

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EC TERM OF YEARS TRUST, :

4 Petitioner :

5 v. : No. 05-1541

6 UNITED STATES. :

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8 Washington, D.C.

9 Monday, February 26, 2007

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 a.m.

14 APPEARANCES:

15 FRANCIS S. AINSA, JR., ESQ., El Paso, Tex.; on behalf of
16 Petitioner

17 DEANNE E. MAYNARD, Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 Respondent

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

2 [10:03 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in case 05-1541, EC Term of Years
5 Trust vs. United States.

6 Mr. Ainsa.

7 ORAL ARGUMENT FRANCIS S. AINSA, JR.

8 ON BEHALF OF PETITIONER

9 MR. AINSA: Mr. Chief Justice and may it
10 please the Court:

11 The Defendant, in unequivocal language of
12 section 1346, waives sovereign immunity and permits a
13 refund suit by a third party such as Petitioner. That
14 conclusion that I've stated to the Court was supported
15 by the holding in United States versus Williams. That
16 case, as the Court well knows, dealt with a situation in
17 which the Government sought to recover money through a
18 tax lien as opposed to a tax levy, which is the
19 situation in this case. However, there is no
20 substantive difference between the --

21 JUSTICE GINSBURG: And why did the court
22 point out twice in Williams that section 7426 was not
23 available?

24 MR. AINSA: Justice Ginsburg, section 7426
25 was not available in the case of Mrs. Williams, but --

1 JUSTICE GINSBURG: Because there was no
2 levy. It was only a lien.

3 MR. AINSA: It was a lien case, and of
4 course, 7426 involves a levy. But nonetheless, the
5 holding that I have read in that case very definitively
6 deals with the breadth of section 1346. And the breadth
7 of section 1346, according to the holding and United
8 States vs. Williams, is certainly broad enough to
9 encompass a third party like Petitioner. I do not view
10 the fact that 7426 was not available to be a controlling
11 issue because the question was whether or not 1346 would
12 permit a third party to bring a refund action. And that
13 was the holding of the court as I read that opinion.

14 JUSTICE GINSBURG: But when Congress
15 provides a special remedy for a particular class of
16 persons, that special remedy usually excludes a more
17 general provision.

18 MR. AINSA: Justice Ginsburg, in the case of
19 7426, Congress never made that remedy expressly
20 exclusive. The language is completely missing from that
21 statute. And the argument was raised in United States
22 vs. Williams that if section 1346 was made available to
23 third parties, like Mrs. Williams, it would render
24 meaningless the short statute of limitations.

25 1346 offers only post deprivation relief.

1 section 7426 offers both pre and post deprivation
2 relief. So the two statutes can live in harmony and can
3 be harmonized and should not be held to have preempt --
4 one over the other when there is no express declaration
5 from Congress making that the case.

6 JUSTICE KENNEDY: The Government does cite
7 the principle that when there's a specific statutory
8 scheme that controls over a more general one. It
9 doesn't cite a tax case for that, at least as I recall.
10 Has that principle ever been applied in the tax code, do
11 you know?

12 MR. AINSA: Justice Kennedy, I don't believe
13 that's been applied in the tax code, but I can answer
14 your question, I think, by saying this. Congress on
15 many instances has made provisions of the United States
16 Internal Revenue Code exclusive. Congress knows how to
17 write those provisions into the tax code when it wants
18 to do so. In this case, it was not done.

19 And I would also like to point out that
20 after the decision in United States vs. Williams,
21 Congress amended 7426 to add a special provision. And
22 in that special provision, it was made exclusive. And I
23 use that to exemplify the fact that Congress can, when
24 it wants to, make a tax provision exclusive.

25 JUSTICE SCALIA: In the law, we don't -- we

1 certainly don't want to deprive any statutory provision
2 of its whole purpose and effect. And as I understand
3 the purpose of this especially short statute of
4 limitations, it is to enable the Government to dispose
5 of the property that it has seized, and to be able to
6 give clear title to it without somebody coming back, you
7 know, many years later and saying this property should
8 not have been taken. How is that purpose served if
9 indeed you can proceed under the provision that has a
10 longer statute?

11 MR. AINSA: Justice Scalia, 7426 has four
12 different components. Two of the components are clearly
13 pre-deprivation type remedies. They are the ability of
14 a taxpayer or third party to seek an injunction to
15 prohibit the Government from either selling property or
16 conducting a levy. Those are clearly pre-deprivation.

17 The other two are primarily post deprivation
18 remedies. And so the object that the Government was
19 trying to achieve can be achieved through looking at it
20 from a pre-deprivation/post-deprivation analysis. I
21 don't believe that the Government's underlying purpose
22 is in any way diminished when the two statutes can live
23 in harmony. And without having an exclusivity provision
24 expressly stated in 7426, and given the fact that 1346
25 on its face plainly waives sovereign immunity for third

1 parties to bring refund suits, the two statutes must be
2 construed --

3 JUSTICE STEVENS: But isn't there this
4 difference between the two. One of them -- you're not
5 challenging the amount of the tax in this case, are you?

6 MR. AINSA: Your Honor, I'm sorry. I didn't
7 understand your question.

8 JUSTICE STEVENS: You're not challenging the
9 amount of the assessed tax, are you? You're just --
10 whether they can collect it from this particular person?

11 MR. AINSA: Petitioner is not challenging
12 the underlying assessment against the taxpayer.

13 JUSTICE STEVENS: And isn't that the basic
14 difference between the two statutes, that one of them
15 deals with a fight about how much money the taxpayer
16 owes, and the other one deals with the method of
17 collection.

18 MR. AINSA: 7426 clearly prevents a person
19 from contesting the underlying assessment, whereas in
20 1346, that is possible. But in this case, 1346 is broad
21 enough because it uses the term collected. And just
22 like in Williams, we are not seeking to contest the
23 underlying assessment.

24 JUSTICE STEVENS: But it does seem to me if
25 you think of the two statutes as performing rather

1 separate functions, one primarily focused at the method
2 of collection, the other the amount of tax, makes quite
3 good sense to have different statute of limitations for
4 the two, because there is an interest in the prompt
5 resolution of the former issue that doesn't apply to the
6 latter.

7 MR. AINSA: Justice Stevens, there is
8 certainly -- Government has demonstrated by -- or
9 Congress has demonstrated by passing 7426, that there is
10 an interest in a shorter statute of limitations in
11 certain cases.

12 However, I return to my original argument
13 that if 1346 is broad enough to encompass third party
14 refund suits, and if Congress has not made 7426
15 exclusive, the two statutes should be allowed to
16 coexist. This Court has held on other occasions that it
17 will not preempt statutes without a very clear
18 expression from Congress. And Congress, once again,
19 knew how to do it after the Williams case.

20 JUSTICE KENNEDY: Well, I suppose -- tell me
21 if I'm wrong, or the Government can tell me if I'm wrong
22 -- but there is this difference also that in a refund
23 suit, you have to pay the money. The Government has the
24 money before you can bring the refund suit. Am I right
25 about that?

1 MR. AINSA: That is correct.

2 JUSTICE KENNEDY: Incidentally, I'm just
3 curious, if the underlying assessment -- if you wished
4 to have challenged the underlying assessment, it's for a
5 million dollars, can you pay \$100,000 and then bring the
6 refund suit in order to test the validity of the tax, or
7 do you have to pay the whole amount?

8 MR. AINSA: The whole amount.

9 CHIEF JUSTICE ROBERTS: What about the
10 underlying principle that waivers of sovereign immunity
11 are strictly construed. And when you have a waiver on
12 the broader statute, but shouldn't you read them
13 together with the specific to suggest that they weren't
14 waiving sovereign immunity when a more specific statute
15 governed, except to the extent of the provisions in that
16 more specific statute.

17 MR. AINSA: Mr. Chief Justice, when I read
18 the opinion in United States vs. Williams, the Nordic
19 case was brought up by the dissent in that case, that
20 there must be an absolutely unequivocal waiver of
21 sovereign immunity in order to allow a particular suit
22 against the United States. The holding in United States
23 versus Williams was that 1346 was sufficiently broad.
24 And given that holding, and given the fact that the
25 Government was asserting that Mrs. Williams had other

1 remedies in the form of a quiet title action, a refund
2 action --

3 JUSTICE GINSBURG: The court took care to
4 point out why those were not realistic remedies. But
5 here there is a prompt and efficient remedy.

6 MR. AINSA: Justice Ginsburg, there is
7 another remedy, which is certainly governed by a much
8 shorter statute of limitations. But in my view, the
9 equities or the facts of the case should not drive the
10 construction of the statute, any more than it did in
11 United States versus Williams. And if 1346 is broad
12 enough to encompass a third party case in the instance
13 of a lien, it is broad enough to encompass it in the
14 case of a levy. There is no functional substantive
15 difference between money taken from a -- from a third
16 party via a lien or via a levy.

17 JUSTICE KENNEDY: Well, your argument is
18 probably based on the statute. I just question one
19 phrase you mentioned, which was that Williams was not
20 driven by the equities. It seems to me it was wholly
21 driven by the equities.

22 MR. AINSA: Justice Kennedy, as I read the
23 holding in United States vs. Williams, the Court found
24 that there was an unequivocal waiver of sovereign
25 immunity in section 1346. And observed afterwards that

1 a person like Mrs. Williams did not have a meaningful
2 remedy. I did not read that to be -- that the
3 construction of the statute was driven by the equities.
4 It was an observation after the fact.

5 JUSTICE GINSBURG: It was a determination
6 that the word taxpayer encompassed someone who had, in
7 fact, paid the tax. Here you don't even have that,
8 because the tax wasn't paid directly by the EC Trust.
9 The trust deposited the money in the bank, and then the
10 Government levied on it, as distinguished from Williams,
11 where Mrs. Williams, in fact, wrote a check to the
12 Internal Revenue Service covering her husband's tax
13 liability.

14 MR. AINSA: Justice Ginsburg, I believe that
15 both Mrs. Williams and the trust are in the same
16 position. Both of them paid the tax. Both were third
17 parties. Neither was a taxpayer. In the case of
18 Williams, the taxpayer was her husband. In the case of
19 the trust --

20 JUSTICE GINSBURG: Well, the whole case was
21 about whether she indeed qualified as a taxpayer, having
22 voluntarily paid the tax.

23 MR. AINSA: In this case, the levy was an
24 involuntary act on the part of the Government to take
25 the money from EC Trust, from the deposit that was put

1 up.

2 JUSTICE GINSBURG: Yes. It was an
3 involuntary act, whereas in Williams, she stepped
4 forward and paid the tax and claimed on that basis that
5 she was the taxpayer.

6 MR. AINSA: Justice Ginsburg, the situation
7 in Williams, however, involved the tax lien.
8 Mrs. Williams would not have paid the tax had the
9 Government not asserted the tax lien and forced her to
10 pay the tax out of the proceeds of the house when it was
11 sold. It was no more voluntary than a levy in the sense
12 that I'm talking about.

13 JUSTICE BREYER: Why isn't the obvious
14 difference -- I may have missed this -- but you say, in
15 the case, a taxpayer owed some money and the Government
16 via a lien took property from a different person who
17 then had to pay the tax who then had to get rid of the
18 lien and wanted it back. And in this case they did
19 exactly the same thing but they did it via a levy. So
20 you say if the first could sue so could the second.

21 But the difference, the obvious difference,
22 which maybe you have explained and I missed, is that in
23 the second case, namely this case, there is a specific
24 statute that says you have to do it with a levy in nine
25 months, and in the other case there wasn't such a

1 statute. Why isn't that the obvious difference?

2 MR. AINSA: Justice Breyer, the answer is
3 because 1346 also permits a third party to bring a
4 refund action. It is not restricted even though there
5 is a specific statute dealing with levies, 1346 was held
6 to be broad enough to -- to encompass the refund action.

7 JUSTICE BREYER: Encompasses a lien for a
8 refund action in the case where you took the property
9 via a lien. And you'd say -- they say, I guess, but it
10 doesn't encompass it when you take it via a levy. Why
11 not? Because of the specific, the same thing I just
12 said. Now I want to be sure I have your whole answer to
13 that.

14 MR. AINSA: My answer to that is there is no
15 substantive distinction between a levy and a lien. And
16 that while Williams dealt with a lien, and I fully
17 understand that, the taking by the Government was just
18 as involuntary under the levy as it is with a lien. And
19 once section 1346 is deemed to be broad enough or held
20 to be broad enough to encompass a refund action, it
21 should encompass an action by the levy.

22 Essentially I'm arguing that the two
23 statutes can coexist together and should coexist
24 together in the absence of a clear declaration from
25 Congress that 7426 is exclusive. I can support my

1 argument by the fact that after Williams, Congress did
2 make, did amend 7426 and did make a specific new remedy
3 and they're exclusive. Congress could have done that at
4 the time 7426 was originally enacted in 1966 but did not
5 do so.

6 JUSTICE BREYER: If your interpretation is
7 correct then are there many such cases where the
8 Government takes property via a levy and the person who
9 wants to sue would get worried about nine months,
10 because obviously he would think I can sue under a --
11 kind of thing. It's two years. So are there still some
12 where he would have to worry about nine months?

13 MR. AINSA: No.

14 JUSTICE BREYER: In other words, are -- in
15 your interpretation, does the nine-month statute become
16 meaningless?

17 MR. AINSA: It, it does not become
18 meaningless because 7426 offers certain remedies that
19 are clearly post deprivation such as filing for an
20 injunction to stop the levy, filing for an injunction to
21 stop a foreclosure. Those are still viable under 7426
22 and would fall within the nine-month period but
23 essentially Congress has permitted two different
24 complementary actions to seek a refund.

25 JUSTICE GINSBURG: But you just -- you just

1 pointed to situations where one to expect action to be
2 taken promptly. You don't want to wait to, to get an
3 injunction against a levy because the Government might
4 be there and levy on the property and then you're out of
5 luck. Where the incompatibility exists is post
6 deprivation, when the nine-month, the interest in having
7 these claims resolved properly is totally defeated if
8 you can get the longer statute of limitations under the
9 general refund statute.

10 MR. AINSA: Justice Ginsburg, if I
11 understand your question you're really talking about the
12 underlying policy of a short statute of limitations
13 driving certain types of --

14 JUSTICE GINSBURG: That's why the code has
15 that nine-month period instead of the two-year or in
16 fact four-years because you have to go to the
17 administrative process first. The whole purpose of the
18 nine-months is to get people to act quickly.

19 MR. AINSA: But I can say to you that with
20 some degree, I think, of sound legal argument, that once
21 1346 was found to have unequivocally waived sovereign
22 immunity for third party refund actions in the context
23 of a lien it should also follow that it waived sovereign
24 immunity for levies because there is no fundamental
25 legal difference between the manner in which the money

1 is extracted from the third party. There is no, the
2 core logic of the decision in United States vs. Williams
3 is that money was involuntarily taken from Mrs. -- from
4 Mrs. Williams.

5 JUSTICE STEVENS: It doesn't seem to me that
6 the fact that there is a waiver of sovereign immunity
7 with regard to levies answers the statute of limitations
8 question. Sure, there is a waive of sovereign immunity,
9 but the question is how long does the -- how promptly do
10 you have to act?

11 MR. AINSA: Justice Stevens, the -- the
12 issue of the statute of limitations I believe is
13 dependent upon whether or not 1346 provides for
14 remaining a viable method of seeking a refund. And my
15 position is that if 1346 does provide that in the
16 context of a levy, then you have in effect two statutory
17 schemes which coexist; one is 7426 and one is 10 - uh,
18 1346. It is true that they overlap in the sense that
19 there is a refund provision that could be sought under
20 either one of them, but 7426 is distinctly different in
21 that it offers pre-deprivation relief that is not
22 offered under 1326.

23 JUSTICE KENNEDY: Getting back to my earlier
24 question, if there is a million-dollar tax liability,
25 and there is a levy on the bank account for \$100,000, do

1 you have to pay the extra 900,000 before can you bring
2 the refund suit?

3 MR. AINSA: Yes, Your Honor.

4 JUSTICE KENNEDY: So that's, that's also a
5 difference.

6 MR. AINSA: Yes. In this case, it wasn't a
7 million dollars, it was \$3 million and the entire amount
8 was paid in order to bring the refund suit.

9 JUSTICE SCALIA: What if the amount wasn't
10 paid and what if your client just sat back and the, the
11 assets, or let's say some real estate were, were seized
12 by the Government. Would the 1346 action still lie? Or
13 is it only for return of money that, that's been paid to
14 satisfy the tax?

15 MR. AINSA: 1346 in my view would not apply
16 to that situation, in that if property was seized and
17 used to, under a tax lien, if that was seized and the
18 Government proceeded to sell, then the third party,
19 Petitioner, would have to file for an injunction to stop
20 the foreclosure sale under 7426.

21 JUSTICE SCALIA: And that's the, it seems to
22 me the principal problem that the Government was facing
23 and justified the short statute, wasn't it? That is the
24 need to get, to be able to convey clear title to this
25 property that it has seized. But once -- once the money

1 is put up, and what the Government has taken is in
2 effect payment of the tax, maybe there is no harm in
3 proceeding under 1346.

4 MR. AINSA: Justice Scalia --

5 JUSTICE SCALIA: I'm helping you.

6 MR. AINSA: There is no harm in proceeding
7 under 1346 once the money is paid because you're dealing
8 with a simple refund action. You're not dealing with
9 trying to stop a foreclosure suit or stop a levy.
10 You're dealing with a simple foreclosure action.

11 CHIEF JUSTICE ROBERTS: Well, but there may
12 be situations where the Government, having levied,
13 doesn't feel the need to pursue other remedies
14 available to it. And if you then allow a challenge to
15 the levy to come in later the person they would have
16 proceeded against if they didn't have the levy may have
17 left the country, may have dissipated the funds that
18 they would otherwise go after. They need to know early
19 on that they are barking up the wrong tree if they have
20 levied on the wrong property, and that's why you have a
21 short statute to clear that up as soon as possible.

22 MR. AINSA: Mr. Chief Justice, there is
23 rationale for having a short statute, but once again I
24 point out that you have two statutory schemes which
25 appear to be able to be harmonized and coexist together.

1 1346 constitutes or at least the language is clear and
2 unequivocal in its waiver of sovereign immunity for a
3 third party who desires to collect a tax that's been
4 taken from that third party. And with that
5 construction, it seems to me that only Congress can --
6 can deal with the question that you've just raised, if
7 Congress wants to make it.

8 JUSTICE BREYER: The -- the, the statute
9 that you point to talks about taking a civil action
10 against the United States. When there has been a
11 wrongful levy, is that right?

12 MR. AINSA: 7426.

13 JUSTICE BREYER: It doesn't say an
14 injunctive action. So I would reading it think it
15 encompasses both actions for injunctions, which are
16 rare, probably, and what I think is not rare at all, an
17 action for damages or money back. Now your reading of
18 the statute takes that whole ordinary case, where people
19 are just suing to get back some money, and it says our
20 nine-month statute of limitations here is meaningless.
21 All it applies to are injunctive actions which I bet are
22 far and few between. You can tell me I'm wrong on that.

23 MR. AINSA: Okay.

24 JUSTICE BREYER: I won't say you've made it
25 meaningless but you have eviscerated it. Is that fair?

1 MR. AINSA: Justice Breyer, it is fair. And
2 it's fair for this reason, that in the Williams case the
3 very --

4 JUSTICE BREYER: I mean, is my
5 characterization fair?

6 (Laughter.)

7 JUSTICE BREYER: You want to say no to that.

8 (Laughter.)

9 MR. AINSA: In the Williams case, the very
10 same argument was raised, that 7426 would be rendered
11 meaningless if, and other, the quiet title action and
12 other actions would be rendered meanings less if 1346
13 was construed to allow Mrs. Williams to have a third
14 party action.

15 JUSTICE BREYER: Why would it have? Because
16 there I think we are talking about liens and it doesn't
17 cover liens, the specifics statute.

18 MR. AINSA: The Government contended that
19 Mrs. Williams had remedies available to her, certainly
20 not a levy, because there was no levy, but the
21 Government was contending she could have sought relief
22 under the Quiet Title Act. She could have sought relief
23 by posting --

24 JUSTICE GINSBURG: And the Government -- and
25 the opinion points out that if she had gone the quiet

1 title route she would have lost the advantageous -- she
2 would have had to make. She could never complete a
3 quiet title suit within the time that she needed to
4 execute this sale.

5 MR. AINSA: Justice Ginsburg, I, I know
6 you've found that in the opinion. But at the same time
7 I'm pointing out that the Government was contending that
8 the Quiet Title Act was available to Mrs. Williams, and
9 also that she could have simply put the money up. And
10 -- put the money up, and the land would have been
11 released and there was an argument over whether the
12 secretary would have discretion to turn her down. But
13 the point is there were other remedies out there, and
14 they were not deemed --

15 JUSTICE GINSBURG: And the, and the opinion
16 suggests -- not merely suggests, determines -- that
17 those other remedies, unlike 7426 in cases where it
18 applies, were ineffective. The Government raised other
19 remedies and the Court said they were ineffective.

20 MR. AINSA: The other remedies I understand
21 were determined to be not meaningful in the opinion of
22 the Court. But I'm pointing out that argument was
23 raised and rejected. And it was rejected because,
24 because 1346 as I understand it has a life of its own,
25 so to speak, and it was construed to be an unequivocal

1 waiver of sovereign immunity. And I return to my
2 original buoyant that if that is the case then the two
3 statutes most coexist together. Mr. Chief Justice, if
4 there are no further questions I would like to reserve
5 the remainder of my time for rebuttal.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
7 Ms. Maynard.

8 ORAL ARGUMENT OF DEANNE E. MAYNARD,
9 ON BEHALF OF RESPONDENT

10 MS. MAYNARD: Mr. Chief Justice, and may it
11 please the Court.

12 When Congress creates a specific remedy for
13 a specific situation that remedy forecloses resort to a
14 more general remedy when that general remedy would
15 frustrate the purposes of the specific remedy.

16 JUSTICE KENNEDY: Do you have a citation for
17 that as would apply to the Internal Revenue code?

18 MS. MAYNARD: Yes, Your Honor. The A.S.
19 Kreider decision that we discuss in our brief is about
20 was whether or not the sorter statute of limitations,
21 ironically, in the case for refund suit, applied, rather
22 than the broad general Tucker Act statute of
23 limitations. And this Court held that the specific
24 controlled over the general because Congress was
25 entitled to provide more specifically in a particular

1 situation when the need called for it.

2 JUSTICE SCALIA: Was, was the more specific
3 statute there enacted after the more general statute?

4 MS. MAYNARD: Both of those statutes, it's
5 been a long time, Your Honor. I'm not, I'm not totally
6 --

7 JUSTICE SCALIA: The reason I ask is we --
8 we do have a principle which I think is a sound one,
9 that repeals by implication are not fatal. And what
10 you're saying is that the enactment of the more narrow
11 statute impliedly repeals the cause of action that
12 existed under 1346. Do you know if any of your cases
13 that you cite, even those outside of the Internal
14 Revenue field, involve more specific statutes enacted
15 after the general statute that they supposedly limit?

16 MS. MAYNARD: I'm not sure if they answer
17 that precise question, but --

18 JUSTICE SCALIA: Well, I guess --

19 MS. MAYNARD: -- the implied repeal analysis
20 is not the proper analysis to apply here, because the
21 proper principle is that the specific remedy forecloses
22 resort to the more general remedy, when two things are
23 true.

24 JUSTICE SCALIA: Well, that's certainly true
25 when the two are enacted at the same time, obviously.

1 Or even when the, when the general is enacted after the
2 more specific one and does not thereby limit the more
3 specific one. But, well --

4 MS. MAYNARD: In -- in this Court's case, if
5 I can answer your, the principle of your question, Your
6 Honor, which is that the replied repeal doctrine is not
7 the proper analysis here because the specific controls
8 the general.

9 JUSTICE ALITO: If 7426 had not been
10 enacted, wouldn't this case have fallen within 1346 as
11 interpreted by Williams.

12 MS. MAYNARD: Well, we would certainly have
13 a more difficult argument here if that were the case,
14 Your Honor. But Williams' specific withholding was --
15 didn't answer the question at issue here, because it
16 only held that a person who had been subjected to a
17 lien, involuntarily paid it under duress, could be a
18 taxpayer within the meaning of 1346. But it didn't
19 answer the question here, which is whether or not when
20 Congress has provided specifically for parties in
21 Petitioner's situation and created a remedial scheme
22 that would be wholly frustrated --

23 JUSTICE ALITO: What could you point to in
24 the language of 1346 that would take this case outside
25 of 1346 as interpreted in Williams?

1 MS. MAYNARD: That would be a difficult
2 argument to make, that it doesn't fall within the
3 erroneously or illegally collected tax. But that was
4 the same case in A.S. Kreider. That was the same
5 language in A.S. Kreider, the erroneously collected tax.
6 Yet the Court held that the more specific refund statute
7 of limitations there applied.

8 JUSTICE ALITO: But if this case would have
9 fallen within 1346 as interpreted by Williams until --
10 then you must be arguing that 1346 was in part impliedly
11 repealed when 7426 was enacted.

12 MS. MAYNARD: One can look at it that way,
13 Your Honor. But I think if one looks at it that way
14 then I think this Court's cases in Brown and Block are
15 how you apply the implied repeal analysis when a
16 specific statute would be wholly fully frustrated by
17 application of a more general statute. And that's
18 particularly true where it's uncertain at the time
19 Congress enacted the specific statute.

20 JUSTICE KENNEDY: I don't, I don't see how
21 you can say there's frustration. Perhaps I'm missing
22 something. It seems to me that for years the Revenue
23 Code has had two basic schemes. One is you can contest
24 the liability before you pay the money. The other is
25 you pay the money and sue for refund. And one requires

1 you go to the Tax Court and the other district court and
2 so forth. So these are two different schemes and here
3 you have to -- we are advised that even if there was a
4 levy for \$100,000 you, couldn't contest it unless you
5 paid the extra 900. So those are two very different
6 schemes. Am I wrong about that?

7 MS. MAYNARD: Well, they are two very
8 different schemes, Your Honor, and one is for the
9 situation that Petitioner faces, which is a third party
10 whose property is levied upon to collect the taxes of
11 another, and it has its own venue provisions, its own
12 jurisdictional provisions, its own short statute of
13 limitations. Importantly, however --

14 JUSTICE KENNEDY: Of course, because the
15 Government doesn't have the money. But in the refund
16 suit the Government has the money.

17 MS. MAYNARD: No, no, Your Honor. In a levy
18 suit the Government often does have the property.

19 JUSTICE KENNEDY: Often does, but not
20 necessarily, and doesn't have to have all the amount.

21 MS. MAYNARD: Not -- I think, Your Honor,
22 the Flora requirement, which is a judicially
23 interpretation on the refund statute which requires you,
24 a taxpayer to pay all of its tax liability for a given
25 year before it can bring a refund statute challenge,

1 actually supports our argument here because it shows how
2 complicated it would be to apply that scheme when you're
3 talking about a party who doesn't owe the tax. We
4 haven't -- the Government has not assessed the tax
5 against the trust here. It believes the trust is a
6 nominee or alter ego of the taxpayer and the -- the
7 wrongful levy statute has a short statute of limitations
8 for the precise reason that if we seize the property of
9 the trust the Government needs to know promptly if the
10 trust claims it's not the taxpayer's property because
11 the Government, as the Chief Justice indicated, will
12 cease going after the taxpayer if it believes it has
13 already collected the tax from someone else that it
14 believes to be holding the money for the taxpayer, which
15 is different and crucially different than in a refund
16 suit, as Justice Stevens alluded to, because in a refund
17 suit where the taxpayer brings the challenge and has
18 paid the tax, at the end of that suit either the
19 Government has to pay the money back to the taxpayer in
20 a refund or the Government gets to keep the tax and
21 that's the end of the matter.

22 In a third party challenge, whether the
23 third party brings it pre- deprivation or
24 post-deprivation, the Government's interest is knowing
25 whether or not the third party has taxpayer property or

1 not. Because if it turns out that it's not the
2 taxpayer's property the Government needs to pursue the
3 taxpayer. And Congress accounted for that not only in
4 7426 by the short statute of limitations, but also for
5 the expression suspension of the Government's period of
6 time that it can pursue the taxpayer. The, the section
7 7426 expressly suspends the time period during the
8 running of a third party challenge whether that's pre or
9 post deprivation.

10 In addition, the -- if I can go back to
11 Justice Scalia, I would like to impress upon you why we
12 don't believe the implied repeal doctrine is applicable
13 here, and not only is it because the specific controls
14 the general when it would be wholly frustrated as it
15 would be here by both the statute of limitations
16 provision and its express suspension, but also because
17 the availability of the general remedy was uncertain at
18 the time that Congress passed -- and for the purposes of
19 the implied repeal doctrine that's the proper analysis:
20 What did the 1966 Congress think it needed to say in
21 order to make this the exclusive remedy? The state of
22 the law at the time --

23 JUSTICE SCALIA: Pre-Williams you're talking
24 about?

25 MS. MAYNARD: Yes, in 1966, Your Honor. The

1 state of the law at the time when the Congress was
2 deciding how to write this provision, there was
3 certainly no authoritative pronouncement that, that the,
4 that third parties could bring a suit, and indeed the
5 law that --

6 JUSTICE ALITO: Why does that make your
7 argument stronger? If Congress didn't think that 1346
8 applied, then surely it didn't intend to repeal it.

9 MS. MAYNARD: Well, the cases say it matters
10 what the Congress saw at the time it passed the statute
11 in Brown and Block. But the reason it does matter as a
12 logical matter is that the state of the law was such
13 that third parties couldn't bring a refund suit under
14 1346. The actions that had been allowed, Your Honor,
15 were against the IRS officials and those were expressly
16 replaced by the statute. Congress expressly replaced
17 them in section 7426(d) and (e), which is on 12a of our,
18 of our petition. So that shows that Congress did intend
19 to make this the exclusive remedy.

20 The other reason why I think you can --

21 JUSTICE SCALIA: Did you make that argument,
22 did the Government make that argument, in Williams?

23 MS. MAYNARD: Did we make the argument in
24 Williams?

25 JUSTICE SCALIA: Yes, that -- that Congress

1 had enacted another statute which presumes that there is
2 no cause of action under 1346?

3 MS. MAYNARD: Well, the Government conceded
4 in Williams that 7426 was not available to Ms. Williams
5 there because she had only been subjected to a lien, not
6 a levy. So the remedies the Government was pointing to
7 in that case as exclusive of the 1346 remedy were the
8 quiet title action and a discretionary --

9 JUSTICE SCALIA: Yes, but even if it wasn't
10 available to her, the fact that there was another
11 statute the whole premise for which is the
12 unavailability of a remedy under 1346, it seems to me
13 that would have, that would have strengthened the
14 Government's case in Williams.

15 MS. MAYNARD: Well, we did point to the
16 statute, Your Honor, and suggest that the Congress had
17 made it available. I think the other reason why the
18 implied repeal doctrine is not the right analysis here
19 is that section 7426 did not withdraw any substantive
20 rights. This, the trust here is simply trying to take
21 advantage of another remedial provision, 1346, and
22 rename its cause of action. They're bringing exactly
23 the same -- their complaint is substantively identical
24 to the complaint they brought in their first action.

25 JUSTICE BREYER: It looks like it's the same

1 in the Kreider case. I can't tell, I don't know. But
2 this case was a specific statute of limitations acted
3 after the general refund statute, right?

4 MS. MAYNARD: That's right, Your Honor.

5 JUSTICE BREYER: And in the prior case it
6 seems to be a specific statute that was enacted in 1926.
7 I just got it out of the library. They give it to us,
8 you know, if you ask them.

9 MS. MAYNARD: Bless them, Your Honor.

10 (Laughter.)

11 JUSTICE BREYER: And it was the 1926 code
12 and it concerned 1926 income, so it must have been
13 brought, the suit, fairly close to when that was
14 enacted. And the general provision was a general
15 judicial code provision having to do with general
16 statute of limitations and, no, it doesn't say. It
17 looks -- I mean, it sounds as if that had been long in
18 existence.

19 MS. MAYNARD: I believe it had been. It was
20 a Tucker Act provision. Thank you. That would be the
21 answer to your question, Justice Scalia.

22 But in direct response to the question you
23 started with, Justice Breyer, Congress -- the general
24 statute of limitations for refund actions did already
25 exist. In fact, the Government believes it's

1 significant when Congress passed 7426, instead of
2 referring to that specific provision, it placed in the
3 same section of the code a shorter statute of
4 limitations specifically for these actions. It created
5 a new subsection and said 7426 actions must be brought
6 within 9 months.

7 CHIEF JUSTICE ROBERTS: So why was it so
8 hard for them to say that this is an exclusive remedy,
9 as they have done in other situations?

10 MS. MAYNARD: As I indicated, Your Honor, at
11 the time there was no authoritative pronouncement. If
12 even --

13 CHIEF JUSTICE ROBERTS: That's even all the
14 more reason for them to say. I mean. If there's
15 confusion about what remedies are available and they
16 want it to be exclusive, it's easy enough to say that.

17 MS. MAYNARD: Well, the remedies that have
18 been allowed by the courts, Your Honor -- and we
19 believe, in the absence of any appropriate waiver -- but
20 the actions that have been allowed have been allowed
21 against IRS officials, and Congress did expressly
22 replace those, on 12a, in 7426(d): "No action may be
23 maintained against any officer or employee of the United
24 States."

25 CHIEF JUSTICE ROBERTS: Well, again that

1 suggests that they know how to spell out exclusivity
2 when they have it in mind, and they didn't do it with
3 respect to the availability of an action under 1346.

4 MS. MAYNARD: That's true, Your Honor. But
5 I think for purposes of trying to discern the intent of
6 the 1966 Congress one has to look at the state of the
7 law in 1966. And there was no reason to believe and
8 certainly no authoritative pronouncement at the time
9 that 1346 covered this type of action, and I don't think
10 --

11 CHIEF JUSTICE ROBERTS: So the Williams
12 decision came like a bolt out of the blue, then?

13 MS. MAYNARD: Well, that's probably how the
14 Government viewed it, Your Honor. But certainly I don't
15 think one should ascribe for purposes of implied repeal,
16 in other words to assume a presumption, by making the
17 Congress prescient of what this Court was going to
18 decide in 1995. And I certainly wouldn't concede,
19 although the Petitioner would like to argue, that
20 Williams' holding is as broad as it is. Williams was
21 about a very particular situation, a woman, as I said,
22 who had a lien placed on her, and the Court didn't
23 answer this question of whether someone who had, as
24 Justice Ginsburg indicated, who had a levy placed on
25 there, could be a taxpayer within the meaning of 1346 as

1 this Court held in Williams.

2 Justice Kennedy, also on your question about
3 the tax code, although we don't cite it in our brief,
4 Estate of Ramani is another case in which this Court had
5 in effect held that a specific provision in the tax
6 code, in this very Tax Lien Act, took priority over a
7 more general provision that had to do with the priority
8 of the United States' claims. And that's Estate of
9 Ramani, 525 U.S. 517.

10 I believe if there are no further questions,
11 the Government would ask the Court to find that 7426 is
12 the -- except I have one more thing to add. Getting
13 lots of help today from all quarters.

14 CHIEF JUSTICE ROBERTS: Mr. Hungar has a
15 further question.

16 MS. MAYNARD: I beg your pardon?

17 CHIEF JUSTICE ROBERTS: Mr. Hungar has a
18 further question.

19 (Laughter.)

20 MS. MAYNARD: He wants me to point out to
21 the Court that, in addition to -- it's always nice to
22 have help. In addition to the great American Federal
23 Savings & Loan case, Justice Scalia, which indicated
24 that the implied repeal analysis is not appropriate when
25 you're talking about a subsequent simply remedial

1 provision that doesn't withdraw substantive rights, the
2 Court in a case authored I believe by Your Honor, Rancho
3 Palos Verdes, in footnote 2 made that same point last
4 term.

5 JUSTICE SCALIA: I forgot about that
6 footnote.

7 (Laughter.)

8 MS. MAYNARD: Mr. Hungar might have
9 questioned your memory.

10 If there are no further questions, we would
11 ask that the Court affirm.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Ainsa, you have 5 minutes remaining.

14 REBUTTAL ARGUMENT OF FRANCIS S. AINSA, JR.,.

15 ON BEHALF OF THE PETITIONER

16 MR. AINSA: The Government argues that A.S.
17 Kreider has relevance to this case and I will submit to
18 the Court that it does not. The analysis in A.S.
19 Kreider about a more specific statute following a
20 general statute controlling was based upon the peculiar
21 syntax of the statute in question. The analysis in A.S.
22 Kreider was that the more general statute was phrased in
23 the negative and that therefore all it did was set an
24 outside time limit that Congress was free to shorten
25 with a subsequent statute. We do not have that

1 situation in this case. There was -- there is no
2 similar analysis that you can apply to 1346 and 7426.

3 JUSTICE KENNEDY: And both statutes in
4 Kreider I take it applied to the refund suit?

5 MR. AINSA: Yes.

6 JUSTICE KENNEDY: So there were two statutes
7 bearing on the same remedy.

8 MR. AINSA: Two statutes bearing on the same
9 remedy. And I submit that the A.S. Kreider analysis is
10 not relevant here.

11 The Government ALSO relies on Brown versus
12 the General Services Administration for the proposition
13 that a very detailed, complete, balanced, structured
14 statute will control over a more general statute, and
15 the argument is of course that 7426 is that type of
16 statute. But the problem is in the Brown case we were
17 dealing, the Court was dealing, with the Civil Rights
18 Act and the Civil Rights Act was clearly the first piece
19 of legislation that had been enacted by Congress to
20 remedy Federal employment discrimination. It was a
21 brand new remedy.

22 In the case before the Court today, 7426 was
23 a response to a particular issue that was raised in 1966
24 and that was that claimants who desired to seek redress
25 from the Government when their property was taken were

1 suing the director. They were suing the tax collector.
2 This was just a statute to give them a remedy directly
3 against the Government. It wasn't creating a brand new
4 situation. It was clarifying that now you could sue the
5 Government directly as opposed to the tax collector.
6 And in fact, the Federal Tax Lien Act prohibited suits
7 against Government officials, as was previously the
8 practice in the United States. And so it's, this issue
9 of implied repeal with the shorter statute I don't
10 believe is apropos to the situation that confronts us
11 here.

12 And I would like to also simply conclude my
13 argument with regards to the Government's contention
14 that the Government needs to know. In this particular
15 case the tax years in question were 1981 through 1984.
16 The Government did not assess the taxpayer until 1993
17 and 1994, 12 years after the first tax year. The
18 government did not levy until 1999, which was 18 years
19 after the first tax year. During this time the
20 Government knew, very clearly knew, what the situation
21 was in this case and for whatever reason did not take
22 prompt action.

23 Therefore, on behalf of the Petitioner, I
24 ask that you reverse and send this case back to the
25 district court for proceedings under the refund statute.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Ainsa. The case is submitted.

3 [Whereupon, at 10:47 a.m., the case in the
4 above-entitled matter was submitted.]

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