

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 J. ELLIOTT HIBBS, DIRECTOR, :

4 ARIZONA DEPARTMENT OF :

5 REVENUE, :

6 Petitioner :

7 v. : No. 02-1809

8 KATHLEEN M WINN, ET AL. :

9 - - - - -X

10 Washington, D. C.

11 Tuesday, January 20, 2004

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:05 a.m.

15 APPEARANCES:

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17 on behalf of the Petitioner.

18 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,

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

20 the United States, as amicus curiae, supporting the

21 Petitioner.

22 MARVIN S. COHEN, ESQ., Scottsdale, Arizona; on behalf of

23 the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in No. 02-1809, J. Elliott Hibbs v. Kathleen Winn.

Very well, General Goddard. You may proceed.

ORAL ARGUMENT OF SAMUEL GODDARD

ON BEHALF OF THE PETITIONER

MR. GODDARD: Mr. Chief Justice, may it please
the Court:

The fundamental -- the fundamental question in
this case is whether the meaning of the term assessment,
as used in the Tax Injunction Act, includes Arizona's
school tax credit.

As this Court has written on several occasions,
the Tax Injunction Act has a very broad reach. It
drastically limits the access to Federal district courts.
The act is relatively simple and -- and straightforward.
It's just 35 words, as I count it, and it specifically
says the Federal district courts shall not enjoin,
restrain, or suspend the assessment, levy, or collection
of a tax under State law where there is a plain, speedy,
and efficient remedy in the courts of that State.

QUESTION: Where is the assessment here that --
that supposedly is being enjoined?

MR. GODDARD: Your Honor, the assessment is the

1 calculation of a tax by the -- for the taxpayer. In other
2 words, it's the bottom line. It's the plain meaning of
3 assessment and the dictionary meaning. It is what happens
4 after you've done all the additions and subtractions and
5 you get to line 40 on the Arizona tax return form which
6 is --

7 QUESTION: It's -- it's a self-assessment? So
8 you -- it's a self-assessment that's being enjoined?

9 MR. GODDARD: Your Honor, I'm not talking about
10 a self-assessment. I believe a self-assessment is a
11 colloquialism that talks about what all of us go through
12 as taxpayers. The assessment I'm talking about is what
13 the defendant in this case, Elliott Hibbs, the Director of
14 the Department of Revenue in Arizona, does both for
15 individual taxpayers and for all the taxpayers
16 collectively to determine what the State's revenues are
17 going to be from the taxpayers. And the only way you get
18 to the revenue is that bottom line on the tax form --

19 QUESTION: Mr. Goddard --

20 MR. GODDARD: -- after you've done all the
21 credits.

22 QUESTION: Mr. Goddard, I thought that in a
23 self-assessment system, such as the one we have, the
24 Federal Government, Arizona, that assessment is associated
25 with assertion of a deficiency. In Arizona, is every

1 taxpayer assessed by the government? That would be quite
2 a different system, wouldn't it?

3 MR. GODDARD: Your Honor, every taxpayer in
4 Arizona has their form calculated by the government. We
5 check the math.

6 QUESTION: You -- you audit everyone in the
7 State?

8 MR. GODDARD: No, Your Honor. I'm not trying to
9 say we audit everyone, but technically the assessment, and
10 as it is used also in the Internal Revenue Code to my
11 understanding, is the assessment -- and I'm quoting from
12 the Internal Revenue Code -- shall be made by recording
13 the liability of the taxpayer in the Office of the
14 Secretary.

15 QUESTION: Which the Government does when it
16 wants to assert a deficiency. And we were told that the
17 assessment just a week ago is nothing more than a
18 bookkeeping entry, and what it does is it triggers certain
19 administrative remedies. But my understanding was that an
20 assessment is made when the Government wants to assert a
21 deficiency. Otherwise, there isn't this entry, this
22 bookkeeping entry someplace, that every taxpayer isn't
23 assessed.

24 MR. GODDARD: Your Honor, it is -- it is our
25 position that the State of Arizona under our State tax

1 system assesses all taxes in the State and that --

2 QUESTION: When -- when does that happen? When
3 the return is received in the office or?

4 MR. GODDARD: It -- it returns during -- excuse
5 me. Your Honor, the -- the activity perhaps is -- is
6 somewhat fictional in terms of the -- of the director.
7 He's not going to sit down, as in the old days, with a
8 green eyeshade and write down a number for each taxpayer.
9 But he does, in fact, and his office does, in fact,
10 calculate the gross revenues in the State, what credits
11 are going to be applied against those gross revenues,
12 various adjustments, and comes up with a bottom line. And
13 that bottom line is our dictionary -- Black's Dictionary
14 definition of what an assessment is.

15 QUESTION: But that's not the assessment that
16 you -- I mean, you used the Internal Revenue Code
17 provision. That is an entry. We were told it's a
18 bookkeeping entry. And it's made as a prerequisite to
19 levying liens, to extending the statute of limitations.
20 But it certainly isn't true that that kind of assessment,
21 which is what your brief suggested you were talking about,
22 is made in the case of every taxpayer.

23 MR. GODDARD: Your Honor, I'm not saying that
24 every taxpayer has a -- a specific entry next to their
25 name. That would -- that would certainly be more than we

1 could do. But our statutes, our tax system in Arizona
2 does, in fact, call for an assessment of the liability of
3 each taxpayer. And that assessment, the entire plan,
4 scheme fixed upon for charging and taxing, the Webster's
5 definition of assessment, is the bottom line. And I guess
6 that's the plain meaning that I'm trying to get to.

7 QUESTION: Because I -- I assume that assessment
8 is -- is -- the assessment that we're concerned with is --
9 is within the meaning of Federal law.

10 But let me just ask you this question. Do you
11 have a statute in Arizona that in effect says what the
12 department does with respect to each taxpayer is to assess
13 that taxpayer? Does -- does that word occur as a
14 statement for some technical function that you go through
15 with respect to every taxpayer within the meaning of
16 Arizona law?

17 MR. GODDARD: Your Honor, I -- I can't say that
18 we have that specific word in our statute. We
19 certainly --

20 QUESTION: Well, then -- then isn't your problem
21 this, that -- that there -- that that specific word is
22 used in the Federal statutes, quite apart from the Tax
23 Injunction Act? And -- and my understanding is the same
24 as Justice Ginsburg's. It is used in -- in a way that --
25 that involves a -- a predicate to the -- the assertion of

1 a lien or -- or steps to collect a deficiency. And -- and
2 that doesn't seem to be what is involved here. Isn't --
3 isn't that a problem for you in your position?

4 MR. GODDARD: Your Honor, I don't believe so
5 because the -- the first step -- and -- and the three
6 words in the statute I think are -- are certainly helpful:
7 assessment, levy, collection. What essentially the
8 Congress --

9 QUESTION: Well, there's no issue of a levy
10 going on here, and they're not trying to stop you from
11 collecting anything. I mean, their -- their argument is
12 you ought to be collecting more, but they're certainly not
13 interfering in a way that's going to leave Arizona without
14 money while it litigates. What they're saying is we want
15 to litigate so that you'll get more money, and -- and so
16 that I suppose that's why the Ninth Circuit said why --
17 that the closest thing to a word involved here that --
18 that might let the statute apply is assessment.

19 MR. GODDARD: Yes, Your Honor, we believe
20 that --

21 QUESTION: And it didn't think it did. But, I
22 mean, it seems to me that that's a basic textual problem
23 in -- in your case, and I don't understand how you get
24 around it.

25 QUESTION: The technical assessment that's made

1 tied to a deficiency you don't fit. So you're talking
2 about some other kind of assessment than the one that, for
3 example, the Government was telling us about last Monday
4 in the Galletti case, not that technical -- some -- if
5 we're talking about property, say, a property tax, then
6 maybe an assessor comes on the land, looks at the house,
7 attributes a value to it. That wouldn't be a self-
8 assessing system from the taxpayer's point of view. But
9 -- but the income tax is quite different. You assess
10 yourself. Sometimes you get audited; sometimes you don't.

11 And I don't see that anybody here is trying to
12 stop the government from making the assessment that would
13 be a trigger to asserting a deficiency. No one is trying
14 to stop Arizona from asserting a deficiency against any
15 taxpayer.

16 MR. GODDARD: No, Your Honor, but -- but what
17 we're asking for is that the -- the director, Mr. Hibbs,
18 be able to -- as the statute says, to implement the -- the
19 tax system under State law.

20 QUESTION: Well, is it the case, though, that
21 other courts of appeal at the Federal level have concluded
22 that the Tax Injunction Act does not bar suits that would
23 increase State revenues rather than reduce them, that the
24 purpose of the Tax Injunction Act was to prevent reduction
25 of State tax revenues, specifically by corporations coming

1 in and getting injunctions and preventing the State from
2 receiving revenues, but that it doesn't apply where the
3 effect of the -- the suit would be to increase the State's
4 coffers?

5 MR. GODDARD: Your Honor, if I could deal with
6 -- there -- there are two questions, one, the legislative
7 history and -- and the -- as this Court has noted --

8 QUESTION: First of all, with the courts of
9 appeal, the majority have so held, I guess, who have
10 addressed it.

11 MR. GODDARD: No, Your Honor. I -- I would
12 submit that -- that that's not the case.

13 QUESTION: Only the Fifth Circuit has gone the
14 other way.

15 MR. GODDARD: The Fifth Circuit in ACLU
16 Foundation v. Bridges has -- has very convincingly --

17 QUESTION: Yes, but the others went the other
18 way on it.

19 MR. GODDARD: Your Honor, I could --

20 QUESTION: The Seventh, the Eighth, and the
21 Ninth. Right?

22 MR. GODDARD: Your Honor, there is -- is
23 language in the Seventh Circuit opinion which speaks about
24 this, but it is in a very limited sense in -- in Dunn v.
25 Kerry. I don't think it's applicable here. I'd be happy

1 to discuss that.

2 I would refer the course also -- the Court also,
3 as our brief does, to First Circuit U.S. *Brewers v. Perez*
4 interpreting the Butler Act which is identical in language
5 to the Tax Injunction Act; to *Kraebel v. New York Housing*
6 Department in the Second Circuit which talks about a tax
7 benefit.

8 That's what we have on -- at -- at stake here is
9 we try -- the -- the respondents are trying to draw a
10 division between all State tax systems to say anything
11 that involves raising revenue is challengeable only in
12 State court, but if there's a benefit involved, if there's
13 anything else that accrues to the benefit of the taxpayer,
14 that has to go Federal court. I believe that's --

15 QUESTION: I don't know about that, but a -- a
16 challenge to a tax credit I think is what we're talking
17 about. Right?

18 MR. GODDARD: Well, Your Honor, I don't believe
19 there's any logical distinction between a deduction, an
20 exclusion, an exemption, and a credit. They all --

21 QUESTION: Well, I suppose you could -- I
22 suppose you could make the argument that it -- it's wrong
23 to say the State is only interested in increasing revenue.
24 The State may be interested in fairness for its taxpayers,
25 giving its taxpayers the -- the benefit of the lower rate.

1 That's certainly a -- a sound State policy.

2 MR. GODDARD: Thank you, Your Honor. I -- I
3 think that's one of the policies, if not the principal
4 policy, behind the Tax Injunction Act is respect for State
5 procedures and also --

6 QUESTION: General Goddard, the -- what we've
7 been talking about is this section of 1341 that talks
8 about assessment, levy, or collection of any debt. Those
9 three words fit perfectly into a property tax scheme.
10 They really don't fit nearly as well into an income tax
11 scheme. Are there cases from courts of appeals that say
12 that the -- the act does apply to income tax as well as
13 property tax?

14 MR. GODDARD: Yes, Your Honor, and that
15 distinction -- the cases I'm referring to involve both.
16 And -- and you're absolutely correct. Many of them are
17 property tax oriented. That's true of In re Gillis.
18 That's true of several others. Colonial Pipeline is
19 another that I would cite showing a tax benefit not a tax
20 deduction to the State.

21 But the most precisely on point is ACLU
22 Foundation v. Bridges from the Fifth Circuit,
23 interestingly after a couple of other cases which might
24 have -- which have been cited by the respondents for their
25 proposition that -- that somehow the revenue -- I mean,

1 the State revenue -- things that give revenues to the
2 State are significantly different from items that benefit
3 the taxpayer. I would submit that under this scheme and
4 under the scheme that this Court has discussed in the six
5 cases that -- where it has discussed the Tax Injunction
6 Act in detail speak about a much broader application.

7 QUESTION: You were going to go to the history
8 or something else. I -- I don't want you to forget that,
9 and the reason I don't want you to forget is I'm thinking
10 yours is a plausible interpretation --

11 MR. GODDARD: Thank you, Your Honor.

12 QUESTION: -- that could be -- well, I mean, it
13 could. I'm about to say maybe it isn't plausible enough.

14 (Laughter.)

15 QUESTION: The -- the -- but what I'm -- what
16 I'm driving at is that the -- the Congress might have said
17 that although Federal courts are in the business quite
18 often, along with State courts, of deciding whether a
19 State law is unconstitutional or violates some other
20 Federal law, and although millions of State laws are very
21 important, we're separating out a set of cases here where
22 they can't do it.

23 Now, one reason for doing that would be we don't
24 want to interfere with States getting money that they need
25 for their business. And that would limit these words to

1 interferences with collection of revenue.

2 MR. GODDARD: Yes, Your Honor.

3 QUESTION: Now, you were about to explain to me
4 why --

5 MR. GODDARD: I -- I would --

6 QUESTION: -- there's evidence that Congress
7 wanted to do more than that.

8 MR. GODDARD: I would greatly appreciate --

9 QUESTION: It wanted to do more than that. It
10 wanted, in fact, to say you just can't stop them from --
11 you cannot, Federal courts, go and have our tax division
12 here interfered with, even though it doesn't affect
13 collection of revenue. We -- we don't want you to
14 interfere with their rules, with their administration,
15 with anything. You can do it for the police department,
16 but not the tax.

17 All right. Now -- now, what's the evidence
18 that's what -- what Congress wanted?

19 MR. GODDARD: Well, the first evidence is the
20 words of the statute. They didn't just say collections.

21 QUESTION: All right. The words -- I think
22 they're pretty ambiguous.

23 MR. GODDARD: They -- well, they don't just say
24 collections, though, Your Honor.

25 QUESTION: No, I know.

1 MR. GODDARD: They say assessment and levy.

2 Those words are not modified.

3 QUESTION: Let's go beyond these words.

4 MR. GODDARD: Thank you.

5 Also, the history of the Tax Injunction Act --
6 it comes from a period when the -- the Congress was
7 reacting to this Court's decision in Ex parte Young, and
8 they felt that extensive equitable relief against State
9 officials was inappropriate, and they passed several laws,
10 the Johnson Act and the Tax Injunction Act in the '30's
11 being the most important, which spoke very broadly about
12 keeping in State courts State proceedings. They did not
13 say anything about just collections, although --

14 QUESTION: Mr. Goddard, in that --, in that
15 regard, wasn't what Congress had in mind -- it was
16 taxpayer suits. They didn't want taxpayers to avoid going
17 through the whole process. I mean, most of the cases that
18 come up under the Tax Injunction Act are taxpayers who say
19 please enjoin the tax or don't assess me or don't levy.
20 But this is not that kind of case.

21 There's no one here who's trying to stop the
22 State from collecting revenue. It's an attack by a non-
23 taxpayer, and that at the time of the Tax Injunction Act,
24 I don't think that kind of action was even on the scene.
25 Do you have any claims where a non-taxpayer was seeking to

1 enjoin the collection of a tax?

2 What they -- what -- what Congress was aiming at
3 is that, taxpayer, you've got a prompt, speedy, efficient
4 remedy in your State, you use that, don't rush to the
5 Federal court.

6 MR. GODDARD: Your -- Your Honor, the -- the
7 Congress had several reasons, and -- and you're absolutely
8 correct that one of the primary ones was not allowing
9 taxpayers, especially out of State, to come in and
10 interrupt the flow of taxes. I'm not denying that that
11 was a -- a very important reason.

12 But as this Court has said in *Rosewell v.*
13 *LaSalle National Bank*, if that was the only reason that
14 they were concerned about the collection of taxes, they
15 could have said so. They could have said only diversity
16 jurisdiction cases will be barred from Federal court.
17 They did not. They used -- they said essentially district
18 courts shall not consider cases to restrain, enjoin, or
19 suspend actions for the assessment, levy, and collection
20 of taxes.

21 They also --

22 QUESTION: That was a taxpayer's case too,
23 wasn't it?

24 MR. GODDARD: Excuse me?

25 QUESTION: Wasn't the case you just cited --

1 wasn't it -- that also a taxpayer's attempt to --

2 MR. GODDARD: Yes, Your Honor.

3 QUESTION: Yes.

4 MR. GODDARD: It was an assessment on property.

5 QUESTION: So I'm asking you about cases where

6 we don't have a taxpayer who's not trying to stop any

7 assessment of his tax, any -- anything else about --

8 MR. GODDARD: Well, I guess the -- the direct

9 collision, Your Honor, is between the decision below in

10 the Ninth Circuit and ACLU Foundation v. Bridges --

11 QUESTION: It's the only one that I know.

12 MR. GODDARD: -- which involves a challenge to a

13 specific tax benefit given to religious organizations in

14 Louisiana. So I believe that's as close as I can come.

15 Your Honor, if I could reserve the balance of my

16 time, I would like to do so.

17 QUESTION: Very well, General Goddard.

18 Mr. Hungar, we'll hear from you.

19 ORAL ARGUMENT OF THOMAS G. HUNGAR

20 ON BEHALF OF THE UNITED STATES,

21 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

22 MR. HUNGAR: Mr. Chief Justice, and may it

23 please the Court:

24 The position of the United States is that

25 respondents' suit is barred by the plain language of the

1 Tax Injunction Act because it seeks to enjoin and restrain
2 the assessment of a tax under State law.

3 And to turn directly to the --

4 QUESTION: May I ask you if you think the
5 language is so plain that we should not even look at the
6 legislative history?

7 MR. HUNGAR: We think it's -- yes. We think
8 that the -- the language is sufficiently plain that
9 there's no need to look at the legislative history, but
10 that if you do, the legislative history also supports the
11 interpretation we advance.

12 QUESTION: And Judge Easterbrook was just dead
13 wrong in looking at the legislative history and he also
14 interpreted it dead wrong.

15 MR. HUNGAR: Judge -- the case before Judge
16 Easterbrook, Justice Stevens, was quite different from
17 this case. That involved not an -- a -- a suit against
18 tax -- the tax collector to affect the manner in which the
19 tax collector administered the tax code, but rather a suit
20 against private plaintiffs who had brought a State court
21 action. It was a Federal court suit to enjoin a State
22 court action. And so the considerations applicable in
23 that case were obviously quite different from those what
24 we have -- where we have presented here.

25 The point of the Tax Injunction Act is to -- to

1 protect the tax collector against Federal court suits to
2 enjoin or restrain the tax collector's assessment,
3 collection, and levy of tax.

4 QUESTION: Does -- does that -- were you
5 finished your answer?

6 MR. HUNGAR: Yes.

7 QUESTION: The -- the -- if you use the word
8 enjoin to mean command, which it can mean, can you say
9 that they are commanding the collection of a tax, contrary
10 to the words of the statute?

11 MR. HUNGAR: Yes. We think that is also quite
12 correct here. That was not the issue addressed by the
13 Ninth Circuit, but that is certainly another way to get to
14 the result which we think is the correct result, that the
15 plain language of the statute bars this kind of suit.

16 Turning to the questions about the meaning of
17 assessment, it is perfectly clear beyond peradventure that
18 under -- in the Federal system, the term assessment means
19 the tax collector's recorded determination of the amount
20 of tax due under Federal law --

21 QUESTION: Do we have a self-assessment?

22 MR. HUNGAR: No, Your Honor.

23 QUESTION: We don't.

24 MR. HUNGAR: No, Your Honor.

25 QUESTION: Is every -- every taxpayer is

1 assessed?

2 MR. HUNGAR: Yes, Your Honor. The -- the --

3 QUESTION: Every taxpayer is assessed even when
4 no deficiency is sought?

5 MR. HUNGAR: Yes, Your Honor. The practice of
6 the Internal Revenue Service is to assess the amount of
7 taxes shown on the return if that is -- absent some audit
8 or some reason to think there's an error in the return.
9 And in fact, the Internal Revenue Code so provides.
10 Section --

11 QUESTION: That every taxpayer is assessed even
12 when there's no deficiency.

13 MR. HUNGAR: Correct. Well, if a taxpayer files
14 a return showing a bottom line calculation of how much tax
15 is due after all credits, deductions, and so forth have
16 been taken into account, that amount and -- and the tax --
17 and the IRS checks the addition, concludes that it's
18 accurate, and is not conducting an audit, that amount is
19 assessed. It's -- it's recorded in the transcript. Now,
20 of course, it's on the computer.

21 QUESTION: You don't have to send them a notice
22 of -- in other words, I file my income tax. I thought
23 there's some provisions that say if somebody thinks I made
24 a mistake, they have to send me some special notice. Some
25 process takes place. We have some other case on this. I

1 thought all that involved an assessment, that it was a
2 particular thing under the IRC, not just my filing of a --
3 of the return.

4 MR. HUNGAR: The assessment is a particular
5 thing. Under the Internal Revenue Code, it's the -- it's
6 the tax collect -- the IRS's determination of the amount
7 of tax --

8 QUESTION: But you just said to Justice Ginsburg
9 that if nothing happens -- like I try to pay my taxes
10 accurately. So I file these pieces of paper. And now,
11 nothing happens. They just take the money. They cash the
12 check. And -- and you're going to say when that's all
13 that happened, there was an assessment? I thought it had
14 a particular meaning that wasn't that, that was when you
15 thought I was wrong, you did something and then went after
16 me. But -- but it just -- everybody is called an
17 assessment? Does it say that in the code where --

18 MR. HUNGAR: 26 U.S.C. 6201. This is not in the
19 -- the briefs. 26 U.S.C. 6201(a)(1) provides, quote, the
20 Secretary shall assess all taxes determined by the
21 taxpayer or by the Secretary as to which returns or lists
22 are made under this title. So if the taxpayer has
23 admitted on their tax return that they owe X dollars in
24 taxes, the Secretary shall assess that amount and also has
25 the discretion to conduct an audit.

1 QUESTION: But -- but nobody -- nobody here is
2 contesting, as far as I can tell, what we were told Monday
3 is a mere bookkeeping entry. Does it -- does it -- is a
4 notice and demand sent out to everyone who's assessed?

5 MR. HUNGAR: Not if the taxpayer has conceded
6 the amount of liability. That's the point. If the
7 taxpayer concedes on the return that their liability is
8 X --

9 QUESTION: So why is anybody trying to enjoin a
10 bookkeeping entry that nobody knows anything about?

11 MR. HUNGAR: Because assessment is the formal
12 determination by the -- by the --

13 QUESTION: But I don't see that there's any
14 effort to stop a bookkeeping entry from being made --

15 MR. HUNGAR: There is, Your Honor.

16 QUESTION: -- that nobody gets any notice of and
17 doesn't -- is -- is, we were told, just a mere bookkeeping
18 entry. That doesn't -- doesn't -- it's not necessary in
19 order to collect the tax?

20 MR. HUNGAR: But the statute, Justice Ginsburg,
21 doesn't say anything about notice. It says the -- the
22 Federal district courts shall not enjoin the assessment of
23 a tax under State law.

24 QUESTION: But nobody is seeking to enjoin any
25 assessment.

1 MR. HUNGAR: They -- they are. The plaintiffs
2 are seeking --

3 QUESTION: They -- as assessment being a
4 bookkeeping entry that nobody knows anything about. You
5 just said you don't need any notice and demand. In the
6 Galletti case, we were told that's what the assessment is.
7 It's a notation in a book someplace. It doesn't even have
8 the taxpayer's name on it.

9 MR. HUNGAR: If I may answer, Justice Ginsburg.
10 What plaintiffs are seeking to do is prevent and restrain
11 and enjoin the -- the tax department from assessing taxes
12 under State law in the manner required by State law, which
13 includes, as part of the assessment, computation and
14 allowance of the credit where it is due. And the -- and
15 the suit in this case would preclude the tax collector
16 from doing that if respondents were to succeed.

17 QUESTION: May I ask you --

18 MR. HUNGAR: That's exactly what the act
19 precludes.

20 QUESTION: -- does the Arizona tax code have a
21 provision in it comparable to the one that you read us --
22 to us from the Federal code?

23 MR. HUNGAR: I don't believe so, Your Honor. I
24 believe what the Arizona tax code provides --

25 QUESTION: Then it's hardly relevant, is it?

1 MR. HUNGAR: -- is that the -- is that the tax
2 collector there, the Department of Revenue, makes a
3 determination or reviews the returns and ultimately either
4 determines that that amount will be accepted, that -- that
5 the amount of tax shown on the return is the -- going to
6 be accepted as the amount of tax due from the tax
7 collector, or that they're going to try to require some --
8 you know, assess a deficiency or whatever it may be.

9 But in either case, within the meaning of
10 Federal law, the tax collector's determination of what the
11 amount is due, either if it's the amount shown on return
12 -- on the return or if they think it's a different amount,
13 within the meaning of Federal law, that is the assessment.

14 And that is what the respondents are trying to
15 change. They're trying to require the tax collector to
16 assess taxes not in a manner required under State law,
17 which is the -- the text of the statute, but rather in a
18 manner contrary to State law.

19 QUESTION: Suppose they clarify that they're not
20 trying to stop a bookkeeping entry from being made in
21 Arizona, even though Arizona law doesn't require it, just
22 like the Feds.

23 MR. HUNGAR: Your Honor, the assessment under
24 State law in Arizona includes the tax credit. The
25 respondents would change that and would preclude the tax

1 collector from doing that.

2 QUESTION: If they couldn't stop a bookkeeping
3 entry, I assume they couldn't stop the acceptance of the
4 tax in accordance with a bookkeeping entry. Isn't that
5 right?

6 MR. HUNGAR: That's correct.

7 QUESTION: I -- I assume it's essential to their
8 case that they stop that ultimate bookkeeping entry which
9 determines how much the taxpayer owes.

10 MR. HUNGAR: Exactly.

11 And the purpose of the --

12 QUESTION: Although we were told that there
13 isn't that bookkeeping entry in Arizona, that they don't
14 have it.

15 MR. HUNGAR: Well, Justice Ginsburg, I'm
16 obviously no expert in Arizona tax law. I'm informed that
17 the tax collector looks at the returns when they come in,
18 checks the addition, and in a certain number of cases goes
19 further.

20 QUESTION: But that's not what you described as
21 the assessment.

22 MR. HUNGAR: The assessment is the tax
23 collector's recorded determination of the amount due.

24 QUESTION: Which we were told they don't have in
25 Arizona.

1 MR. HUNGAR: Well, it -- again, I think for
2 purposes of Federal law, it -- it is not unreasonable to
3 assume that the tax collector in Arizona decides whether
4 they're going to accept the amount of return shown on the
5 tax as --

6 QUESTION: And keeps a record of it.

7 MR. HUNGAR: And keeps a record of it. Exactly.

8 QUESTION: I mean, he must keep a record of it
9 for --

10 MR. HUNGAR: Exactly, exactly. Now, the
11 Attorney General can address that, but -- but that's my
12 understanding of Arizona law.

13 QUESTION: Isn't the case just simpler if we say
14 you cannot command the collection of a tax, which is
15 what's happening here?

16 MR. HUNGAR: Yes, Justice Kennedy. That -- that
17 is exactly right. That is -- that is entirely consistent
18 with the United States' view of and interpretation of this
19 act and the Anti-Injunction Act.

20 And it's also consistent with the legislative
21 history and purposes of the act. This Court has
22 repeatedly recognized, in Justice O'Connor's opinion for
23 the -- for the Court in the Grace Brethren case and in
24 other cases, that the purpose of the act sweeps more
25 broadly than simply a focus on collection and --

1 QUESTION: But those were all taxpayers trying
2 to stop the collection of tax from them

3 MR. HUNGAR: Yes, Justice Ginsburg, but the
4 Court did not say that the purpose and scope of the act is
5 limited to that context, nor is the language limited to
6 that context. To the contrary, the Court said this -- the
7 act sweeps broadly to prevent Federal court interference
8 in the administration of -- of State tax systems.

9 QUESTION: But wouldn't you agree that the
10 primary purpose of the statute was to protect the State's
11 fisc?

12 MR. HUNGAR: That is certainly a primary purpose
13 of the statute.

14 QUESTION: And insofar as that purpose is
15 relevant, you lose on that purpose.

16 MR. HUNGAR: It's -- it's not applicable here,
17 although I think it is important to recognize that it
18 would be quite extraordinary for Federal courts to be in
19 the business of ordering State tax collectors to collect
20 -- to collect taxes from their citizens that the
21 legislature of the State had deemed should not be
22 collected.

23 QUESTION: It's curious that the Moore's Federal
24 Practice and Wright and Miller and Hart and Wechsler all
25 suggest that the Tax Injunction Act does not prevent a

1 challenge in Federal court to the constitutionality of
2 State tax credits. They seem uniform in that view.

3 MR. HUNGAR: Well, I think some of those quotes,
4 if I recall correctly, Justice O'Connor, deal with -- they
5 say the -- the Tax Injunction Act does not apply to suits
6 to collect taxes, which is a different situation than
7 here.

8 QUESTION: Well, they speak in terms of tax
9 credits.

10 Has this Court taken some cases that appear to
11 fly in the face of your theory and just not said anything
12 about it?

13 MR. HUNGAR: This Court in two or three cases
14 identified by respondents has not addressed the Tax
15 Injunction Act where it might be -- it might be relevant.

16 Thank you.

17 QUESTION: Thank you, Mr. Hungar.

18 Mr. Cohen, we'll hear from you.

19 ORAL ARGUMENT OF MARVIN S. COHEN

20 ON BEHALF OF THE RESPONDENTS

21 MR. COHEN: Mr. Chief Justice, and may it please
22 the Court:

23 I'll begin by stating what our position is. The
24 Tax Injunction Act and the associated principles of comity
25 only -- only -- apply when a district court is asked to

1 stop the flow of revenue to the State. For more than 60
2 years, the act and the associated principles of comity
3 have been applied only when claimants sought to stop the
4 flow of tax revenues. The decisions of this Court support
5 this.

6 In challenges to tax credits, the Tax Injunction
7 Act has been either not considered at all by this Court or
8 in other Federal courts has specifically -- they've
9 specifically held, except in Bridges last summer --
10 they've specifically held that the Tax Injunction Act did
11 not apply.

12 It -- this is -- also our position is consistent
13 with the revenue protective purpose of the Tax Injunction
14 Act and common sense supports this. If there's no threat
15 to the flow of State revenue -- State tax revenues, then
16 the administration of the State tax laws is the same as
17 the administration of education laws and penal laws --

18 QUESTION: Mr. Cohen, going back to the
19 language, assessment, levy, or collection of any tax,
20 which was the subject of questions to your -- your
21 opponent, you don't question, do you, that the statute
22 applies to income taxes as well as to property taxes?

23 MR. COHEN: Mr. Chief Justice, we don't question
24 that.

25 QUESTION: And would you question its

1 applicability if the -- the State could not point to a
2 particular act of assessment or levy or collection in its
3 procedures?

4 MR. COHEN: Your Honor, we view the phrase,
5 enjoin, suspend, or restrain the assessment, levy, or
6 collection, as a phrase. We -- we don't believe that any
7 one word there has special meanings. That phrase has been
8 interpreted by the courts to say that the process of
9 causing a flow of tax revenues to the State will not be
10 stopped.

11 QUESTION: You mean I -- I can't read this
12 statute to say that the district court shall not enjoin
13 the collection of a tax? I have to read all the other
14 things with it? That -- that's a very strange
15 interpretation of any statute.

16 MR. COHEN: Justice Kennedy, the -- let's take a
17 -- I -- I believe the idea was that there is a process.
18 The -- at the time the word assessment was first used, it
19 was 1867 in the Federal Anti-Injunction Act, which was the
20 model for the Tax Injunction Act in 1937, as this Court
21 held in Jefferson County. And at that time if a -- and a
22 -- the assessment process which was valuing property -- if
23 that had been stopped, then -- then they wouldn't get to
24 the collection phase, or if they stopped the levy phase,
25 they wouldn't get to the collection phase. So it's a --

1 the concept was that it took these three things to make
2 the flow of revenue come to the State.

3 And that while individuals have an option under
4 the section 1983 and 1343 together to choose either the
5 Federal or State courts in which to vindicate their
6 constitutional rights, the Congress decided that they
7 should not have that option if it could interfere -- if it
8 could stop the flow of revenues to the State --

9 QUESTION: Let's assume --

10 MR. COHEN: -- but it didn't go farther than
11 that.

12 QUESTION: Let's assume it means just that.

13 MR. COHEN: Yes.

14 QUESTION: And -- and let's assume that -- that
15 you get your injunction in a Federal district court
16 against the Secretary of State's collection of this tax.
17 What is the Secretary of State to do? His -- his State
18 statute tells him that he should collect less. This
19 injunction says he should collect more. He will appeal
20 the case from the district court to the court of appeals.
21 Meanwhile, what is he to do? He is not authorized by
22 State law, which he thinks is valid, to collect more.

23 It seems to me during the whole period while
24 that -- that case is on appeal from the district court to
25 the court of appeals to the Supreme Court, if it gets

1 here, the Secretary of State doesn't know what to do, and
2 his collection of the tax is impaired.

3 MR. COHEN: Justice Scalia --

4 QUESTION: Why isn't that so?

5 MR. COHEN: The -- two -- two answers, if -- if
6 you allow me. The first is that the district court, of
7 course, has the power to stay the effectiveness of that
8 judgment until there is a final decision, and he could be
9 asked --

10 QUESTION: Well, then the statute wouldn't apply
11 I suppose. It just says it shall not enjoin. We're
12 assuming it has enjoined. If your reading is correct, it
13 should be able to enjoin because there's nothing wrong
14 with enjoining. Okay?

15 Let's assume it does enjoin. Does that not
16 interfere with the collection, even if you think that
17 that's -- that's all that's at issue is the collection of
18 taxes? How is the State going to collect its taxes?

19 MR. COHEN: Justice Scalia, the statute does not
20 say interfere. The statute talks about stopping the
21 collection, and this would not stop the collection. It
22 would -- it would allow the collection --

23 QUESTION: You have a much narrower position.
24 Your earlier position was this whole purpose was just to
25 protect the State's tax revenue and so long as it doesn't

1 impair that. Now you say it can impair that so long as it
2 does not enjoin it. That's a much narrower position.

3 MR. COHEN: Justice Scalia, I'm not saying that.
4 I -- I -- you --

5 QUESTION: I thought that's what --

6 MR. COHEN: I must have misspoke myself because
7 what I am saying is that they can't stop the collection of
8 taxes and that this would not stop the collection.

9 QUESTION: But the statute doesn't say stop. It
10 says enjoin and enjoin can mean -- can mean command.

11 MR. COHEN: In Jefferson --

12 QUESTION: And that's exactly what you're doing.
13 You're commanding the collection of the tax.

14 MR. COHEN: Justice Kennedy, in Jefferson
15 County, this Court unanimously interpreted the statute to
16 say stop the collection. That's what this Court said in
17 Jefferson County, and there are a number of cases in which
18 a commandment seeking to command the payment of taxes has
19 been held to be outside the Tax Injunction Act.

20 QUESTION: Can I bring you -- can I bring you
21 back to my question which I don't think I got an answer
22 to? What is the Secretary of State supposed to do? He
23 has gotten an order from a Federal district court to
24 collect more taxes than he is authorized to collect under
25 State law. He intends to appeal that district court

1 order, but meanwhile, he has been enjoined from
2 collecting. What is he supposed to do?

3 MR. COHEN: Justice Scalia, he obeys the order
4 of the court and he's -- he's only enjoined from --

5 QUESTION: Well, that means --

6 MR. COHEN: He's only enjoined with regard to
7 the tax credit. He's not enjoined from collecting the tax
8 which includes not honoring the tax credit.

9 QUESTION: And I take that -- I take it that's
10 the answer to -- to Justice Kennedy's question, that his
11 obligation to collect the tax is an obligation under State
12 law, and once he is enjoined from recognizing the credit,
13 he simply follows State law and collects the tax without
14 reference to the credit. The Federal court, conversely,
15 doesn't say, you go out and collect the tax. The State
16 law does that. Is -- is -- do you buy that?

17 MR. COHEN: Yes, absolutely.

18 QUESTION: He believes the district court
19 decision is wrong, and let's assume it is wrong. What is
20 he supposed to do while it is on appeal?

21 MR. COHEN: Unless it -- Your Honor, unless it
22 is stayed, he is to obey it, and --

23 QUESTION: And that does not --

24 MR. COHEN: It does not interfere with the
25 collection -- with the flow -- it does not interfere with

1 the flow of revenue to the State, and that's what the Tax
2 Injunction Act is basically about.

3 QUESTION: He -- he obeys the injunction and he
4 obeys State law except with respect to the credit which he
5 is enjoined from giving.

6 MR. COHEN: I agree, Your Honor.

7 QUESTION: And the result is that he collects
8 the -- the full tax. That's the way it would work.

9 MR. COHEN: That's correct, Your Honor.

10 QUESTION: Suppose -- suppose the State law says
11 if these tax credits are invalidated, all other taxpayers
12 shall be assessed an additional 2 percent to make up for
13 -- I'm sorry. If these -- if these tax credits are
14 invalidated, other taxpayers shall be -- their taxes shall
15 be reduced by 1 percent. Okay? I mean, the -- the State
16 looks forward to this possibility that there will be an
17 injunction. What is the Secretary of State to do then?
18 Is he to assess everybody else at a lesser amount?

19 MR. COHEN: Your Honor, I believe --

20 QUESTION: In other words, he is prevented from
21 collecting the additional amount that he would have had to
22 collect from other taxpayers had this tax credit been
23 acknowledged. The tax credit is struck down, and what the
24 law says is, if it's struck down, you have to collect more
25 from everybody else. Now, I assume in that situation the

1 district court would not be able to enjoin the collection,
2 would it?

3 So all you're talking about is whether the State
4 law is -- is drafted in a clever way or not.

5 MR. COHEN: Your Honor, if -- if the tax credit
6 is struck down, the State gets more money. It has no need
7 to assess an additional 1 or 2 percent of its taxpayers.
8 But if -- if the State in its wisdom chose to do so, then
9 whoever collects taxes would obey the State law until
10 another case came to court and another judge told them
11 what to do.

12 QUESTION: All right. So -- so there would be
13 some interference. But what do you do about the word?

14 I mean, I'm somewhat shaken by the fact that the
15 -- the Internal Revenue Code does -- as I have just read
16 6201 and 6203, it does use that word assessment as
17 apparently to refer simply to the record keeping function
18 of the tax division which it says under rules and
19 regulations the assessment shall be made by recording the
20 liability of the taxpayer in the Office of the Secretary.
21 And therefore, what it seems to have in mind in the IRC is
22 a simple bookkeeping notation of how much money this
23 taxpayer owes which takes place in every case.

24 Now, the -- the act says there shall be no suit
25 that restrains the assessment of that tax; i.e., you

1 cannot restrain the Secretary in noting the amount that
2 the taxpayer owes.

3 Now, they're saying stop right there. End of
4 the matter. Now, what in your opinion overcomes that
5 argument?

6 MR. COHEN: Your Honor, Justice Breyer, it's
7 interesting about the Internal Revenue Code and the -- the
8 Federal income tax law because there is a corollary to the
9 Tax Injunction Act: the Anti-Injunction Act of 1867. And
10 it uses the word assessment. And there are a number of
11 Federal court decisions saying that that does not apply to
12 tax credits. And in each --

13 QUESTION: That's not an answer for the
14 reason --

15 MR. COHEN: May I --

16 QUESTION: -- that they're saying they're wrong,
17 just as they say we were wrong in five cases not to notice
18 this. So continue, please.

19 MR. COHEN: Yes. None of them -- none of them
20 looked at the word assessment in isolation. What it
21 looked at -- what those cases looked at was the phrase, as
22 -- as I've suggested to the Court, that the phrase
23 assessment, levy, and collection is the process of
24 creating the flow of revenue.

25 QUESTION: But it isn't and; it's or. Isn't it?

1 MR. COHEN: The -- Justice Scalia, it -- it is
2 or for purposes of saying that you can't restrain any of
3 those because if you restrain any of those in the context
4 of creating the stream of revenue, you have stopped the
5 stream of revenue. And that -- that's what history of the
6 act shows, the purpose of the act.

7 QUESTION: So your answer is this. You say
8 indeed they've got it correctly defined. Indeed, it says
9 assessment. It says assessment, levy, or collection. But
10 that phrase does not refer to every assessment, levy, or
11 collection. Rather, in context it refers to those
12 assessments, levies, and collections that will have, were
13 they enjoined, the impact of cutting the revenue stream
14 flowing to the State.

15 MR. COHEN: That's our position, Your Honor.

16 QUESTION: That's your view. So we should look
17 at that in context. That's why you go to the history and
18 these other things.

19 MR. COHEN: That's correct, Your Honor.

20 QUESTION: All right. I understand.

21 MR. COHEN: I -- I would like to also point out
22 to the Court that this use of a tax credit as a mechanism
23 could also to -- that is to funnel money to school tuition
24 organizations could just as well have been an
25 appropriation of dollars and vouchers. And if instead the

1 State was giving vouchers to school tuition organizations,
2 93 percent of which went to religious schools, there would
3 be no question about the individual citizen's option to
4 choose to go to the Federal court.

5 QUESTION: But it wasn't done that way. I mean,
6 it's just like saying it could have been extracted by
7 torture too, and that would have been clearly
8 unconstitutional.

9 (Laughter.)

10 QUESTION: But that happens not to be the way it
11 was done.

12 MR. COHEN: That's correct, Your Honor, but in
13 Nyquist this Court particularly pointed out that a tax
14 credit was the same as giving money to the State. That --
15 that was this Court dealing with a tax credit that --
16 where the money was used to support religious schools,
17 which is just what we're asserting here.

18 QUESTION: Mueller certainly distinguished that
19 part of Nyquist.

20 MR. COHEN: I'm sorry, Mr. Chief Justice. I
21 didn't --

22 QUESTION: The Mueller against Allen case surely
23 distinguished that part of Nyquist. I mean, it's much
24 less valuable to -- after Mueller than it was before
25 Mueller.

1 MR. COHEN: Mr. Chief Justice, Mueller was a tax
2 deduction case rather than a tax credit case. In a tax
3 credit case --

4 QUESTION: Why should -- why should that make
5 any difference to your argument?

6 MR. COHEN: It -- generally, it wouldn't, but a
7 tax credit is every dollar that goes to the benefit of the
8 school tuition organization -- if it wasn't given to them,
9 every dollar of that would go to the State. In a tax
10 deduction, a tax deduction is a more generalized --
11 helping to support charity, and only a portion of that
12 money goes to the State --

13 QUESTION: Yes. It may be -- it may be a
14 smaller amount, but in both cases it goes to the person
15 who -- who claims it.

16 MR. COHEN: Mr. Chief Justice, that's correct,
17 but it's a smaller percentage. My use of tax credit with
18 Nyquist is that that's an unusual feature of Nyquist is
19 it's dollar for dollar. In Mueller, there was the --
20 there were a number of considerations when you deal with a
21 tax deduction. They're a little different than tax
22 credit, and this Court has recognized those. Generally
23 they are tax benefits and generally they are to be
24 considered outside the Tax Injunction Act according to the
25 cases.

1 QUESTION: Is the point you're making is -- is
2 it's the taxpayer who's designating a certain portion of
3 money which would otherwise go to the general revenues
4 will instead go to this charitable purpose. It's kind of
5 like on the Federal return where you can check off and say
6 I want \$3 -- instead of going to general revenues, it goes
7 to fund campaign -- to presidential elections.

8 MR. COHEN: Justice --

9 QUESTION: That's on the -- that's what this is,
10 isn't it?

11 MR. COHEN: Justice Ginsburg, that's exactly
12 right. That's what I'm saying.

13 And if you have no further questions --

14 QUESTION: I have --

15 QUESTION: I do. I do have one.

16 QUESTION: Don't kid yourself.

17 QUESTION: Go on. Go first.

18 QUESTION: I just want to make sure I didn't
19 miss something in your argument, Mr. Cohen. Talking about
20 the history of this statute, did you refer to an earlier
21 statute that used the similar language in the same order,
22 assessment, levy, and collection or collection and levy,
23 whichever it is, and that that statute only applied to
24 real estate taxes? Was that -- did you say that? I want
25 to make sure I didn't --

1 MR. COHEN: Justice Stewart, I was referring to
2 the Anti-Injunction Act of 1867 --

3 QUESTION: Right.

4 MR. COHEN: -- in which the word levy was not
5 used. It was assessment or collection, and I said it was
6 in the context of valuation then because there was no
7 income tax in 1867. And that could be -- for instance, I
8 know there weren't Federal property taxes, but it could be
9 in -- in valuation of -- of property for tariffs coming in
10 or things of that nature. The word assessment then was
11 not used in the context of the income tax laws. That's
12 all I was saying because there were none.

13 QUESTION: And -- and it would be perfectly
14 natural in the real estate tax context to use them in that
15 order because the assessment comes first. Whereas, the
16 argument of your opponents here is the assessment is the
17 last thing in the chain of events, which seems somewhat
18 counter-intuitive if you're -- when you're referring to
19 income taxes.

20 MR. COHEN: I -- I agree, Justice Stewart.

21 QUESTION: See, this -- in -- in -- do you know
22 this in State tax systems? Apparently in the Federal tax
23 system assessment refers to an official determination of
24 the amount that the individual taxpayer owes. Now, there
25 are 50 State systems plus the District of Columbia. Do

1 you know if there are a significant number of States that
2 would not consider that official determination of the
3 amount owed to be an assessment?

4 MR. COHEN: Mr. Justice Breyer, no, I do not
5 know. We haven't done a survey of the States.

6 QUESTION: But the question I was going to put
7 was you -- you say that the -- the principal purpose of
8 this law was to protect the fisc of the State. And I --
9 you know, I will concede that, that -- that what Congress
10 was most concerned about was preventing somebody from
11 stopping the State from collecting money. But it's not
12 unusual that Congress drafts its prohibitions broader than
13 is necessary to achieve just the narrow purpose. And if
14 indeed they -- they prohibited not just stopping the
15 collection but also stopping the assessment, it seems to
16 me we have to take the statute for what it says, if indeed
17 this is an assessment. And the mere fact that it goes
18 beyond what the principal purpose was, I mean, that --
19 that's often the case with statutes.

20 MR. COHEN: Justice Scalia, the State contends
21 and the United States both contend that this statute is --
22 the purpose of it was to stop any court -- Federal court
23 interference with the tax administration process itself.
24 And the -- the Federal court decisions, other than
25 Bridges, reject that point of view.

1 And this Court rejected that point of view in
2 Jefferson County when the -- the issue there was that the
3 county had sued in the State court against Federal judges
4 to try to get an occupational tax. And the Federal judges
5 removed the case to Federal court, and the county said,
6 well, the Tax Injunction Act applies here because the
7 Federal judges are going to raise State tax issues and
8 this Federal court will be deciding cases having to do
9 with State tax administration. And they cited the
10 Kelleher case out of the Second Circuit which it held that
11 the Tax Injunction Act was so broad that it applied to tax
12 -- all State tax administration. And this Court rejected
13 that position, and this Court I believe unanimously
14 overruled Kelleher. So we --

15 QUESTION: Mr. Cohen, we are ships passing in
16 the night because you're -- I don't care what the purpose
17 was. I care what the language says, and my point is that
18 very often the language goes beyond the narrow purpose
19 that Congress had in mind. And when -- when the language
20 does so, we read the statute as it's written, but you
21 don't -- don't agree with that apparently. We -- we have
22 to intuit the purpose and limit the language no matter
23 what it says to that purpose.

24 MR. COHEN: Mr. Justice, I -- I'm saying that
25 for 60 years with the Tax Injunction Act and for 150 years

1 -- no -- I guess 140 years with the Anti-Injunction Act
2 that is the way the Federal courts -- the way we're
3 suggesting is the way the Federal courts have interpreted
4 this language.

5 And we suggest that if there's a problem, as
6 long as the tax revenue is flowing to the State and we're
7 not interfering -- we're not stopping that, if there's a
8 problem with -- with that system that's been there now
9 for, oh, 100, 60 years for States, 140 years for the
10 Federal fisc, if there's a problem, the States can take
11 that problem to Congress to change this exemption. This
12 is an exemption from the Federal jurisdiction, which under
13 the Phillips case is to be narrowly construed. If -- if
14 they -- if there's a real problem -- and I suggest there
15 is not because the money will continue to flow to the
16 State notwithstanding our -- the Federal court
17 jurisdiction here.

18 And we believe that the law should not be
19 changed and we request that the -- this Court remain with
20 the past 60 years and 140 years of judicial experience on
21 this issue.

22 Thank you very --

23 QUESTION: Mr. Cohen --

24 QUESTION: Thank you, Mr. Cohen.

25 General Goddard, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF SAMUEL GODDARD
2 ON BEHALF OF THE PETITIONER

3 MR. GODDARD: Thank you, Your Honor.

4 If -- if I may go to the overriding principle
5 here because I think to some extent that's what governs
6 the actions of the State and should be appropriate here.

7 As this Court said in -- many years ago under
8 the principle of comity, which Mr. Cohen referred to,
9 comity refers to the scrupulous regard for the rightful
10 independence of State governments which should at all
11 times actuate the Federal courts and a proper reluctance
12 to interfere by injunction with their fiscal operations.
13 That's *Matthews v. Rodgers*.

14 QUESTION: What -- what happened in -- in
15 *Nyquist* and *Mueller*? Is that just the Court overlooked
16 it?

17 MR. GODDARD: Your -- Your Honor, the Court did
18 not deal in any way with the issue of -- of section 1341
19 in either *Nyquist* or *Mueller*, and I believe under -- under
20 your decision in *DeBuono* there is -- which also deals with
21 1341 and the failure to raise it, there can be a
22 presumption that the escape clause was exercised. It is
23 -- if there is no plain, speedy, or adequate remedy under
24 State law, obviously jurisdiction in the Federal court is
25 appropriate.

1 QUESTION: But there -- one sees plain, speedy,
2 and effective --

3 MR. GODDARD: Efficient.

4 QUESTION: -- that's a taxpayer who has to go
5 through the system But that -- that's -- how does that
6 fit when it's a non-taxpayer who's stopping -- who's --
7 who's trying to declare a credit unconstitutional? This
8 -- this quick, speedy remedy is -- is that the taxpayer
9 gets a refund remedy, gets a deficiency, whatever it is,
10 but how does this swift -- how does that play into
11 somebody who is not a taxpayer?

12 MR. GODDARD: Your Honor, in -- in the Anti-
13 Injunction Act, that creates a serious problem In the --
14 in this issue -- and I think that a critical thing is
15 these -- these taxpayers have a remedy at State law. This
16 case was decided by the Arizona Supreme Court in Kotterman
17 v. Killian, and this -- this -- the Supreme Court denied
18 cert 4 years ago. The exact same issues that have been
19 brought forward in Federal court by the petitioners in
20 this case were decided by the Arizona Supreme Court under
21 the Arizona constitution and the United States
22 Constitution, and there was not an establishment issue in
23 this case.

24 And that brings me back --

25 QUESTION: I meant within the meaning of the

1 Injunction Act, it seems that swift, whatever, remedy was
2 referring to the taxpayer's remedy under State law --

3 MR. GODDARD: Yes.

4 QUESTION: -- could take care of --

5 MR. GODDARD: Yes, Your Honor, and under the
6 Federal law there's a problem because you can't pay a tax
7 and get it refunded if you're a third party. But in
8 Arizona law, there is standing for -- for these parties
9 and that's already been exercised. They're trying to take
10 another shot by going into Federal court and trying to get
11 an -- another opinion which will deviate from the Arizona
12 Supreme Court.

13 And excuse me. If I could refer --

14 QUESTION: The same plaintiffs? If it's the
15 same plaintiffs, you would have a -- a --

16 MR. GODDARD: Your Honor, I -- I didn't mean to
17 imply they were the same plaintiffs, but they were exactly
18 the same issues in turning a constitutional violation.

19 If I could to Justice Scalia's earlier question,
20 as the -- as the legal representative of the Arizona
21 Department of Revenue, if there were an adverse decision
22 in the -- in the district court of Arizona -- and our
23 Supreme Court has already spoken on the same issue -- I
24 have a very hard time advising a client as to what they
25 should do going forward in terms of honoring, under

1 Arizona law, the school tax credit.

2 QUESTION: We have that same problem in habeas
3 sometimes too when the State Supreme Court disagrees with
4 the Federal district court.

5 MR. GODDARD: Yes, Your Honor, but in the
6 situation in habeas, we don't have the Tax Injunction Act.
7 We don't have a specific legislative bar that says there
8 will not be jurisdiction in the district court if there is
9 a plain, speedy, and efficient remedy at the State court.
10 And I believe that is -- it doesn't tolerate any -- any
11 degrees of variation. As this Court has said, it's --
12 it's automatic. There is -- it is -- there are no
13 exceptions.

14 CHIEF JUSTICE REHNQUIST: Thank you, General
15 Goddard.

16 The case is submitted.

17 (Whereupon, at 11:58 a.m., the case in the
18 above-entitled matter was submitted.)

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