRILLI:  That's the essence of it.  
4   They called it a penalty.  They didn't give any other  
5   textual instruction in the Affordable Care Act or in the  
6   Internal Revenue Code that that penalty should be  
7   treated as a tax --

8                   CHIEF JUSTICE ROBERTS:  Well, except you --

9                   GENERAL VERRILLI:  -- for Anti-Injunction  
10  Act purposes.

11                  CHIEF JUSTICE ROBERTS:  You agree with  
12  Mr. Long, isn't -- I mean, I thought you just agreed  
13  with Justice Breyer that one of the purposes of the  
14  provision is to raise revenue.

15                  GENERAL VERRILLI:  It will -- well, it  
16  will raise revenue.  It has been predicted by the CBO  
17  that it will raise revenue, Your Honor.  But even though  
18  that's the case -- and I think that would be true of  
19  any -- of any penalty, that it will raise some revenue,  
20  but even though that's the case, there still needs to be  
21  textual instruction in the statute that this penalty  
22  should be treated as a tax for Anti-Injunction Act  
23  purposes, and that's what's lacking here.

24                  JUSTICE ALITO:  After this takes effect,  
25  there may be a lot of people who are assessed the

1 penalty and disagree either with whether they should be  
2 assessed the penalty at all or with the calculation of  
3 the amount of their penalty. So, under your  
4 interpretation of the Act, all of them can now go to  
5 court? None of them are barred by the Anti-Injunction  
6 Act?

7                   GENERAL VERRILLI: Those are two different  
8 things, Justice Alito. I think for reasons that  
9 Justice Kennedy, I think, suggested in one of his  
10 questions to Mr. Long, all of the other doctrines, that  
11 exhaustion of remedies and related doctrines, would  
12 still be there, and the United States would rely on them  
13 in those circumstances. And -- and so, I don't think  
14 the answer is that they can all go to court, no.

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

16                   JUSTICE ALITO: Two former -- two former  
17 commissioners of the IRS have filed a brief saying that  
18 your interpretation is going to lead to a flooded  
19 litigation. Now, they're wrong on that?

20                   GENERAL VERRILLI: Yes. We don't -- we've  
21 taken this position after very careful consideration,  
22 and we've assessed the institutional interests of the  
23 United States, and we think we're in the right place.

24                   JUSTICE SOTOMAYOR: But tell me something,  
25 why isn't this case subject to the same bars that --

1 that you list in your brief? The Tax Court, at least so  
2 far, considers constitutional challenges to statutes.  
3 So, why aren't we -- why isn't this case subject to a  
4 dismissal for failure to exhaust?

5 GENERAL VERRILLI: We don't -- because the  
6 exhaustion would go to the individual amount owed, we  
7 think, and that's a different situation from this case.

8 If the Court has no further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, General.

10 GENERAL VERRILLI: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Katsas.

12 ORAL ARGUMENT OF GREGORY G. KATSAS

13 ON BEHALF OF THE RESPONDENTS

14 MR. KATSAS: Mr. Chief Justice, and may it  
15 please the Court:

16 Let me begin with the question whether the  
17 Anti-Injunction Act is jurisdictional.

18 Justice Ginsburg, for reasons you suggested,  
19 we think the text of the Anti-Injunction Act is  
20 indistinguishable from the text of the statute that was  
21 unanimously held to be non-jurisdictional in Reed  
22 Elsevier. That statute said no suit shall be  
23 instituted. This statute says no suit shall be  
24 maintained. No --

25 JUSTICE GINSBURG: They are different



1 things.

2 JUSTICE SOTOMAYOR: Big difference, though.

3 JUSTICE GINSBURG: This says

4 "Immediately" -- the Reed Elsevier statute says

5 immediately after instituted unless a copyright is

6 registered.

7 MR. KATSAS: Unless the copyright is

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

9 of the lawsuit. The statute in Reed Elsevier says

10 register your copyright and then come back to court.

11 JUSTICE GINSBURG: So, why isn't that like

12 the filing fee? Before you can maintain a suit for

13 copyright infringement, you have to register your

14 copyright?

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

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

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

18 is --

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

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

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

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

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

24 permitting the court to exercise what otherwise would be

25 one of its powers.

1                   MR. KATSAS: It has to be the same  
2 challenge, Justice Sotomayor, or else South  
3 Carolina v. Regan would say the Anti-Injunction Act  
4 doesn't apply. You are right that once you file -- once  
5 you pay your taxes and then file the refund action, the  
6 act of filing the taxes converts the suit from one  
7 seeking prospective relief into one seeking money  
8 damages. And in that sense, you could think of the  
9 statute as a remedial limitation on the courts.

10                   But whether you think of it as an exhaustion  
11 requirement or a remedial limitation, neither of those  
12 characterizations is jurisdictional. In  
13 Davis v. Passman, you said that a remedial limitation  
14 doesn't go --

15                   JUSTICE SOTOMAYOR: It does seem strange to  
16 think of a -- a law that says no court can entertain a  
17 certain action and give a certain remedy as merely a  
18 claim-processing rule. What the -- the court is being  
19 ousted from -- from what would otherwise be its power to  
20 hear something.

21                   MR. KATSAS: The suit is being delayed, I  
22 think, is the right way of looking at it. The  
23 jurisdictional apparatus in the district court is  
24 present. Prospective relief under 1331, money damages  
25 action under 1346. If the Anti-Injunction Act were

1 jurisdiction-ousting, one might have expected it to be  
2 in Title 28 and to qualify those statutes and to use  
3 jurisdictional limits.

4 JUSTICE SOTOMAYOR: So, how do you deal with  
5 this case and our Gonzalez -- our recent Gonzalez case,  
6 where we talked about --

7 MR. KATSAS: Right.

8 JUSTICE SOTOMAYOR: -- the language of the  
9 COA statute, that no appeal will be heard absent the  
10 issuance of?

11 MR. KATSAS: Gonzalez -- Gonzalez v. Thaler  
12 rests on a special rule that applies with respect to  
13 appeals from one Article III court to another.  
14 That's -- that explains Gonzalez, and it explains Bowles  
15 before it.

16 You have five unanimous opinions in the last  
17 decade in which you have strongly gone the other  
18 direction on what counts as jurisdictional.

19 JUSTICE SOTOMAYOR: There is an argument  
20 that we should just simply say that Bowles applies only  
21 to appeals, but we haven't said that.

22 MR. KATSAS: Though, you came very close.  
23 In Henderson, Justice Sotomayor, you said that Bowles,  
24 which is akin to Thaler, is explained by the special  
25 rules and understandings governing appeals from one

1 Article III court to another. And you specifically said  
2 that it does not apply to situations involving a party  
3 seeking initial judicial review of agency action, which  
4 is what we have here.

5 So, while you're right, the texts in Bowles  
6 and Thaler are not terribly different, those cases are  
7 explained by that principle. Under Henderson, it  
8 doesn't apply to this case.

9 The text in this case speaks to the suit,  
10 the cause of action of the litigant. It doesn't speak  
11 to the jurisdiction or power of the court. The  
12 Anti-Injunction Act is placed in a section of the tax  
13 code governing procedure. It's not placed in --

14 JUSTICE SOTOMAYOR: Counsel, all of those --  
15 all of that in particular --

16 MR. KATSAS: You did rely on that in Reed  
17 Elsevier as one consideration.

18 JUSTICE SOTOMAYOR: And we haven't relied on  
19 it in other cases.

20 MR. KATSAS: Another -- another  
21 consideration in Reed Elsevier that cuts in our favor is  
22 the presence of exceptions. You said three in Reed  
23 Elsevier cut against jurisdictional characterization.  
24 Here, there are 11. And --

25 JUSTICE SOTOMAYOR: Many of which themselves

1 speak in very clear jurisdictional language.

2 MR. KATSAS: Well, some of them have no  
3 jurisdictional language at all, and not a single one of  
4 them uses the word "jurisdiction" to describe the  
5 ability of the court to restrain the assessment and  
6 collection of taxes, which is what one would have  
7 expected --

8 JUSTICE BREYER: It basically, basically the  
9 difference -- of language is relevant. There are a lot  
10 of relevant things. But one thing that's relevant in my  
11 mind is that taxes are, for better or for worse, the  
12 life's blood of government.

13 MR. KATSAS: Yes.

14 JUSTICE BREYER: And so, what Congress is  
15 trying to do is to say there is a procedure here that  
16 you go through. You can get your money back, or you go  
17 through the Tax Court, but don't do this in advance for  
18 the reason that we don't want 500 Federal judge --  
19 judges substituting their idea of what is a proper  
20 equitable defense, of when there shouldn't be an  
21 exception made about da, da, da, for the basic rule.  
22 No. Okay?

23 And so, there is strong reason that is  
24 there. You tried to apply that reason to the copyright  
25 law. You can't find it. Registration with the

1 copyright register is not the life's blood of anything.

2 (Laughter.)

3 JUSTICE BREYER: Copyright exists  
4 regardless. So, the reasoning isn't there.

5 MR. KATSAS: Except --

6 JUSTICE BREYER: The language -- you're -- I  
7 see the similarity of language. I've got that. But  
8 it's the reasoning, the sort of underlying reason for  
9 not wanting a waiver here that is -- has a significant  
10 role in my mind of finding that it is jurisdictional.  
11 Plus the fact that we've said it nonstop since that  
12 Northrop or whatever that other case is.

13 MR. KATSAS: Justice Breyer, as to  
14 reasoning, you -- you give an argument -- you give an  
15 argument why, as a policy matter, it might make sense to  
16 have a non-jurisdictional statute. But of course, this  
17 Court's recent cases time and again say Congress has to  
18 clearly rank the statute as non-jurisdictional in its  
19 text and structure. It seems to me a general appeal to  
20 statutory policies doesn't speak with sufficient  
21 clarity --

22 JUSTICE BREYER: That's fine. I just asked  
23 in case you wanted to answer the policy.

24 MR. KATSAS: Okay. As to policy -- as to  
25 policy, I think Helvering v. Davis is the refutation of

1 this view. It is true that in most cases, the  
2 government doesn't want and Congress doesn't want people  
3 coming into court. But Davis shows that there may be  
4 some cases including, for instance, constitutional  
5 challenges to landmark Federal statutes where the  
6 government sensibly decides that its revenue-raising  
7 purposes are better served by allowing a party to come  
8 into court and waiving its defense. That's what the  
9 Solicitor General did in Davis, and this Court accepted  
10 that waiver.

11 As for prior cases, we have the holding in  
12 Davis and the holding in all of the equitable exception  
13 cases like Williams Packing. The government --

14 JUSTICE SOTOMAYOR: So, why don't we say --  
15 so, why don't we say it's jurisdictional except when the  
16 Solicitor General waives?

17 MR. KATSAS: You have used --

18 JUSTICE SOTOMAYOR: Why would that not  
19 promote Congress's policy of ensuring -- or Congress  
20 explicitly says --

21 MR. KATSAS: It's jurisdictional except when  
22 the Solicitor General waives it?

23 JUSTICE SOTOMAYOR: Yes. It's a  
24 contradiction in terms. I don't disagree. I don't  
25 disagree.

1           MR. KATSAS: It is a contradiction in terms.  
2 All of your cases analyze the situation as if a statute  
3 is jurisdictional, then it's not subject to waiver. If  
4 you were to construe this as such a one-off unique  
5 statute, it seems to me we would still win because the  
6 Solicitor General with full knowledge of the  
7 Anti-Injunction Act argument available to him  
8 affirmatively gave it up. This is not just a forfeiture  
9 where a government lawyer is -- through inadvertence  
10 fails to raise an argument. This is a case where the  
11 government --

12           JUSTICE SOTOMAYOR: They raised it and then  
13 gave it up.

14           MR. KATSAS: They made it below. They know  
15 what it is. And not only are they not pursuing it here;  
16 they're affirmatively pursuing an argument on the other  
17 side.

18           JUSTICE KAGAN: Mr. Katsas, is your basic  
19 position that when we're talking about the jurisdiction  
20 of the district courts, a statute has to say it's  
21 jurisdictional to be jurisdictional?

22           MR. KATSAS: I wouldn't go quite that far.  
23 I think at a minimum, it has -- it has to either say  
24 that or at least be directed to the courts, which is a  
25 formulation you've used in your cases and which is the



1 formulation that Congress used in the Tax Injunction Act  
2 but did not use in this statute.

3 JUSTICE KAGAN: Well, how is -- I mean, I  
4 suppose one could try to make a distinction between this  
5 case and Reed Elsevier by focusing on the difference  
6 between instituting something and maintaining something.  
7 I'm suggesting that instituting is more what a litigant  
8 does, and maintaining, as opposed to dismissing, is more  
9 what a judge does.

10 MR. KATSAS: I don't think so, Justice  
11 Kagan, because we have an adversarial system, not an  
12 inquisitorial one. The parties maintain their lawsuits,  
13 I think, is the more natural way of thinking of it.

14 If I could turn -- if I could turn to the  
15 merits question on the AIA before my time runs out.

16 The purpose of this lawsuit is to challenge  
17 a requirement -- a Federal requirement to buy health  
18 insurance. That requirement itself is not a tax. And  
19 for that reason alone, we think the Anti-Injunction Act  
20 doesn't apply.

21 What the amicus effectively seeks to do is  
22 extend the Anti-Injunction Act, not just to taxes which  
23 is how the statute is written, but to free-standing,  
24 nontax legal duties. And it's just --

25 CHIEF JUSTICE ROBERTS: The whole point --

1 the whole point of the suit is to prevent the collection  
2 of penalties.

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

4 CHIEF JUSTICE ROBERTS: Well, prevent the  
5 collection of taxes. But the idea that the mandate is  
6 something separate from whether you want to call it a  
7 penalty or tax just doesn't seem to make much sense.

8 MR. KATSAS: It's entirely separate, and let  
9 me explain to you why.

10 CHIEF JUSTICE ROBERTS: It's a command. A  
11 mandate is a command.

12 MR. KATSAS: Right.

13 CHIEF JUSTICE ROBERTS: Now, if there's  
14 nothing behind the command -- it's sort of, well, what  
15 happens if you don't follow the mandate, and the answer  
16 is nothing -- it seems very artificial to separate the  
17 punishment from the crime.

18 MR. KATSAS: I'm not sure the answer is  
19 nothing, but even assuming it were nothing, it seems to  
20 me there is a difference between what the law requires  
21 and what enforcement consequences happen to you. This  
22 statute was very deliberately written to separate  
23 mandate from penalty in several different ways.

24 They are put in separate sections. The  
25 mandate is described as a "legal requirement" no fewer

1    than 20 times, 3 times in the operative text and 17  
2    times in the findings.  It's imposed through use of a  
3    mandatory verb "shall."  The requirement is very well  
4    defined in the statute, so it can't be sloughed off as a  
5    general exhortation, and it's backed up by a penalty.

6               Congress then separated out mandate  
7    exceptions from penalty exceptions.  It defined one  
8    category of people not subject to the mandate.  One  
9    would think those are the category of people as to whom  
10   Congress is saying you need not follow this law.  It  
11   then defined a separate category of people not subject  
12   to the penalty, but subject to the mandate.  I don't  
13   know what that could mean other than --

14              CHIEF JUSTICE ROBERTS:  Well, why would you  
15   have a requirement that is completely toothless?  Pay --  
16   you know, buy insurance or else.  Or else what?  Or else  
17   nothing.

18              MR. KATSAS:  Because Congress reasonably  
19   could think that at least some people will follow the  
20   law precisely because it is the law.  And let me give  
21   you an example of one category of person that might be:  
22   The very poor, who are exempt from the penalty but  
23   subject to the mandate.

24              Mr. Long says this must be a mandate  
25   exemption because it would be wholly harsh and

1 unreasonable for Congress to expect people who are very  
2 poor to comply with a requirement to obtain health  
3 insurance when they have no means of doing so.

4           That gets things exactly backwards. The  
5 very poor are the people Congress would be most  
6 concerned about with respect to the mandate to the  
7 extent one of the justifications for the mandate is to  
8 prevent emergency room cost shifting when people receive  
9 uncompensated care. So, they would have had very good  
10 reason to make the very poor subject to the mandate, and  
11 then they didn't do it in a draconian way; they gave the  
12 very poor a means of complying with the insurance  
13 mandate, and that is through the Medicaid system.

14           JUSTICE KAGAN: Mr. Katsas, do you think a  
15 person who is subject to the mandate but not subject to  
16 the penalty would have standing?

17           MR. KATSAS: Yes, I think that person would,  
18 because that person is injured by compliance with the  
19 mandate.

20           JUSTICE KAGAN: And what would that look  
21 like? What would the argument be as to what the injury  
22 was?

23           MR. KATSAS: The injury -- when that person  
24 is subject to the mandate, that person is required to  
25 purchase health insurance. That's a forced acquisition

1 of an unwanted good. It's a classic pocketbook injury.

2 But even if I'm wrong about that question,  
3 Justice Kagan, the question of who has standing to bring  
4 the challenge that we seek to bring seems to me very  
5 different -- your hypothetical plaintiff is very  
6 different from the actual plaintiffs. We have  
7 individuals who are planning for compliance in order to  
8 avoid a penalty, which is what their affidavits say.  
9 And we have the States, who will be subject no doubt to  
10 all sorts of adverse ramifications if they refuse to  
11 enroll in Medicaid the people who are forced into  
12 Medicaid by virtue of the mandate.

13 So, we don't have the problem of no adverse  
14 consequences in the case.

15 And then, we have the separate distinction  
16 between the question of who has Article III standing in  
17 order to maintain a suit and the question of who is  
18 subject to a legal obligation. And you've said in your  
19 cases that even if there may be no one who has standing  
20 to challenge a legal obligation like the incompatibility  
21 clause or something, that doesn't somehow convert the  
22 legal obligation into a legal nullity.

23 Finally, with respect to the States, even if  
24 we are wrong about everything I've said so far, the  
25 States clearly fall within the exception recognized in

1 South Carolina v. Regan. They are injured by the  
2 mandate because the mandate forces 6 million new people  
3 onto their Medicaid rolls. But they are not directly  
4 subject to the mandate, nor could they violate the  
5 mandate and incur a penalty.

6 JUSTICE KAGAN: Could I just understand, Mr.  
7 Katsas, when the States say that they're injured, are  
8 they talking about the people who are eligible now but  
9 who are not enrolled? Or are they also talking about  
10 people who will become newly eligible?

11 MR. KATSAS: It's people who will enroll --  
12 people who wouldn't have enrolled had they been given a  
13 voluntary choice.

14 JUSTICE KAGAN: But who are eligible now.

15 MR. KATSAS: That's the largest category. I  
16 think there could be future eligibles who would enroll  
17 because they're subject to a legal obligation but  
18 wouldn't have enrolled if given a voluntary choice.

19 But I'm happy to -- I'm happy to focus on  
20 currently eligible people who haven't enrolled in  
21 Medicaid. That particular class is the one that gives  
22 rise to, simply in Florida alone, a pocketbook injury on  
23 the order of 500 to \$600 million per year.

24 JUSTICE KAGAN: But that does seem odd, to  
25 suggest that the State is being injured because people

1 who could show up tomorrow with or without this law  
2 will show up in greater numbers. I mean, presumably the  
3 State wants to cover people whom it is declared eligible  
4 for this benefit.

5 MR. KATSAS: They could, but they don't.  
6 What the State wants to do is make Medicaid available to  
7 all who are eligible and choose to obtain it.

8 JUSTICE GINSBURG: Why would --

9 MR. KATSAS: And in any event --

10 JUSTICE GINSBURG: Why would somebody not  
11 choose to obtain it? Why -- that's one puzzle to me.  
12 There's this category of people who are Medicaid  
13 eligible; Medicaid doesn't cost them anything. Why  
14 would they resist enrolling?

15 MR. KATSAS: I -- I don't know, Justice  
16 Ginsburg. All I know is that the difference between  
17 current enrollees and people who could enroll but have  
18 not is, as I said, on the -- is a \$600 million delta.  
19 And --

20 JUSTICE GINSBURG: But it may be just that  
21 they haven't been given sufficient information to  
22 understand that this is a benefit for them.

23 MR. KATSAS: It's possible, but all we're  
24 talking about right now is the standing of the States.  
25 And the only arguments made against the standing of the

1 States -- I mean, there is a classic pocketbook injury  
2 here. The only arguments made about -- against the  
3 standing of the States are, number one, this results  
4 from third-party actions. That doesn't work, because  
5 the third-party actions are not unfettered in the sense  
6 of Lujan; they are coerced in the sense of  
7 Bennett v. Spear. Those people are enrolling because  
8 they're under a legal obligation to do so.

9           The second argument made against the States'  
10 standing is that the States somehow forfeit their  
11 ability to challenge the constitutionality of a  
12 provision of Federal law because they voluntarily choose  
13 to participate --

14           JUSTICE SOTOMAYOR: I'm -- I'm a little bit  
15 confused, and this is what I'm confused about: There --  
16 there's a challenge to the individual mandate.

17           MR. KATSAS: Yes.

18           JUSTICE SOTOMAYOR: All right? What does  
19 the fact that the State is challenging Medicaid -- how  
20 does it give the State standing to challenge an  
21 obligation that is not imposed on the State in any way?

22           MR. KATSAS: The principal theory for State  
23 standing is that States are challenging the mandate  
24 because the mandate injures them when people are forced  
25 to enroll in Medicaid.



1                   Now, it is true they are not directly  
2   subject to the mandate, but --

3                   JUSTICE SOTOMAYOR:   Yes.   That's what I'm --

4                   MR. KATSAS:   Okay.   Let me -- let me try  
5   to --

6                   JUSTICE SOTOMAYOR:   -- a little confused by.

7                   MR. KATSAS:   Let me try it this way -- may I  
8   finish the thought?

9                   CHIEF JUSTICE ROBERTS:   Yes.

10                  MR. KATSAS:   In South Carolina v. Regan, the  
11   State was not subject to the tax at issue.   The State  
12   was harmed as the issuer of the bonds, and the bond  
13   holders were the ones subject to the tax.   So, the State  
14   is injured not because it is the direct object of the  
15   Federal tax, but because of its relationship to the  
16   regulated party as issuer/bond holder.

17                  CHIEF JUSTICE ROBERTS:   Thank you,  
18   Mr. Katsas.

19                  MR. KATSAS:   Thank you, Mr. Chief Justice.

20                  CHIEF JUSTICE ROBERTS:   Mr. Long, you have 5  
21   minutes remaining.

22                  REBUTTAL ARGUMENT OF ROBERT A. LONG

23                  AS THE COURT-APPOINTED AMICUS CURIAE

24                  MR. LONG:   Everyone agrees that the section  
25   5000A penalty shall be assessed and collected in the

1 same manner as taxes. And the parties' principal  
2 argument why that does not make the Anti-Injunction Act  
3 applicable is that, well, that simply goes to the  
4 Secretary's activities.

5 And I would simply ask, if you look at  
6 chapters 63 and 64 of the Internal Revenue Code, which  
7 are the chapters on assessment and collection, they are  
8 not just addressed to the Secretary. There are many  
9 provisions in there that are addressed to courts and  
10 indeed talk about this interaction, the very limited  
11 situations in which courts are permitted to restrain the  
12 assessment and collection of taxes.

13 There was a statement made that there  
14 aren't -- and many of the exceptions to the  
15 Anti-Injunction Act are in the assessment and collection  
16 provisions -- there was a statement made that none of  
17 these directly confer jurisdiction to restrain the  
18 assessment and collection of taxes. That's not true.  
19 In footnote 11 of our opening brief, we cite several.

20 I'll simply mention section 6213 as an  
21 example. That says -- I quote: "Notwithstanding the  
22 provisions of section 7421(a), the making of such  
23 assessment or the beginning of such proceeding or levy  
24 during the time such prohibition is in force may be  
25 enjoined by a proceeding in the proper court, including

1 the Tax Court. The Tax Court shall have no jurisdiction  
2 to enjoin any action or proceeding or order any refund  
3 under this subsection unless a timely petition for  
4 redetermination of the deficiency has been filed and  
5 then only in respect of the deficiency that is the  
6 subject of such petition."

7 JUSTICE BREYER: All that's going to really  
8 what I'd think Congress's intent was meant to be in  
9 sticking the collection thing into chapter 68, and --  
10 and it's certainly an argument in your favor.

11 The over-arching thing in my mind is it's up  
12 to Congress, within leeway. And they did not use that  
13 word "tax," and they did have a couple of exceptions.  
14 And it is true that all this language that you quote --  
15 you know, the first two sentences and so forth, it talks  
16 about the use of "tax" in the IRC. It talks about the  
17 penalties and liabilities provided by this subchapter.  
18 And we look over here, and it's a penalty and liability  
19 provided by a different law, which says collect it  
20 through the subchapter. And it has nothing to do with  
21 the IRC. See?

22 So, we've got it in a separate place. We  
23 can see pretty clearly what they're trying to do. They  
24 couldn't really care very much about interfering with  
25 collecting this one. That's all the statutory argument.

1 Are you following me?

2 MR. LONG: Well, I --

3 JUSTICE BREYER: You see? I'm trying to get  
4 you to focus on that kind of argument that I'm just  
5 making.

6 MR. LONG: I mean, I think I'm following  
7 you, but the fact that it's not in the particular  
8 subchapter for assessable penalties in my view makes no  
9 difference, because they said it's still clearly -- it's  
10 assessed and collected in the same manner --

11 JUSTICE BREYER: Yes, it is.

12 MR. LONG: -- as a penalty in that  
13 subchapter, and those penalties are collected in the  
14 same manner as taxes.

15 JUSTICE BREYER: Yes, yes.

16 MR. LONG: And so, that's -- I think it's  
17 rather detailed, but I think it's a rather clear  
18 indication that the Anti-Injunction Act applies.

19 The -- the refund statute that does  
20 specifically refer to penalties -- that has nothing to  
21 do with this argument that it's assessed and collected  
22 in the same manner as a tax. That would simply go to  
23 the point that, well, you can't just call it a tax,  
24 because they've referred to it as a penalty.

25 And, finally, on jurisdiction, you know, I

1 think the key point is we have a long line of this  
2 Court's decisions that's really been ratified by  
3 Congress, with all these exceptions in jurisdictional  
4 terms.

5                   As I read Bowles and John R. Sand & Gravel,  
6 the gist of those decisions was not any sort of special  
7 rule about appeals, It's that when we have that  
8 situation, which I would submit applies as much to the  
9 collection of Federal taxes as it does to appeals from  
10 Federal district courts when we have this degree of --  
11 of precedent, including precedent from Congress in the  
12 form of amendments to this Anti-Injunction Act, that  
13 should be -- the presumption should be that this is  
14 jurisdictional.

15                   If there are no further questions.

16                   CHIEF JUSTICE ROBERTS: Mr. Long, you were  
17 invited by this Court to defend the proposition that the  
18 Anti-Injunction Act barred this litigation. You have  
19 ably carried out that responsibility, for which the  
20 Court is grateful.

21                   MR. LONG: Thank you.

22                   CHIEF JUSTICE ROBERTS: We will continue  
23 argument in this case tomorrow.

24                   (Whereupon, at 11:41 a.m., the case in the  
25 above-entitled matter was submitted.)

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