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IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HEALTH AND :

HUMAN SERVICES, ET AL., :

Petitioners : No. 11-398

v. :

FLORIDA, ET AL. :

- - - - - x

Washington, D.C.

Monday, March 26, 2012

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

APPEARANCES:

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Court-appointed amicus curiae

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

Petitioners.

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

Respondents.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case Number 11-398, Department of Health and Human Services v. Florida.

Mr. Long.

ORAL ARGUMENT OF ROBERT A. LONG  
FOR COURT-APPOINTED AMICUS CURIAE

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

The Anti-Injunction Act imposes a "pay first, litigate later" rule that is central to Federal tax assessment and collection. The Act applies to essentially every tax penalty in the Internal Revenue Code. There is no reason to think that Congress made a special exception for the penalty imposed by section 5000A. On the contrary, there are three reasons to conclude that the Anti-Injunction Act applies here.

First, Congress directed that the section 5000A penalty shall be assessed and collected in the same manner as taxes. Second, Congress provided that penalties are included in taxes for assessment purposes. And, third, the section 5000A penalty bears the key indicia of a tax.

Congress directed that the section 5000A

1 penalty shall be assessed and collected in the same  
2 manner as taxes. That directive triggers the  
3 Anti-Injunction Act, which provides that "no suit for  
4 the purpose of restraining the assessment or collection  
5 of any tax may be maintained in any court by any  
6 person."

7 JUSTICE SCALIA: Well, that depends, as --  
8 as the government points out, on whether that directive  
9 is a directive to the Secretary of the Treasury as to  
10 how he goes about getting this penalty, or rather a  
11 directive to him and to the courts. All of the other  
12 directives there seem to me to be addressed to the  
13 Secretary. Why should this one be directed to the  
14 courts? When you say "in the same manner," he goes  
15 about doing it in the same manner, but the courts simply  
16 accept that -- that manner of proceeding but nonetheless  
17 adjudicate the cases.

18 MR. LONG: Well, I think I have a three-part  
19 answer to that, Justice Scalia. First, the text does  
20 not say that the Secretary shall assess and collect  
21 taxes in the same manner; it just says that it shall be  
22 assessed in the same manner as a tax, without addressing  
23 any party particularly.

24 JUSTICE SCALIA: Well, he's assessing and  
25 collecting it in the same manner as a tax.

1                   MR. LONG: Well, the assessment -- the other  
2 two parts of the answer are, as a practical matter, I  
3 don't think there's any dispute in this case that if the  
4 Anti-Injunction Act does not apply, this penalty, the  
5 section 5000A penalty, will as a practical matter be  
6 assessed and collected in a very different manner from  
7 other taxes and other tax penalties.

8                   There are three main differences. First,  
9 when the Anti-Injunction Act applies, you have to pay  
10 the tax or the penalty first and then litigate later to  
11 get it back with interest. Second, you have to exhaust  
12 administrative remedies. Even after you pay the tax,  
13 you can't immediately go to court. You have to go to  
14 the Secretary and give the Secretary at least 6 months  
15 to see if the matter can be resolved administratively.  
16 And, third, even in the very carefully defined  
17 situations in which Congress has permitted a challenge  
18 to a tax or a penalty before it's paid, the Secretary  
19 has to make the first move. The taxpayer is never  
20 allowed to rush into court before the tax -- before the  
21 Secretary sends a notice of deficiency to start the  
22 process.

23                   Now, if -- if the Anti-Injunction Act does  
24 not apply here, none of those rules apply. And that's  
25 not just for this case; it will be for every challenge

1 to a section 5000A penalty going forward. The taxpayer  
2 will be able to go to court at any time without  
3 exhausting administrative remedies; there will be none  
4 of the limitations that apply in terms of you have to  
5 wait for the Secretary to make the --

6 JUSTICE KENNEDY: Why will the  
7 administrative remedies rule not be applicable,  
8 exhaustion rule not be applicable?

9 MR. LONG: Well, because if the  
10 Anti-Injunction Act doesn't apply, there's no  
11 prohibition on courts restraining the assessment or  
12 collection of this penalty, and you can simply --

13 JUSTICE KENNEDY: Well, but courts apply the  
14 exhaustion rule. I mean, I know you've studied this.  
15 I'm just not following it. Why couldn't the court say,  
16 well, you haven't exhausted your remedies; no  
17 injunction?

18 MR. LONG: Well, in -- you could do that, I  
19 think, as a matter of -- of common law or judicially  
20 imposed doctrine, but in the code itself, which is  
21 all -- I mean, the Anti-Injunction Act is an absolutely  
22 central statute to litigation --

23 JUSTICE KENNEDY: Yes. Yes.

24 MR. LONG: -- about taxes. And the code  
25 says -- first it says you must pay the tax first and

1 then litigate. So, that's the baseline. And then, in  
2 addition, it says you must -- I mean, it's not common  
3 law; it's in the code -- you must apply for a refund,  
4 you must wait at least 6 months. That's -- many of  
5 these provisions are extremely specific, with very  
6 specific time limits.

7 CHIEF JUSTICE ROBERTS: They would apply  
8 even if the rule is not jurisdictional. The only  
9 difference would be that the court could enforce it or  
10 not enforce it in particular cases, which brings me to  
11 the Davis case, which I think is your biggest hurdle.  
12 It's a case quite similar to this in which the  
13 constitutionality of the Social Security Act was at  
14 issue, and the government waived its right to insist  
15 upon the application of this Act.

16 Of course, if it's jurisdictional, you can't  
17 waive it. So, are you asking us to overrule the Davis  
18 case?

19 MR. LONG: Well, Helvering v. Davis was  
20 decided during a period when this Court interpreted the  
21 Anti-Injunction Act as simply codifying the  
22 pre-statutory equitable principles that usually, but not  
23 always, prohibited a court from enjoining the assessment  
24 or collection of taxes. So, that understanding, which  
25 is what was the basis for the Helvering v. Davis

1 decision, was rejected by the Court in Williams Packing  
2 and a series of subsequent cases -- Bob Jones. And so,  
3 I would say, effectively, the Davis case has been  
4 overruled by subsequent decisions of this Court.

5 JUSTICE GINSBURG: Mr. Long, why don't we  
6 simply follow the statutory language? I know that  
7 you've argued that the Davis case has been overtaken by  
8 later cases, but the language of the Anti-Injunction Act  
9 is "no suit shall be maintained." It's remarkably  
10 similar to the language in -- that was at issue in Reed  
11 Elsevier: "No civil action for infringement shall be  
12 instituted." And that formulation, "no suit may be  
13 maintained," contrasts with of the Tax Injunction Act,  
14 that says the district court shall not enjoin. That Tax  
15 Injunction Act is the same pattern as 2283, which says  
16 "courts of the United States may not stay a proceeding  
17 in State court." So, both of those formulas, the TIA  
18 and the "no injunction against proceedings in State  
19 court" are directed to "court." The Anti-Injunction  
20 Act, like the statute at issue in Reed Elsevier, says  
21 "no suit shall be maintained." And it has been argued  
22 that that is suitor-directed in contrast to  
23 court-directed.

24 MR. LONG: Right. Well, I mean, this Court  
25 has said several times that the Tax Injunction Act was



1 based on the Anti-Injunction Act. You're quite right,  
2 the language is different; but we submit that the  
3 Anti-Injunction Act itself, by saying that no suit shall  
4 be maintained, is addressed to courts as well as  
5 litigants. I mean, after all, a case cannot go from  
6 beginning to end without the active cooperation of the  
7 court.

8 JUSTICE GINSBURG: But how is that different  
9 from "no civil action for infringement shall be  
10 instituted" -- "maintained and instituted"? Anything  
11 turn on that?

12 MR. LONG: Well, it's -- I mean -- perhaps a  
13 party could initiate an action without the act of  
14 cooperation of the court, but to maintain it from  
15 beginning to end, again, requires the court's  
16 cooperation.

17 And even if -- I mean, if the Court were  
18 inclined to say as an initial matter, if this statute  
19 were coming before us for the first time today, given  
20 all of your recent decisions on jurisdiction, that you  
21 might be inclined to say this is not a jurisdictional  
22 statute, a lot of water has gone over the dam here. The  
23 Court has said multiple times that this is a  
24 jurisdictional statute. Congress has not disturbed  
25 those decisions. To the contrary --

1 JUSTICE SOTOMAYOR: Counsel --

2 JUSTICE ALITO: Well, the Court said that  
3 many times, but is there any case in which the result  
4 would have been different if the Anti-Injunction Act  
5 were not viewed as jurisdictional but instead were  
6 viewed as a mandatory claims-processing --

7 MR. LONG: There's --

8 JUSTICE ALITO: -- rule.

9 MR. LONG: There -- there are certainly a  
10 number of cases where the Court dismissed saying it is  
11 jurisdictional.

12 As I read the cases, I don't think any of  
13 them would necessarily have come out differently,  
14 because I don't think we had a case where the argument  
15 was, well, you know, the Government has waived this, so,  
16 you know, even -- if it's not jurisdictional --

17 JUSTICE ALITO: Well, the clearest -- the  
18 clearest way of distinguishing between the  
19 jurisdictional provision and a mandatory claims  
20 processing rule is whether it can be waived and whether  
21 the Court feels that it has an obligation to raise the  
22 issue sua sponte.

23 Now, if there are a lot of cases that call  
24 it jurisdictional, but none of them would have come out  
25 differently if the Anti-Injunction Act were simply a

1 mandatory claims processing rule, you have that on one  
2 side.

3           And on the other side, you have Davis, where  
4 the Court accepted a waiver by the Solicitor General;  
5 the Sunshine Anthracite coal case, where there also was  
6 a waiver; and, there's the Williams Packing case, which  
7 is somewhat hard to understand as viewing the  
8 Anti-Injunction Act as a jurisdictional provision.

9           The Court said that there could be a suit if  
10 there is no way the Government could win, and the  
11 Plaintiff would suffer irreparable harm. Now, doesn't  
12 that sound like an equitable exception to the  
13 Anti-Injunction Act?

14           MR. LONG: No, I think the -- I think the  
15 best interpretation of the Court's cases is that it was  
16 interpreting a jurisdictional statute. And, indeed, in  
17 Williams Packing, the Court said it was a jurisdictional  
18 statute.

19           But, again, even if you have doubt about  
20 simply the cases, there is more than that because  
21 Congress has -- has not only not disturbed this Court's  
22 decision stating that the statute is jurisdictional,  
23 they've passed numerous amendments to this  
24 Anti-Injunction Act.

25           CHIEF JUSTICE ROBERTS: Well, it seems --

1 you can't separate those two points. The idea that  
2 Congress has acquiesced in what we have said only helps  
3 you if what we have said is fairly consistent. And you,  
4 yourself, point out in your brief that we've kind of  
5 gone back and forth on whether this is a jurisdictional  
6 provision or not. So, even if Congress acquiesced in  
7 it, I'm not sure what they acquiesced in.

8 MR. LONG: Well, what you have said,  
9 Mr. Chief Justice, has been absolutely consistent for  
10 50 years, since the Williams Packing case. The period  
11 of inconsistency was after the first 50 years, since the  
12 statute was enacted in 1867. And there was a period, as  
13 I said, when the Court was allowing extraordinary  
14 circumstances exceptions and equitable exceptions, but  
15 then, very quickly, it cut back on that. And since --  
16 and since Williams Packing, you have been utterly  
17 consistent --

18 JUSTICE KAGAN: Well, even since  
19 Williams Packing, there was South Carolina v. Regan.  
20 And that case can also be understood as a kind of  
21 equitable exception to the rule, which would be  
22 inconsistent with thinking that the rule is  
23 jurisdictional.

24 MR. LONG: Well, again, I mean, I think the  
25 best understanding of South Carolina v. Regan is not

1 that its an equitable exception, but it's the Court  
2 interpreting a jurisdictional statute as it would  
3 interpret any statute in light of its purpose, and  
4 deciding in that very special case, it's a very narrow  
5 exception, where the --

6 JUSTICE SOTOMAYOR: Mr. Long, in Bowles, the  
7 Court looked to the long history of appellate issues as  
8 being jurisdictional, in its traditional sense, not as a  
9 claim processing rule, but as a pure jurisdiction rule,  
10 the power of the Court to hear a case.

11 From all the questions here, I count at  
12 least four cases in the Court's history where the Court  
13 has accepted a waiver by the Solicitor General and  
14 reached a tax issue. I have at least three cases, one  
15 of them just mentioned by Justice Kagan, where  
16 exceptions to that rule were read in.

17 Given that history, regardless of how we  
18 define jurisdictional statutes versus claim processing  
19 statutes in recent times, isn't the fairer statement  
20 that Congress has accepted that in the extraordinary  
21 case, we will hear the case?

22 MR. LONG: No. No, Justice Sotomayor,  
23 because in many of these amendments which have come in  
24 the '70s and the '90s and the 2000s, the Congress has  
25 actually framed the limited exceptions to the

1 Anti-Injunction Act in jurisdictional terms. And it has  
2 written many of the express exceptions by saying  
3 notwithstanding Section 7421 --

4 JUSTICE SOTOMAYOR: But doesn't that just  
5 prove that it knows that the Court will impose a claim  
6 processing rule in many circumstances, and so, in those  
7 in which it specifically doesn't want the Court to, it  
8 has to be clearer?

9 MR. LONG: Well, but Congress says,  
10 notwithstanding 7421, the Court "shall have jurisdiction  
11 to restrain the assessment and collection of taxes in  
12 very limited" --

13 JUSTICE SOTOMAYOR: Could you go back to the  
14 question that Justice Alito asked? Assuming we find  
15 that this is not jurisdictional, what is the parade of  
16 horrors that you see occurring if we call this a  
17 mandatory claim processing rule? What kinds of cases do  
18 you imagine that courts will reach?

19 MR. LONG: Right. Well, first of all, I  
20 think you would be saying that for the refund statute,  
21 as well as for the Anti-Injunction Act -- which has very  
22 similar wording, so if the Anti-Injunction Act is not  
23 jurisdictional, I think that's also going to apply to  
24 the refund statute, the statute that says you have to  
25 first ask for a refund and then file, you know, within

1 certain time -- so it would be -- it would be both of  
2 those statutes. And, you know, we are dealing with  
3 taxes here, if people --

4 JUSTICE SOTOMAYOR: That wasn't my question.

5 MR. LONG: I'm sorry.

6 JUSTICE SOTOMAYOR: My question was, if we  
7 deem this a mandatory claim processing rule --

8 MR. LONG: Right.

9 JUSTICE SOTOMAYOR: -- what cases do you  
10 imagine courts will reach on what grounds? Assuming the  
11 Government does its job and comes in and raises the AIA  
12 as an immediate defense --

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

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

16 MR. LONG: That would certainly be the first  
17 class of cases, it occurs to me, where, if the  
18 Government does not raise it in a timely way, it could  
19 be waived. I would think plaintiffs would see if there  
20 was some clever way they could get a suit going that  
21 wouldn't immediately be apparent that --

22 JUSTICE SOTOMAYOR: Assumes the lack of  
23 competency of the Government, which I don't, but what  
24 other types of cases?

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

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

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

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

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

24 Now, here, Congress has nowhere used the  
25 word "tax." What it says is penalty. Moreover, this is



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

3 And so why is this a tax? And I know you  
4 point to certain sentences that talk about taxes within  
5 the Code --

6 MR. LONG: Right.

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

9 MR. LONG: Right.

10 JUSTICE BREYER: So why does it fall within  
11 that word?

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

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

22 It says, "in the same manner as." It is  
23 then attached to Chapter 68, when that -- it references  
24 that as "being the manner of." Well, that it's being  
25 applied -- or if it's being collected in the same manner

1 as a tax doesn't automatically make it a tax,  
2 particularly since the reasons for the AIA are to  
3 prevent interference with revenue sources. And here, an  
4 advance attack on this does not interfere with the  
5 collection of revenues.

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

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

23 JUSTICE SCALIA: There's at least some doubt  
24 about it, Mr. Long, for the reasons that Justice Breyer  
25 said, and I thought that we had a -- a principle that

1 ousters of jurisdiction are narrowly construed; that,  
2 unless it's clear, courts are not deprived of  
3 jurisdiction. And I find it hard to think that this is  
4 clear. Whatever else it is, it's easy to think that  
5 it's not clear.

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

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

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

1 substantial amounts of revenues, at least \$4 billion a  
2 year by the --

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

5 MR. LONG: That's --

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

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

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

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

21 JUSTICE BREYER: The best collection I've  
22 found in your favor, I think, is in Mortimer Caplin's  
23 brief on page 16, 17. He has a whole list. All right.  
24 So -- I got my law clerk to look all those up. And it  
25 seems to me that they all fall into the categories of

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

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

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

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

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

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

11 JUSTICE KAGAN: No, but it -- it in section  
12 9008 and in section 9010 --

13 MR. LONG: Right.

14 JUSTICE KAGAN: -- it specifically referred  
15 --

16 MR. LONG: Right.

17 JUSTICE KAGAN: -- to the part of the  
18 code where the Anti-Injunction Act is.

19 MR. LONG: Right, all of subtitle F, which  
20 picks up lots of administration and procedure  
21 provisions, but those -- those are fees, and they're  
22 not -- Congress did not provide, you know, in the  
23 sections themselves that they should be paid as part of  
24 a tax return. So they were free-standing fees, and by  
25 using that subtitle F language, Congress plugged in a

1 whole set of rules for how to collect and administer the  
2 fees, and it went not just to assessment and  
3 collection -- and the IRS has recognized this -- but to  
4 examination, privacy, a whole series of additional  
5 things.

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

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

16 JUSTICE KENNEDY: Maybe it's easier to talk  
17 about this case if we just forget the words "for the  
18 purpose of restraining assessment and collection." In a  
19 sense, that brings the jurisdictional question and  
20 Justice Breyer's question together.

21 It seems to me -- maybe you could just  
22 comment on that language. Is that sort of language  
23 usually contained in a jurisdictional provision? I  
24 mean, you often don't know the purpose of a suit until  
25 after the thing is under way. I can see it with

1 malicious prosecution and some civil rights cases. Does  
2 it strike you as somewhat unusual to have this provision  
3 in a jurisdictional case?

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

5 JUSTICE KENNEDY: Yes.

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

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

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



1 MR. LONG: Well, I think that argument  
2 doesn't work for two reasons. I mean, first, if you  
3 look at the plaintiffs' own complaint, they clearly  
4 challenge both the minimum coverage requirement and the  
5 penalty. At page 122 of the Joint Appendix, they  
6 challenge the requirement that the individuals obtain  
7 health care coverage or pay a penalty.

8 JUSTICE ALITO: Well, why is that?

9 JUSTICE GINSBURG: If that's -- if that's  
10 the problem, it's easier to amend the complaint. They  
11 can just take that out of the complaint. So, it can't  
12 turn on that.

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

21 So, first, I mean, I think these plaintiffs  
22 would not be satisfied if the Court were to render a  
23 judgment saying the minimum coverage requirement is  
24 invalidated; the penalty, however, remains standing.  
25 Anybody who doesn't have insurance has to pay the

1 penalty. Then they'd have to pay a penalty equal to the  
2 cost of insurance and they wouldn't even have insurance.  
3 So, I don't think that would be --

4 JUSTICE ALITO: Well, they say they want to  
5 obey the law --

6 MR. LONG: Right.

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

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

19 And so even if it were really true that  
20 these plaintiffs were not interested in the penalty and  
21 would never pay the penalty, if they were to succeed in  
22 this case in striking down the minimum coverage  
23 requirement, the inevitable result would be that the  
24 penalty would fall as well, because the Government  
25 couldn't collect a penalty for failing to follow an

1 unconstitutional requirement, and so it would still be  
2 barred because it would be a suit that would prevent the  
3 collection of some of the --

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

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

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

1                   But that's not the way the statute reads.  
2   And Congress, it must be supposed, you know, made a  
3   decision that that shouldn't be the way the statute  
4   reads, that it should instead be a regulatory command  
5   and a penalty attached to that command.

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

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

22                   So I -- so I do think, although it's -- I  
23  certainly wouldn't argue it's clear -- that that's the  
24  best way to understand the statute as a whole.

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

1 essential to the question we're discussing now of  
2 whether the Anti-Injunction Act applies. Again, you  
3 know, I think --

4 JUSTICE SOTOMAYOR: Could you tell me why  
5 you think the Solicitor General's reading creates a  
6 problem?

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

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

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

23 JUSTICE SOTOMAYOR: But that's not -- that's  
24 carrying it too far, because he says if a penalty is  
25 designated as a tax by Congress, then it's subject to

1 the AIA, and that's most of the code, the tax code. And  
2 he says for those portions of the Affordable Care Act  
3 that designate things as taxes, the AIA applies. So  
4 it's only -- and I haven't found another statute. I'm  
5 going to ask him if there's another one. It's only for  
6 those statutes in which Congress has designated  
7 something solely as a penalty.

8 MR. LONG: Right.

9 JUSTICE SOTOMAYOR: And not indicated that  
10 it is a tax.

11 MR. LONG: Right.

12 JUSTICE SOTOMAYOR: They don't fall within  
13 the AIA.

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

21 If there are no further questions, I would  
22 like to reserve my time.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.  
24 General Verrilli.

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

1 ON BEHALF OF THE PETITIONERS

2 GENERAL VERRILLI: Mr. Chief Justice and may  
3 it please the Court:

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

14 Congress has authority under the taxing  
15 power to enact a measure not labeled as a tax, and it  
16 did so when it put section 5000A into the Internal  
17 Revenue Code. But for purposes of the Anti-Injunction  
18 Act, the precise language Congress used is  
19 determinative. And there is no language in the  
20 Anti-Injunction Act -- excuse me, no language in section  
21 5000A of the Affordable Care Act or in the Internal  
22 Revenue Code generally that provides a textual  
23 instruction that --

24 JUSTICE ALITO: General Verrilli, today you  
25 are arguing that the penalty is not a tax. Tomorrow you

1 are going to be back and you will be arguing that the  
2 penalty is a tax.

3 Has the Court ever held that something that  
4 is a tax for purposes of the taxing power under the  
5 Constitution is not a tax under the Anti-Injunction Act?

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

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

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

25 GENERAL VERRILLI: Yes. I do think, Justice



1 Sotomayor, that with respect to one of the arguments  
2 that my friend from the NFIB has made in of the brief,  
3 that Bailey against George is a significant problem  
4 because I think their argument on the constitutionality  
5 under the taxing power is essentially that the  
6 Affordable Care Act provision is the same thing as the  
7 provision that was held unconstitutional in Bailey  
8 against Drexel Furniture.

9 JUSTICE SOTOMAYOR: That's a different  
10 issue. The question Justice --

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

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

1 it, as the amicus suggest it should be read, on that  
2 theory, but --

3 JUSTICE GINSBURG: Mr. Verrilli, a basic  
4 question about your argument. If you are right about  
5 the second part, that is, for purposes of the statute,  
6 the Anti-Injunction statute, this penalty does not  
7 constitute a tax, then does the Court need to decide  
8 whether the Anti-Injunction Act in other cases, where it  
9 does involve a tax, is jurisdictional?

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

19 And I would, if I could, follow up on a  
20 question, Justice Ginsburg, that you asked Mr. Long in  
21 terms of the language of the Anti-Injunction Act,  
22 7421(a), which can be found at page 16a of the appendix  
23 to our brief.

24 I'd ask the Court to compare that to the  
25 language of the very next provision in the code, which

1 is on the next page of our statutory appendix, 17a,  
2 which is the refund statute, which we've talked about a  
3 little bit so far this morning, 7422(a).

4 The refund statute this Court held in Dolan  
5 was jurisdictional, and the Court in both Dolan and  
6 Brockamp held that the statute of limitations that  
7 applies to the refund statute cases is jurisdictional.

8 The language in 7422(a) is virtually  
9 identical to the language in 7421(a) --

10 JUSTICE KENNEDY: That is correct, although  
11 in the refund context, you have the sovereign immunity  
12 problem, in which we presume that has not been waived.

13 GENERAL VERRILLI: Right. But I -- 7421(a)  
14 --

15 JUSTICE KENNEDY: But you're --

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

18 JUSTICE KENNEDY: The language is quite  
19 parallel.

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

25 JUSTICE KAGAN: General --

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

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

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

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

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

18 (Laughter.)

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

24 JUSTICE KENNEDY: But you indicated -- there  
25 was a discussion earlier about why does the government

1 really care, they have competent attorneys, et cetera.  
2 But -- and you began your argument by saying it would be  
3 very troubling to say that it's not jurisdictional.

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

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

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

1 forfeiture by a simple omission in failing to raise it  
2 in an answer. And that -- and that's a troubling  
3 prospect.

4 JUSTICE KAGAN: General, can I ask --

5 JUSTICE GINSBURG: How likely is it --

6 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

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

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

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

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

1                   GENERAL VERRILLI: That's true,  
2 Mr. Chief Justice. Several points about that, though.

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

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

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

18                  GENERAL VERRILLI: Yes.

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

1                   GENERAL VERRILLI:  Yes.  And --

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

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

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

12                   GENERAL VERRILLI:  Well --

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

15                   (Laughter.)

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

21                   JUSTICE KAGAN:  General, can I ask you about  
22 Reed Elsevier?  Justice Ginsburg suggested that the  
23 language was very similar in Reed Elsevier as it is  
24 here, but there are even further similarities.  Reed  
25 Elsevier pointed out that the provision in question



1 wasn't in Title 28. Here, too, it's not in Title 28.  
2 In Reed Elsevier, it was pointed out that the provision  
3 there had numerous exceptions to it. Here, too, there  
4 are numerous exceptions that we find that have been  
5 created by the courts over the years.

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

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

13 Why is that wrong?

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

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

1 JUSTICE KAGAN: I take the point --

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

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

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

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

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

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

1 you have to pay a filing fee before you can file a  
2 complaint?

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

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

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

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

25 JUSTICE GINSBURG: On your statutory

1 construction argument, is there any other exaction  
2 imposed under the Internal Revenue Code that would not  
3 qualify as a tax for Anti-Injunction Act purposes, or is  
4 5000A just out there all by itself?

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

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

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

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

24 JUSTICE SOTOMAYOR: Could we address,  
25 General, the question of whether there are any

1 collateral consequences for the failure to buy -- to not  
2 buy health insurance? Is the only consequence the  
3 payment of the penalty?

4           The private respondents argue that there are  
5 other collateral consequences such as for people on  
6 probation who are disobeying the law, if they don't buy  
7 health insurance, they would be disobeying the law and  
8 could be subject to having their supervised release  
9 revoked.

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

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

1           The exemptions in section 5000A, it is true  
2 that there are two categories of exemptions. There are  
3 exemptions to the penalty and exemptions to the  
4 subsection (a) requirement. But the -- but I think, not  
5 only as a practical matter, but I think there's a  
6 textual indication and even as a legal matter,  
7 they are -- they both function as exceptions to the  
8 requirement.

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

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

20           We think another way in which you can get to  
21 the same conclusion slightly differently is by  
22 considering the provision on the prior page, 10A, which  
23 is 5000A -- 5000A(e)(3), members of Indian tribes.

24           Members of Indian tribes are exempt only  
25 from the penalty as a formal matter under the structure

1 of the statute here; but, the reason for that is because  
2 members of Indian tribes obtain their healthcare through  
3 the Indian Health Service, which is a clinic-based  
4 system that doesn't involve insurance at all. It's an  
5 entirely different system.

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

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

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

22 And there is an additional textual  
23 indication of that, which one can find at page 13 of our  
24 reply brief. This is a provision that is 42 U.S.C. A,  
25 section 18022(e). This is a provision that provides for

1 a certification that certain individuals can get. And  
2 it's the paragraph starting with the words "other  
3 provisions," contains the quote.

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

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

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

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



1 is the stronger reading of the statute.

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

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

16 JUSTICE KAGAN: Could I --

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

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

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

3           JUSTICE KAGAN: And that's because --

4           GENERAL VERRILLI: That if they don't pay  
5 the tax, they violated a federal law.

6           JUSTICE KAGAN: But as long as they pay the  
7 penalty --

8           GENERAL VERRILLI: If they pay the tax, then  
9 they are in compliance with the law.

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

12          GENERAL VERRILLI: If they pay the tax  
13 penalty, they're in compliance with the law.

14          JUSTICE BREYER: Thank you.

15          GENERAL VERRILLI: Thank you,  
16 Justice Breyer.

17          JUSTICE BREYER: The penalty.

18          GENERAL VERRILLI: Right. That's right.

19          JUSTICE ALITO: Suppose a person who has  
20 been receiving medical care in an emergency room -- has  
21 no health insurance but, over the years, goes to the  
22 emergency room when the person wants medical care --  
23 goes to the emergency room, and the hospital says, well,  
24 fine, you are eligible for Medicaid, enroll in Medicaid.  
25 And the person says, no, I don't want that. I want to

1 continue to get -- just get care here from the emergency  
2 room. Will the hospital be able to point to the mandate  
3 and say, well, you're obligated to enroll?

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

11 JUSTICE ALITO: No, they are not facing the  
12 tax penalty.

13 GENERAL VERRILLI: Right, right.

14 JUSTICE ALITO: So the hospital will have to  
15 continue to give them care and pay for it themselves,  
16 and not require them to be enrolled in Medicaid.

17 GENERAL VERRILLI: Right.

18 JUSTICE ALITO: Will they be able to take  
19 this out and say, well, you really should -- you have a  
20 moral obligation to do it; the Congress of the United  
21 States has said, you have to enroll? No, they can't say  
22 that?

23 GENERAL VERRILLI: I do think it's -- I  
24 think it's certainly fair to say that Congress wants  
25 people in that position to sign up for Medicaid. I

1 think that's absolutely right. And I think the statute  
2 is structured to accomplish that objective; but, the  
3 reality still is that the only consequence of  
4 noncompliance is the penalty.

5 JUSTICE SOTOMAYOR: General, but I thought  
6 the people who were eligible for Medicaid weren't  
7 subject to the penalty. Am I wrong? I could be just  
8 factually wrong.

9 GENERAL VERRILLI: Well, it all -- the  
10 penalty is keyed to income.

11 JUSTICE SOTOMAYOR: Yes.

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

19 So, there isn't necessarily a precise  
20 mapping between somebody's income level and their  
21 Medicaid eligibility at the present moment. That will  
22 depend on where things are and what the eligibility  
23 requirements are in the State.

24 JUSTICE SOTOMAYOR: But those people  
25 below --

1                   GENERAL VERRILLI: But, as a general matter,  
2 for people below the poverty line, it's almost  
3 inconceivable that they're ever going to be subject to  
4 the penalty, and they would, after the Act's Medicaid  
5 reforms go into place, be eligible for Medicaid.

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

16                   GENERAL VERRILLI: Yes.

17                   JUSTICE BREYER: -- it's in a different  
18 chapter, et cetera.

19                   Is that what the heart of what you're  
20 saying?

21                   GENERAL VERRILLI: That's the essence of it.  
22 They called it a penalty. They didn't give any other  
23 textural instruction in the Affordable Care Act or in  
24 the Internal Revenue Code that that penalty should be  
25 treated as a tax --

1 CHIEF JUSTICE ROBERTS: Well, except you --

2 GENERAL VERRILLI: -- for Anti-Injunction  
3 Act purposes.

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

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

17 JUSTICE ALITO: After this takes effect,  
18 there may be a lot of people who are assessed the  
19 penalty and disagree either with whether they should be  
20 assessed the penalty at all or with the calculation of  
21 the amount of their penalty. So, under your  
22 interpretation of the Act, all of them can now go to  
23 court? None of them are barred by the Anti-Injunction  
24 Act?

25 GENERAL VERRILLI: Those are two different

1 things, Justice Alito. I think for reasons that  
2 Justice Kennedy, I think, suggested in one of his  
3 questions to Mr. Long, all of the other doctrines,  
4 exhaustion of remedies and related doctrines, would  
5 still be there, and the United States would rely on them  
6 in those circumstances. And -- and so, I don't think  
7 the answer is that they can all go to court, no.

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

9 JUSTICE ALITO: Two former -- two former  
10 commissioners of the IRS have filed a brief saying that  
11 your interpretation is going to lead to a flood of  
12 litigation. Are they wrong on that?

13 GENERAL VERRILLI: Yes. We don't -- you  
14 know -- we've taken this position after very careful  
15 consideration, and we've assessed the institutional  
16 interests of the United States, and we think we're in  
17 the right place.

18 JUSTICE SOTOMAYOR: But tell me something,  
19 why isn't this case subject to the same bars that --  
20 that you list in your brief? The Tax Court, at least so  
21 far, considers constitutional challenges to statutes.  
22 So, why aren't we -- why isn't this case subject to a  
23 dismissal for failure to exhaust?

24 GENERAL VERRILLI: Because we don't --  
25 because the exhaustion would go to the individual amount

1 owed, we think, and that's a different situation from  
2 this case.

3 If the Court has no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you, General.

5 GENERAL VERRILLI: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Katsas.

7 ORAL ARGUMENT OF GREGORY G. KATSAS

8 ON BEHALF OF THE RESPONDENTS

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

11 Let me begin with the question whether the  
12 Anti-Injunction Act is jurisdictional.

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

20 JUSTICE GINSBURG: They are different  
21 things.

22 JUSTICE SOTOMAYOR: Big difference,  
23 though --

24 JUSTICE GINSBURG: This says  
25 "immediately" -- the Reed Elsevier statute says



1 immediately after instituted unless a copyright is  
2 registered.

3 MR. KATSAS: Unless the copyright is  
4 registered. And this goes -- this goes to the character  
5 of the lawsuit. The statute in Reed Elsevier says  
6 register your copyright and then come back to court.

7 JUSTICE GINSBURG: So, why isn't that like a  
8 filing fee? Before you can maintain a suit for  
9 copyright infringement, you have to register your  
10 copyright?

11 MR. KATSAS: It -- it's a precondition to  
12 filing suit. The -- the analogous precondition here is  
13 pay your taxes and then come back to court. The point  
14 is --

15 JUSTICE SOTOMAYOR: No, that -- that's not  
16 true. The suit here has nothing to do with hearing the  
17 action. It has to do with the form of relief that  
18 Congress is barring. It's not permitting -- it is not a  
19 tax case; you can come in afterwards. It's not  
20 permitting the court to exercise what otherwise would be  
21 one of its powers.

22 MR. KATSAS: It has to be the same  
23 challenge, Justice Sotomayor, or else South  
24 Carolina v. Regan would say the Anti-Injunction Act  
25 doesn't apply. You are right that once you file -- once

1 you pay your taxes and then file the refund action, the  
2 act of filing the taxes converts the suit from one  
3 seeking prospective relief into one seeking money  
4 damages. And in that sense, you could think of the  
5 statute as a remedial limitation on the courts.

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

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

17 MR. KATSAS: The suit is being delayed, I  
18 think is the right way of looking at it. The  
19 jurisdictional apparatus in the district court is  
20 present. Prospective relief under 1331, money damages  
21 action under 1346. If the Anti-Injunction Act were  
22 jurisdiction-ousting, one might have expected it to be  
23 in Title 28 and to qualify those statutes and to use  
24 jurisdictional limits.

25 JUSTICE SOTOMAYOR: So, how do you deal with

1 this case and our Gonzalez -- our recent Gonzalez case,  
2 where we talked about --

3 MR. KATSAS: Right.

4 JUSTICE SOTOMAYOR: -- the language of the  
5 COA statute that no appeal will be heard absent the  
6 issuance of?

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

12 You have five unanimous opinions in the last  
13 decade in which you have strongly gone the other  
14 direction on what counts as jurisdictional.

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

18 MR. KATSAS: No, you came very close. In  
19 Henderson, Justice Sotomayor, you said that Bowles,  
20 which is akin to Thaler, is explained by the special  
21 rule and understandings governing appeals from one  
22 Article III court to another. And you specifically said  
23 that it does not apply to situations involving a party  
24 seeking initial judicial review of agency action, which  
25 is what we have here.

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

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

10           JUSTICE SOTOMAYOR: Counsel, all of those --  
11 all of that in particular --

12           MR. KATSAS: You did rely on that in Reed  
13 Elsevier as one consideration.

14           JUSTICE SOTOMAYOR: And we haven't relied on  
15 it in other cases.

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

21           JUSTICE SOTOMAYOR: Many of which themselves  
22 speak in very clear jurisdictional language.

23           MR. KATSAS: Well, some of them have no  
24 jurisdictional language at all, and not a single one of  
25 them uses the word "jurisdiction" to describe the

1 ability of the court to restrain the assessment and  
2 collection of taxes, which is what one would have  
3 expected --

4 JUSTICE BREYER: Basically, it begs the  
5 difference -- language is relevant. There are a lot of  
6 relevant things. But one thing that's relevant in my  
7 mind is that taxes are, for better or for worse, the  
8 life's blood of government.

9 MR. KATSAS: Yes.

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

19 And so there is strong reason that is there.  
20 You tried to apply that reason to the copyright law.  
21 You can't find it. Registration for the copyright  
22 register is not the life's blood of anything. Copyright  
23 exists regardless. So the reasoning isn't there.

24 The language -- I see the similarity of  
25 language. I've got that. But it's the reasoning, the

1 sort of underlying reason for not wanting a waiver here  
2 that --that is -- has a significant role in my mind of  
3 finding that it is jurisdictional. Plus the fact that  
4 we have said it nonstop since that Northrop or whatever  
5 that other case is.

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

15 JUSTICE BREYER: That's fine. I just wanted  
16 to ask the question in case you wanted to answer the  
17 policy question.

18 MR. KATSAS: As to policy -- as to policy, I  
19 think Helvering against Davis is the refutation of this  
20 view. It is true that in most cases, the Government  
21 doesn't want and Congress doesn't want people coming  
22 into court. But Davis shows there may be some cases  
23 including, for instance, constitutional challenges to  
24 landmark Federal statutes where the Government sensibly  
25 decides that its revenue-raising purposes are better

1 served by allowing a party to come into court and  
2 waiving its defense. That's what the Solicitor General  
3 did in Davis, and this Court accepted that waiver.

4 As for prior cases, we have the holding in  
5 Davis and the holding in all of the equitable exception  
6 cases like Williams Packing, the Government --

7 JUSTICE SOTOMAYOR: So why don't we say --  
8 why don't we say it's jurisdictional except when the  
9 Solicitor General waives?

10 MR. KATSAS: You have used --

11 JUSTICE SOTOMAYOR: Why would that not  
12 promote Congress's policy of ensuring -- or Congress,  
13 explicitly says --

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

16 JUSTICE SOTOMAYOR: Yes. It's a  
17 contradiction in terms. I don't disagree. I don't  
18 disagree.

19 MR. KATSAS: It is a contradiction in terms.  
20 All of your cases analyze the situation as if the  
21 statute is jurisdictional, then it's not subject to  
22 waiver. If you were to construe this as such a one-of  
23 unique statute, it seems to me we would still win  
24 because the Solicitor General with full knowledge of the  
25 Anti-Injunction Act argument available to him

1 affirmatively gave it up. This is not just a forfeiture  
2 where a Government lawyer is -- through inadvertence  
3 fails to raise an argument. This is a case where the  
4 Government --

5 JUSTICE SOTOMAYOR: They raised it and then  
6 gave it up.

7 MR. KATSAS: They made it below. They know  
8 what it is; and not only are they not pursuing it here,  
9 they are affirmatively pursuing an argument on the other  
10 side.

11 JUSTICE KAGAN: Mr. Katsas, is your basic  
12 position that when we are talking about the jurisdiction  
13 of the district courts, a statute has to say it's  
14 jurisdictional to be jurisdictional?

15 MR. KATSAS: I wouldn't go quite that far.  
16 I think at a minimum, it has -- it has to either say  
17 that or at least be directed to the courts which is a  
18 formulation you have used in your cases and which is the  
19 formulation that Congress used in the Tax Injunction  
20 Act, but did not use in this Statute.

21 JUSTICE KAGAN: Well, how would -- I mean, I  
22 suppose one could try to make a distinction between this  
23 case and Reed Elsevier by focusing on the difference  
24 between instituting something and maintaining something,  
25 and suggesting that instituting is more what a litigant



1 does, and maintaining, as opposed to dismissing, is more  
2 of what judge does.

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

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

9 The purpose of this lawsuit is to challenge  
10 a requirement -- a Federal requirement to buy health  
11 insurance. That requirement itself is not a tax. And  
12 for that reason alone, we think the Anti-Injunction Act  
13 doesn't apply.

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

18 CHIEF JUSTICE ROBERTS: The whole point --  
19 the whole point of the suit is to prevent the collection  
20 of penalties.

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

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

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

3                   CHIEF JUSTICE ROBERTS: It's a command. A  
4 mandate is a command. Now, if there is nothing behind  
5 the command, it's sort of, well, what happens if you  
6 don't follow the mandate? And the answer is nothing, it  
7 seems very artificial to separate the punishment from  
8 the crime.

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

15                   They are put in separate sections. The  
16 mandate is described as a "legal requirement" no fewer  
17 than 20 times, three times in the operative text and 17  
18 times in the findings. It's imposed through use of a  
19 mandatory verb "shall." The requirement is very well  
20 defined in the statute, so it can't be sloughed off as a  
21 general exhortation, and it's backed up by a penalty.

22                   Congress then separated out mandate  
23 exceptions from penalty exceptions. It defined one  
24 category of people not subject to the mandate. One  
25 would think those are the category of people as to whom

1 Congress is saying: You need not follow this law. It  
2 then defined a separate category of people not subject  
3 to the penalty, but subject to the mandate. I don't  
4 know what that could mean other than --

5 CHIEF JUSTICE ROBERTS: Why would you have a  
6 requirement that is completely toothless? You know, buy  
7 insurance or else. Or else what? Or else nothing.

8 MR. KATSAS: Because Congress reasonably  
9 could think that at least some people will follow the  
10 law precisely because it is the law. And let me give  
11 you an example of one category of person that might  
12 be -- the very poor, who are exempt from the penalty but  
13 subject to the mandate. Mr. Long says this must be a  
14 mandate exemption because it would be wholly harsh and  
15 unreasonable for Congress to expect people who are very  
16 poor to comply with the requirement to obtain health  
17 insurance when they have no means of doing so.

18 That gets things exactly backwards. The  
19 very poor are the people Congress would be most  
20 concerned about with respect to the mandate to the  
21 extent one of the justifications for the mandate is to  
22 prevent emergency room cost shifting when people receive  
23 uncompensated care. So they would have had very good  
24 reason to make the very poor subject to the mandate, and  
25 then they didn't do it in a draconian way; they gave the

1 very poor a means of complying with the insurance  
2 mandate, and that is through the Medicaid system.

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

6 MR. KATSAS: Yes, I think that person would,  
7 because that person is injured by compliance with the  
8 mandate.

9 JUSTICE KAGAN: What would that look like?  
10 What would the argument be as to what the injury was?

11 MR. KATSAS: The injury -- when that subject  
12 to the mandate, that person is required to purchase  
13 health insurance. That is a forced acquisition of an  
14 unwanted good. It's a classic pocketbook injury.

15 But even if I'm wrong about that question,  
16 Justice Kagan, the question of who has standing to bring  
17 the challenge that we seek to bring seems to me very  
18 different -- your hypothetical plaintiff is very  
19 different from the actual plaintiffs. We have  
20 individuals who are planning for compliance in order to  
21 avoid a penalty, which is what their affidavits say.  
22 And we have the States, who will be subject no doubt to  
23 all sorts of adverse ramifications if they refuse to  
24 enroll in Medicaid the people who are forced into  
25 Medicaid by virtue of the mandate.

1           So we don't have the problem of no adverse  
2 consequences in the case.

3           And then, we have the separate distinction  
4 between the question of who has Article III standing in  
5 order to maintain a suit and the question of who is  
6 subject to a legal obligation. And you've said in your  
7 cases that even if there may be no one who has standing  
8 to challenge a legal obligation like the incompatibility  
9 clause or something, that doesn't somehow convert the  
10 legal obligation into a legal nullity.

11           Finally, with respect to the States, even if  
12 we are wrong about everything I've said so far, the  
13 States clearly fall within the exception recognized in  
14 South Carolina against Regan. They are injured by the  
15 mandate because the mandate forces 6 million new people  
16 onto their Medicaid rolls. But they are not directly  
17 subject to the mandate, nor could they violate the  
18 mandate and incur a penalty.

19           JUSTICE KAGAN: Could I just understand, Mr.  
20 Katsas, when the States say that they are injured, are  
21 they talking about the people who are eligible now, but  
22 who are not enrolled? Or are they also talking about  
23 people who will become newly eligible?

24           MR. KATSAS: It's people who will enroll --  
25 people who wouldn't have enrolled had they been given a

1 voluntary choice.

2 JUSTICE KAGAN: But who are eligible now.

3 MR. KATSAS: That's the largest category. I  
4 think there could be future eligibles who would enroll  
5 because they are subject to a legal obligation but  
6 wouldn't have enrolled if given a voluntary choice.

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

12 JUSTICE KAGAN: But that does seem odd, to  
13 suggest that the State is being injured because people  
14 who could show up tomorrow with or without this law  
15 will -- will show up in greater numbers. I mean,  
16 presumably the State wants to cover people whom it has  
17 declared eligible for this benefit.

18 MR. KATSAS: They -- they could, but they  
19 don't. What the State wants to do is make Medicaid  
20 available to all who are eligible and choose to obtain  
21 it. And in any event --

22 JUSTICE GINSBURG: Why would somebody not  
23 choose to obtain it? Why -- that's one puzzle to me.  
24 There's this category of people who are Medicaid  
25 eligible; Medicaid doesn't cost them anything. Why

1 would they resist enrolling?

2 MR. KATSAS: I -- I don't know, Justice  
3 Ginsburg. All I know is that the difference between  
4 current enrollees and people who could enroll but have  
5 not is, as I said, on the -- is a \$600 million delta.  
6 And --

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

10 MR. KATSAS: It's possible, but all we're  
11 talking about right now is the standing of the States.  
12 And the only arguments made against the standing of the  
13 States -- I mean, there is a classic pocketbook injury  
14 here. The only arguments made about -- against the  
15 standing of the States are, number one, this results  
16 from third-party actions. That doesn't work, because  
17 the third-party actions are not unfettered in -- in the  
18 sense of Lujan; they are coerced in the sense of  
19 Bennett v. Spear. Those people are enrolling because  
20 they are under a legal obligation to do so.

21 The second argument made against the States'  
22 standing is that the States somehow forfeit their  
23 ability to challenge the constitutionality of a  
24 provision of Federal law because they voluntarily choose  
25 to participate --

1 JUSTICE SOTOMAYOR: I'm -- I'm a little bit  
2 confused. And this is what I'm confused about.  
3 There -- there is a challenge to the individual mandate.

4 MR. KATSAS: Yes.

5 JUSTICE SOTOMAYOR: All right. What is --  
6 the fact that the State is challenging Medicaid, how  
7 does it give the State standing to challenge an  
8 obligation that is not imposed on the State in any way?

9 MR. KATSAS: The -- the principal theory for  
10 State standing is that States are challenging the  
11 mandate because the mandate injures them when people are  
12 forced to enroll in Medicaid.

13 Now, it is true they are not directly  
14 subject to the mandate, but --

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

16 MR. KATSAS: Okay. Let me -- let me try  
17 to --

18 JUSTICE SOTOMAYOR: -- a little confused by.

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

21 CHIEF JUSTICE ROBERTS: Go ahead.

22 MR. KATSAS: In South Carolina v. Regan, the  
23 State was not subject to the tax at issue. The State  
24 was harmed because -- as the issuer of the bonds, and  
25 the bond holders were the ones subject to the tax. So



1 the State is injured not because it is the direct object  
2 of the Federal tax, but because of its relationship to  
3 the regulated party as issuer/bond holder.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Katsas.

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

7 CHIEF JUSTICE ROBERTS: Mr. Long, you have 5  
8 minutes remaining.

9 REBUTTAL ARGUMENT OF ROBERT A. LONG  
10 FOR COURT-APPOINTED AMICUS CURIAE

11 MR. LONG: Everyone agrees that the section  
12 5000A penalty shall be assessed and collected in the  
13 same manner as taxes. And the parties' principal  
14 argument why that does not make the Anti-Injunction Act  
15 applicable is that, well, that simply goes to the  
16 Secretary's activities.

17 And I would simply ask, if -- if you look at  
18 chapters 63 and 64 of the Internal Revenue Code, which  
19 are the chapters on assessment and collection, they are  
20 not just addressed to the Secretary. There are many  
21 provisions in there that are addressed to courts and  
22 indeed talk about this interaction, the very limited  
23 situations in which courts are permitted to restrain the  
24 assessment and collection of taxes.

25 There was a statement made that there

1 aren't -- and many of the exceptions to the  
2 Anti-Injunction Act are in the assessment and collection  
3 provisions -- there was a statement made that none of  
4 these directly confer jurisdiction to restrain the  
5 assessment and collection of taxes. That's not true.  
6 In footnote 11 of our opening brief, we cite several.  
7 I'll simply mention section 6213 as an example.

8           That says -- I quote: "Notwithstanding the  
9 provisions of section 7421(a), the making of such  
10 assessment or the beginning of such proceeding or levy  
11 during the time such prohibition is in force may be  
12 enjoined by a proceeding in the proper court, including  
13 the Tax Court. The Tax Court shall have no jurisdiction  
14 to enjoin any action or proceeding or order any refund  
15 under this subsection unless a timely petition for  
16 redetermination of the deficiency has been filed, and  
17 then only in respect of the deficiency that is the  
18 subject of such petition."

19           JUSTICE BREYER: And all that's going to  
20 really what I think Congress's intent was meant to be in  
21 sticking the collection thing into chapter 68, and --  
22 and it's certainly an argument in your favor.

23           The -- the over-arching thing in my mind is  
24 it's -- it's up to Congress, within leeway. And they  
25 did not use that word "tax," and they did have a couple

1 of exceptions. And it is true that all this language  
2 that you quote -- you know, the first two sentences and  
3 so forth, it talks about the use of tax in the IRC. It  
4 talks about the penalties and liabilities provided by  
5 this subchapter. And we look over here and it's a  
6 penalty and liability provided by a different law, which  
7 says collect it through the subchapter, and it has  
8 nothing to do with the IRC. See?

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

13           Are you following me?

14           You see? I'm trying to get you to focus on  
15 that kind of argument.

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

21           JUSTICE BREYER: Yes, it is.

22           MR. LONG: -- as the penalty in that  
23 subchapter, and those penalties are collected in the  
24 same manner as taxes.

25           JUSTICE BREYER: Yes, yes.

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

4           The -- the refund statute that does  
5 specifically refer to penalties, that has nothing to do  
6 with this argument that it's assessed and collected in  
7 the same manner as a tax. That would simply go to the  
8 point that well, you can't just call it a tax, because  
9 they've referred to it as a penalty.

10           And finally, on jurisdiction, you know, I  
11 think the key point is we have a long line of this  
12 Court's decisions that's really been ratified by  
13 Congress, with all these exceptions in jurisdictional  
14 terms.

15           As I read Bowles and John R. Sand & Gravel,  
16 the -- the gist of those decisions was not any special  
17 sort of rule about appeals, it's that when we have that  
18 situation, which I would submit applies as much to the  
19 collection of Federal taxes as it does to appeals from  
20 Federal district courts when we have this degree of --  
21 of precedent, including precedent from Congress in the  
22 form of amendments to this Anti-Injunction Act, that  
23 should be -- the presumption should be that this is  
24 jurisdictional.

25           If there are no further questions.

1 CHIEF JUSTICE ROBERTS: Mr. Long, you were  
2 invited by this Court to defend the proposition that the  
3 Anti-Injunction Act barred this litigation. You have  
4 ably carried out that responsibility, for which the  
5 Court is grateful.

6 MR. LONG: Thank you.

7 CHIEF JUSTICE ROBERTS: We will continue  
8 argument in this case tomorrow.

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

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