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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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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  
ON BEHALF OF THE 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 derivative triggers the  
3 Anti-Injunction Act which provides that "no suit for the  
4 purpose of restraining the assessment or collection of  
5 any tax may be maintained in any court by any person."

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

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

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

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

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

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

22           Now if -- if the Anti-Injunction Act does  
23 not apply here, none of those rules apply. That's not  
24 just for this case; it will be for every challenge to a  
25 section 5000A penalty going forward. The -- the

1 taxpayer will be able to go to court at any time without  
2 exhausting administrative remedies; there will be none  
3 of the limitations that apply in terms of you have to  
4 wait for the Secretary to make the --

5 JUSTICE KENNEDY: Why -- why will the  
6 administrative remedies rule not be applicable --  
7 exhaustion rule not be applicable?

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

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

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

22 JUSTICE KENNEDY: Yes, yes.

23 MR. LONG: -- about taxes. And the code  
24 says, first it says you must pay the tax first and then  
25 litigate. So that's the baseline. And then in addition

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

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

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

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

1 series of subsequent cases -- Bob Jones. And so I would  
2 say effectively, the Davis case has been overruled by  
3 subsequent decisions of this Court.

4 JUSTICE GINSBURG: Mr. Long, why don't we  
5 simply follow the statutory language? I know that  
6 you've argued that the Davis case has been overtaken by  
7 later cases, but the language of the Anti-Injunction Act  
8 is "no suit shall be maintained." It's remarkably  
9 similar to the language in -- that was at issue in Reed  
10 Elsevier: "No civil action for infringement shall be  
11 instituted." And that formulation, "no suit may be  
12 maintained," contrasts with of the Tax Injunction Act,  
13 that says the district court shall not enjoin. That Tax  
14 Injunction Act is the same pattern as 2283, which says  
15 "courts of the United States may not stay a proceeding  
16 in State court."

17 So both of those formulas, the TIA and the  
18 no injunction against proceedings in State court, are  
19 directed to "court." The Anti-Injunction Act, like the  
20 statute at issue in Reed Elsevier, says "no suit shall  
21 be maintained," and it has been argued that that is  
22 suitor-directed in contrast to court-directed.

23 MR. LONG: Right. Well, I mean, this Court  
24 has said several times that the Tax Injunction Act was  
25 based on the Anti-Injunction Act. You are quite right,



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

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

11 MR. LONG: Well, it's -- I mean -- perhaps a  
12 party could initiate an action without the act of  
13 cooperation of the court, but to maintain it from  
14 beginning to end again requires the court's cooperation.  
15 And -- and even if -- I mean, if the Court were inclined  
16 to say as an initial matter if this statute were coming  
17 before us for the first time today, given all of your  
18 recent decisions on jurisdiction, that you might be  
19 inclined to say this is not a jurisdictional statute.

20 A lot of water has gone over the dam here.  
21 The Court has said multiple times that this is a  
22 jurisdictional statute. Congress has not disturbed  
23 those decisions. To the contrary --

24 JUSTICE SOTOMAYOR: Counsel --

25 JUSTICE ALITO: Well, Congress said that

1 many times, but is there any case in which the result  
2 would have been different if the Anti-Injunction Act  
3 were not viewed as jurisdictional but instead were  
4 viewed as a mandatory claims processing -- rule?

5 MR. LONG: There -- there are certainly a  
6 number of cases where the Court dismissed saying it is  
7 jurisdictional.

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

13 JUSTICE ALITO: Well, the clearest -- the  
14 clearest way of distinguishing between the  
15 jurisdictional provision and a mandatory claims  
16 processing rule is whether it can be waived and whether  
17 the Court feels that it has an obligation to raise the  
18 issue Sua Sponte.

19 Now, if there are a lot of cases that call  
20 it jurisdictional, but none of them would have come out  
21 differently if the Anti-Injunction Act were simply a  
22 mandatory claims processing rule, you have that on one  
23 side.

24 And on the other side, you have Davis, where  
25 the Court accepted a waiver by the Solicitor General;

1 the Sunshine Anthracite coal case, where there also was  
2 a waiver; and, there's the Williams Packing case, which  
3 is somewhat hard to understand as viewing the  
4 Anti-Injunction Act as a jurisdictional provision.

5 The Court said that there could be a  
6 suit if -- there is no way the government could win, and  
7 the Plaintiff would suffer irreparable harm. Now,  
8 doesn't that sound like an equitable exception to the  
9 Anti-Injunction Act?

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

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

21 CHIEF JUSTICE ROBERTS: Well, it seems --  
22 you can't separate those two points. The idea that  
23 Congress has acquiesced in what we have said only helps  
24 you if what we have said is fairly consistent. And you,  
25 yourself, point out in your brief that we've kind of

1 gone back and forth on whether this is a jurisdictional  
2 provision or not. So, even if Congress acquiesced in  
3 it, I'm not sure what they acquiesced in.

4 MR. LONG: Well, what you have said,  
5 Mr. Chief Justice, has been absolutely consistent for  
6 50 years, since the Williams Packing case. The period  
7 of inconsistency was after the first 50 years, since the  
8 statute was enacted in 1867. And there was a period, as  
9 I said, when the Court was allowing extraordinary  
10 circumstances exceptions and equitable exceptions, but  
11 then, very quickly, it cut back on that. And since --  
12 and since Williams Packing, you have been utterly  
13 consistent --

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

20 MR. LONG: Well, again, I mean, I think the  
21 best understanding of South Carolina v. Regan is not  
22 that its an equitable exception, but it's the court  
23 interpreting a jurisdictional statute as it would  
24 interpret any statute in light of its purpose, and  
25 deciding in that very special case, it's a very narrow

1 exception, where the --

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

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

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

18 MR. LONG: No. No, Justice Sotomayor,  
19 because in many of these amendments which have come in  
20 the '70s and the '90s and the 2000's, Congress has  
21 actually framed the limited exceptions to the  
22 Anti-Injunction Act in jurisdictional terms. And it's  
23 written many of the express exceptions by saying  
24 notwithstanding Section 7421 --

25 JUSTICE SOTOMAYOR: But doesn't that just

1 prove that it knows that the Court will impose a claim  
2 processing rule in many circumstances, and so, in those  
3 in which it specifically doesn't want the Court to, it  
4 has to be clearer?

5 MR. LONG: Well, but Congress says,  
6 notwithstanding 7421, the Court "shall have jurisdiction  
7 to restrain the assessment and collection of taxes in  
8 very limited" --

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

15 MR. LONG: Right. Well, first of all, I  
16 think you would be saying that for the refund statute,  
17 as well as for the Anti-Injunction Act -- which has very  
18 similar wording, so if the Anti-Injunction Act is not  
19 jurisdictional, I think that's also going to apply to  
20 the refund statute, the statute that says you have to  
21 first ask for a refund and then file, you know, within  
22 certain time -- so it would be -- it would be both of  
23 those statutes. And, you know, we are dealing with  
24 taxes here, if people --

25 JUSTICE SOTOMAYOR: That wasn't my question.

1 MR. LONG: I'm sorry.

2 JUSTICE SOTOMAYOR: My question was if we  
3 deem this a mandatory claim processing rule --

4 MR. LONG: Right.

5 JUSTICE SOTOMAYOR: -- what cases do you  
6 imagine courts will reach on what grounds? Assuming the  
7 government does its job and comes in and raises the AIA  
8 as an immediate defense --

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

10 JUSTICE SOTOMAYOR: -- where can a Court  
11 then reach the question, despite --

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

18 JUSTICE SOTOMAYOR: Assumes the lack of  
19 competency of the government, which I don't, but what  
20 other types of cases?

21 JUSTICE SCALIA: Mr. Long, I don't think you  
22 are going to come up with any, but I think your response  
23 is you could say that about any jurisdictional rule. If  
24 it's not jurisdictional, what's going to happen is you  
25 are going to have an intelligent federal court deciding

1 whether you are going to make an exception. And there  
2 will be no parade of horribles because all federal  
3 courts are intelligent.

4 So it seems to me it's a question you can't  
5 answer. It's a question which asks "why should there be  
6 any jurisdictional rules?" And you think there should  
7 be.

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

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

20 Now, here, Congress has nowhere used the  
21 word "tax." What it says is penalty. Moreover, this is  
22 not in the Internal Revenue Code "but for purposes of  
23 collection."

24 And so why is this a tax? And I know you  
25 point to certain sentences that talk about taxes within



1 the code --

2 MR. LONG: Right.

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

5 MR. LONG: Right.

6 JUSTICE BREYER: -- so why does it fall  
7 within that word?

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

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

18 It says "in the same manner as." It is then  
19 attached to chapter 68, when that -- it that references  
20 that as "being the manner of." Well, that it's being  
21 applied -- or if it's being collected in the same manner  
22 as a tax doesn't automatically make it a tax,  
23 particularly since the reasons for the AIA are to  
24 prevent interference with revenue sources. And here, an  
25 advance attack on this does not interfere with the

1 collection of revenues.

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

5 MR. LONG: So specifically on the argument  
6 that it -- it is actually a tax, even setting aside the  
7 point that it should be assessed and collected in the  
8 same manner as a tax.

9 The Anti-Injunction Act uses the term "tax";  
10 it doesn't define it. Somewhat to my surprise, "tax" is  
11 not defined anywhere in the Internal Revenue Code. In  
12 about the time that Congress passed the Anti-Injunction  
13 Act, tax had a very broad definition. It's broad enough  
14 to include this exaction, which is codified in the  
15 Internal Revenue Code. It's part of the taxpayers'  
16 annual income tax return. The amount of the liability  
17 and whether you owe the liability is based in part on  
18 your income. It's assessed and collected by the IRS.

19 JUSTICE SCALIA: There -- there is at least  
20 some doubt about it, Mr. Long, for the reasons that  
21 Justice Breyer said, and I -- I thought that we -- we  
22 had a principle that ousters of jurisdiction are -- are  
23 narrowly construed, that, unless it's clear, courts are  
24 not deprived of jurisdiction, and I find it hard to  
25 think that this is clear. Whatever else it is, it's

1 easy to think that it's not clear.

2 MR. LONG: Well, I mean, the Anti-Injunction  
3 Act applies not only to every tax in the code, but, as  
4 far as I can tell, to every tax penalty in the code.

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

16 MR. LONG: Well, in -- in Bob Jones the  
17 Court said that they had gotten out of the business of  
18 trying to determine whether an exaction is primarily  
19 revenue raising or primarily regulatory. And this one  
20 certainly raises -- is expected to raise very  
21 substantial amounts of revenues, at least \$4 billion a  
22 year by the --

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

25 MR. LONG: That's --

1 JUSTICE SOTOMAYOR: Here we have one where  
2 the Congress is not denominating it as a tax; it's  
3 denominating it as a penalty.

4 MR. LONG: That's -- that's absolutely  
5 right, and that's obviously why, if it were called a  
6 tax, there would be absolutely no question that the  
7 Anti-Injunction Act applies.

8 JUSTICE SOTOMAYOR: Absolutely. But even  
9 the section of the Code that you referred to previously,  
10 the one following 7421, the AIA, it does very clearly  
11 make a difference -- 7422 -- make a difference between  
12 tax and penalties. It's very explicit.

13 MR. LONG: Yes, that's -- it does, that is  
14 correct, and there are many other places in the Code  
15 where --

16 JUSTICE BREYER: The best collection I've  
17 found in your favor, I think, is in Mortimer Caplin's  
18 brief on page 16, 17. He has a whole list. All right.  
19 So -- I got my law clerk to look all those up. And it  
20 seems to me that they all fall into the categories of  
21 either, one, these are penalties that were penalties  
22 assessed for not paying taxes, or, two, they involve  
23 matters that were called by the court taxes, or, three,  
24 in some instances they were deemed by the Code to be  
25 taxes.

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

10           Now I got that. Here it's not at stake and  
11 here are all the differences I just mentioned. So I ask  
12 that because I want to hear your response.

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

21           JUSTICE KAGAN: Mr. Long, aren't there  
22 places in this Act -- fees and penalties -- that were  
23 specifically put under the Anti-Injunction Act? There  
24 is one on health care plans, there is one on  
25 pharmaceutical manufacturers, where Congress

1 specifically said the Anti-Injunction Act is triggered  
2 for those. It does not say that here. Wouldn't that  
3 suggest that Congress meant for a different result to  
4 obtain?

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

7 JUSTICE KAGAN: No, but it -- it in section  
8 9008 and in section 9010 --

9 MR. LONG: Right.

10 JUSTICE KAGAN: -- it specifically referred  
11 to the part of the Code where the Anti-Injunction Act  
12 is.

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

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

1 that language and say, "oh, here's Congress saying they  
2 want the Anti-Injunction Act to apply." They are  
3 actually doing more than that. And, yes, I grant you,  
4 you could look at section 5000A, the individual coverage  
5 requirement, and say, well, they could have been clearer  
6 about saying the Anti-Injunction Act applied, and that's  
7 certainly true, but, again, they were trying to  
8 accomplish a lot. Maybe --

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

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

22 MR. LONG: It does strike me, honestly, as a  
23 bit unusual, but this is an old statute. I mean, this  
24 -- the core language is essentially unchanged since  
25 1867, and, you know, I think that's part of the

1 explanation for it. And, again, it's, you know, become  
2 the center of a series of provisions that very carefully  
3 control the circumstances in which litigation about  
4 federal taxes can take place.

5 JUSTICE GINSBURG: Mr. Long, there's another  
6 argument that has been made that I would like you to  
7 address, and that is all this talk about tax penalties  
8 is all beside the point because this suit is not  
9 challenging the penalty. This is a suit that is  
10 challenging the must-buy provision, and the argument is  
11 made that, if, indeed, "must-buy" is constitutional,  
12 than these complainants will not resist the penalty.

13 So what they're seeking is a determination  
14 that that "must-buy" requirement, stated separately from  
15 penalty, that "must-buy" is unconstitutional, and, if  
16 that's so, that's the end of the case; if it's not so,  
17 they are not resisting the penalty.

18 MR. LONG: Well, I think that argument  
19 doesn't work for two reasons. I mean, first, if you  
20 look at the Plaintiff's own complaint, they clearly  
21 challenge both the minimum coverage requirement and the  
22 penalty. At page 122 of the Joint Appendix they  
23 challenge the requirement that the individuals obtain  
24 health care coverage or pay a penalty.

25 JUSTICE ALITO: Why is that?



1 JUSTICE GINSBURG: If that's -- if that's  
2 the problem, it's easier to amend the complaint. They  
3 can just take that out of the complaint. So it can't  
4 turn on that.

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

13 So -- so, first, I mean, I think these  
14 Plaintiffs would not be satisfied if the Court were to  
15 render a judgment saying the minimum coverage  
16 requirement is invalidated; the penalty, however,  
17 remains standing. Anybody who doesn't have insurance  
18 has to pay the penalty. Then they would have to pay a  
19 penalty equal to the cost of insurance and they wouldn't  
20 even have insurance. So I don't think that would be --

21 JUSTICE ALITO: Well, they say they want to  
22 obey the law, and they say that your argument puts them  
23 in the position of having to disobey the law in order to  
24 obtain review of their claim. And what is your answer  
25 to that?

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

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

19           JUSTICE ALITO: Well, let me take us back to  
20 Justice Kennedy's question about the "for the purpose  
21 of" language. I take it you interpret the statute to  
22 mean the following: "For the purpose of" means having  
23 the effect of. Is that correct?

24           MR. LONG: Well -- - well, I mean, this  
25 Court in the Bob Jones case, where a similar kind of

1 argument was being made by the plaintiff in that case,  
2 said: Look, you know, where the -- where it's  
3 inevitable that this is what the suit is about, they're  
4 sort of two sides of the same coin, that clearly is a  
5 primary purpose of the suit. And it's -- and you can't  
6 by clever pleading get away from that. That's just the  
7 nature of the situation.

8 JUSTICE KAGAN: But, Mr. Long, aren't you  
9 trying to rewrite the statute in a way? The statute has  
10 two sections. One is the you have to have insurance  
11 section and the other is the sanction. The statute has  
12 two different sets of exceptions corresponding to those  
13 two different sections. You are trying to suggest that  
14 the statute says: Well, it's your choice; either buy  
15 insurance or pay a -- or pay a fee.

16 But that's not the way the statute reads.  
17 And Congress, it must be supposed, you know, made a  
18 decision that that shouldn't be the way the statute  
19 reads, that it should instead be a regulatory command  
20 and a penalty attached to that command.

21 MR. LONG: Well, I would not argue that this  
22 statute is a perfect model of clarity, but I do think  
23 the most reasonable way to read the entire statute is  
24 that it does impose a single obligation to pay a penalty  
25 if you are an applicable individual and you are not

1 subject to an exemption. And the reason I say that, if  
2 you look at the exemptions from the penalty, the very  
3 first one is you are exempt from the penalty because you  
4 can't afford to purchase insurance. And it just doesn't  
5 seem reasonable to me to interpret the statute as  
6 Congress having said, well, you know, this person is  
7 exempt from paying a penalty because we find they can't  
8 afford to buy insurance, however they still have a legal  
9 obligation to buy insurance. That just doesn't seem  
10 reasonable.

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

14 But again, I would say, you know, that's not  
15 essential to the question we're discussing now of  
16 whether the Anti-Injunction Act applies. Again, you  
17 know, I think --

18 JUSTICE SOTOMAYOR: Could you tell me why  
19 you think the Solicitor General's reading creates a  
20 problem?

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

25 JUSTICE SOTOMAYOR: That it is a

1 jurisdictional bar, but there's an exemption for those  
2 items that Congress has designated solely as penalties  
3 that are not like taxes.

4 MR. LONG: Right. Well, I mean, I think the  
5 Solicitor General's reading would probably create the  
6 fewest problems, as I understand it. I mean, my -- my  
7 main objection to the Solicitor General's reading is I  
8 don't think it makes a whole lot of sense. I mean,  
9 basically the Solicitor General says every penalty in  
10 the Internal Revenue Code, every other penalty in the  
11 Affordable Care Act is -- -

12 JUSTICE SOTOMAYOR: But that's not -- that's  
13 carrying it too far, because he says if a penalty is  
14 designated as a tax by Congress then it's subject to the  
15 AIA, and that's most of the code, the tax code. And he  
16 says for those portions of the Affordable Care Act that  
17 designate things as taxes, the AIA applies. So it's  
18 only -- and I haven't found another statute. I'm going  
19 to ask him if there's another one. It's only for those  
20 statutes in which Congress has designated something  
21 solely as a penalty.

22 MR. LONG: Right.

23 JUSTICE SOTOMAYOR: And not indicated that  
24 it is a tax.

25 MR. LONG: Right.

1 JUSTICE SOTOMAYOR: They don't fall within  
2 the AIA.

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

10 If there are no further questions, I would  
11 like to reserve my time.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.  
13 General Verrilli.

14 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
15 ON BEHALF OF THE PETITIONERS

16 GENERAL VERRILLI: Mr. Chief Justice and may  
17 it please the Court:

18 This case presents issues of great moment,  
19 and the Anti-Injunction Act does not bar the Court's  
20 consideration of those issues. That is so even though  
21 the Anti-Injunction Act is a jurisdictional limit that  
22 serves what this Court described in *Clintwood Elkhorn* as  
23 an exceedingly strong interest in protecting the  
24 financial stability of the Federal Government, and even  
25 though the minimum coverage provision of the Affordable

1 Care Act is an exercise of Congress's taxing power as  
2 well as its commerce power.

3 Congress has authority under the taxing  
4 power to enact a measure not labeled as a tax, and it  
5 did so when it put section 5000A into the Internal  
6 Revenue Code. But for purposes of the Anti-Injunction  
7 Act, the precise language Congress used is  
8 determinative. And there is no language in the  
9 Anti-Injunction Act -- excuse me, no language in section  
10 5000A of the Affordable Care Act or in the Internal  
11 Revenue Code generally that provides a textual  
12 instruction that --

13 JUSTICE ALITO: General Verrilli, today you  
14 are arguing that the penalty is not a tax. Tomorrow you  
15 are going to be back and you will be arguing that the  
16 penalty is a tax.

17 Has the Court ever held that something that  
18 is a tax for purposes of the taxing power under the  
19 Constitution is not a tax under the Anti-Injunction Act?

20 GENERAL VERRILLI: No, Justice Alito, but  
21 the Court has held in a license tax cases that something  
22 can be a constitutional exercise of the taxing power  
23 whether or not it is called a tax. And that's because  
24 the nature of the inquiry that we will conduct tomorrow  
25 is different from the nature of the inquiry that we will

1 conduct today. Tomorrow the question is whether  
2 Congress has the authority under the taxing power to  
3 enact it and the form of words doesn't have a  
4 dispositive effect on that analysis. Today we are  
5 construing statutory text where the precise choice of  
6 words does have a dispositive effect on the analysis.

7 JUSTICE SOTOMAYOR: Well, General, you also  
8 have the Bailey child labor tax cases, because there the  
9 Court said that the tax, which was a prohibitory tax  
10 alone, was a tax subject to the AIA, and then it said it  
11 was beyond the Court's taxing power in a separate case,  
12 correct?

13 GENERAL VERRILLI: Yes. I do think, Justice  
14 Sotomayor, that, with respect to one of the arguments  
15 that my friend from the NFIB has made in of the brief,  
16 that Bailey v. George is a significant problem because I  
17 think their argument on the constitutionality under the  
18 taxing power is essentially that the Affordable Care Act  
19 provision is the same thing as the provision that was  
20 held unconstitutional in Bailey v. Drexel Furniture  
21 Company.

22 JUSTICE SOTOMAYOR: That's a different  
23 issue.

24 GENERAL VERRILLI: But on the same day --  
25 right, but on the same day as Bailey v. Drexel



1 Furniture, the court issued *Bailey v. George*, which held  
2 that the Anti-Injunction Act did bar a challenge to that  
3 provision, even though the Court had concluded that it  
4 was invalid under the tax power.

5           So -- and I think the reason for that has  
6 been -- is clear now after *Williams Packing* and *Bob*  
7 *Jones*, in that in order to find that the Anti-Injunction  
8 Act doesn't apply to something that otherwise would be a  
9 tax that triggers it, you have to conclude essentially  
10 that there is no substantial argument that can be made  
11 in defense of it as a tax. We don't have that here, so  
12 I don't think you can get around the Anti-Injunction Act  
13 if the Court were to read it, as the amicus suggest it  
14 should be read, on that theory. But.

15           JUSTICE GINSBURG: Mr. Verrilli, a basic  
16 question about your argument. If you are right about  
17 the second part, that is for purposes of the statute,  
18 the anti-injunction statute, this penalty does not  
19 constitute a tax, then does the Court need to decide  
20 whether the Anti-Injunction Act in other cases where it  
21 does involve a tax is jurisdictional?

22           GENERAL VERRILLI: No. I -- I apologize if  
23 I'm creating confusion about that, Justice Ginsburg. We  
24 think by far the better route here is to understand the  
25 statute as we have proposed that it be construed as not

1 applying here. From the perspective of the United  
2 States -- and if I could, I'd like to take a minute on  
3 this -- the idea that the Anti-Injunction Act would be  
4 construed as not being a jurisdictional provision is  
5 very troubling, and we don't think it's correct.

6 And I -- I would, if I could follow up on a  
7 question, Justice Ginsburg, that you asked Mr. Long in  
8 terms of the language of the Anti-Injunction Act  
9 7421(a), which can be found at page 16A of the appendix  
10 to our brief.

11 I -- I'd ask the Court to compare that to  
12 the language of the very next provision in the code,  
13 which is on the next page of our statutory appendix,  
14 17A, which is the refund statute which we've talked  
15 about a little bit so far this morning, 7422(a).

16 The refund statute this Court held in Dolan  
17 was jurisdictional, and the Court in both Dolan and  
18 Brockamp held that the statute of limitations that  
19 applies to the refund statute cases is jurisdictional.

20 The language in 7422(a) is virtually  
21 identical to the language in 7421(a) --

22 JUSTICE KENNEDY: That -- that is correct,  
23 although in the refund context, you have the sovereign  
24 immunity problem, in which we presume that has not been  
25 waived.

1                   GENERAL VERRILLI: Right. But I --  
2   7421(a) -- were the same --

3                   JUSTICE KENNEDY: The language is quite  
4 parallel.

5                   GENERAL VERRILLI: And -- originally, they  
6 were the same statutory provision. They were only  
7 separated out later. So I do think that's the strongest  
8 textual indication, Justice Ginsburg, that -- that  
9 7421(a) is jurisdictional.

10                  JUSTICE GINSBURG: But then, General, what I  
11 asked you is, if you're right that this penalty is not  
12 covered by section 7421, if you're right about that, why  
13 should we deal with the jurisdictional question at all?  
14 Because this statute, correct, the way you reading --  
15 read it, doesn't involve a tax that's subject to the  
16 Anti-Injunction Act.

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

19                  JUSTICE GINSBURG: So -- so you -- you agree  
20 that we would not -- if we agree with you about the  
21 correct interpretation of the statute, we need not  
22 decide the jurisdiction.

23                  GENERAL VERRILLI: There would be no reason  
24 to decide the jurisdictional issue.

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

1 answer?

2 (Laughter.)

3 GENERAL VERRILLI: Justice Kennedy, I think  
4 we all want to know the answer to a lot of things in  
5 this case. But -- but I do -- I do think that the  
6 prudent course here is to construe the statute in the  
7 manner that we read it.

8 JUSTICE KENNEDY: But -- but you  
9 indicated -- there was a discussion earlier about why  
10 does the government really care, they have competent  
11 attorneys, et cetera. But -- and you began your  
12 argument by saying it would be very troubling to say  
13 that it's not jurisdictional.

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

20 GENERAL VERRILLI: I think there are two  
21 problems. One is the problem that Justice Scalia  
22 identified, that if it's not jurisdictional, then courts  
23 have authority to craft equitable exceptions. And it  
24 may seem from where we stand now that that authority is  
25 or could be very, very tightly cabined, but if -- if

1 this Court were to conclude that it isn't  
2 jurisdictional, that does empower courts to find other  
3 circumstances in which they might find it equitable to  
4 allow cases to go forward in the absence of -- of --  
5 despite the existence of the Anti-Injunction Act.

6 And second, although I certainly am not  
7 going to stand up here and disparage the attorneys from  
8 the United States in the slightest, the reality is that  
9 if this isn't jurisdictional, then it's -- the argument  
10 -- it's open to the argument that it's subject to  
11 forfeiture by a simple omission in failing to raise it  
12 in an answer. And that -- and that's a troubling  
13 prospect.

14 JUSTICE SOTOMAYOR: How, if you're troubled  
15 by --

16 JUSTICE GINSBURG: Can I ask --

17 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

18 JUSTICE GINSBURG: How -- how likely is  
19 it -- I mean, the government is going to be defending  
20 these suits, how likely is it that the government will  
21 overlook the Anti-Injunction Act? It seems to me that  
22 this is arming the government by saying it's waivable at  
23 the government's option.

24 GENERAL VERRILLI: That's -- that is not our  
25 assessment of the institutional interests of the United

1 States, Justice Ginsburg. And we do think that the --  
2 the right way to go in this case is to read the statute  
3 as not applying to the minimum coverage provision of the  
4 Affordable Care Act.

5 CHIEF JUSTICE ROBERTS: It was -- it was the  
6 calculation of the interests of the United States that  
7 your predecessor made in the Davis case.

8 There, the -- the Solicitor General  
9 exercised the authority that we sanctioned to waive  
10 the -- the Anti-Injunction Act. And of course, that  
11 couldn't be done if it were jurisdictional.

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

14 We do agree with Mr. Long's analysis that  
15 Davis occurred in -- during a time in -- which under the  
16 Standard Nut case, the Court had interpreted the  
17 Anti-Injunction Act as doing no more than codifying the  
18 traditional equitable principles which allowed courts  
19 discretion to conclude that in certain circumstances, a  
20 case could go forward.

21 Williams Packing repudiated that analysis,  
22 and Bob Jones v. Simon again repudiated that analysis  
23 and said, no, we're no longer abiding by that. It is  
24 true that the Davis case has not formally been  
25 overruled, but we do think it's fundamentally

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

2 JUSTICE BREYER: Davis was the case where a  
3 shareholder sues the corporation.

4 GENERAL VERRILLI: Yes.

5 JUSTICE BREYER: And the remedy is that the  
6 corporation shouldn't pay the money to the tax  
7 authority. Now, it's a little technical, but that isn't  
8 actually an injunction against the tax authority  
9 collecting. He's not -- they're not restraining the  
10 collection of tax. They're saying to the taxpayer,  
11 don't pay it.

12 GENERAL VERRILLI: Yes. And --

13 JUSTICE BREYER: I don't know how far that  
14 gets you.

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

19 JUSTICE SCALIA: Don't do it again, because  
20 I think that goes too far. I don't think that's  
21 restraining the collection of a tax. It's restraining  
22 the payment of a tax.

23 GENERAL VERRILLI: Well --

24 JUSTICE SCALIA: You -- you don't want to  
25 let that bone go, right?

1                   GENERAL VERRILLI: Our view here is that it  
2 is jurisdictional. Because it's jurisdictional as this  
3 Court understands jurisdiction now, it's not waivable.  
4 And therefore, we don't think that -- that that part of  
5 the Davis decision is good law.

6                   JUSTICE KAGAN: General, can I ask you about  
7 Reed Elsevier? Justice Ginsburg suggested that the  
8 language was very similar in Reed Elsevier as it is  
9 here, but there are even further similarities. Reed  
10 Elsevier pointed out that the provision in question  
11 wasn't in Title 28. Here, too, it's not in Title 28.  
12 In Reed Elsevier, it was pointed out that the provision  
13 there had numerous exceptions to it. Here, too, there  
14 are numerous exceptions that we find that have been  
15 created by the courts over the years.

16                   In Reed Elsevier, the question was  
17 essentially one about timing. Come to court after you  
18 file your registration. Here, too, the question is one  
19 about timing. Come to court after you make -- after you  
20 pay your taxes.

21                   So Reed Elsevier seems in multiple respects  
22 on all fours with this case.

23                   Why is that wrong?

24                   GENERAL VERRILLI: I don't think so, Justice  
25 Kagan. First, we think -- I guess I'm repeating myself



1 and I apologize, but -- we think the closest analogue is  
2 the very next provision in the United States Code,  
3 7422(a), which this Court has held is jurisdictional,  
4 and is phrased in exactly the same way as 7421(a). In  
5 fact, as I said, they were the same provision back in  
6 the earlier days. That's the closest analogue.

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

11           JUSTICE KAGAN: I take the point --

12           GENERAL VERRILLI: -- the assessment or  
13 collection.

14           JUSTICE KAGAN: -- bu if you would comment  
15 on the similarities of Reed Elsevier to this case.

16           How do you think it's different, if at all?

17           GENERAL VERRILLI: Well, because the -- the  
18 -- I think the best answer to that is there are no magic  
19 words. And that history and context matter, as the  
20 Court said in Henderson. And the history and context  
21 here is that 7422 and 7421 function together to protect  
22 an exceedingly strong interest that -- that the Court  
23 has held with respect to 7422 sufficiently strong that  
24 it -- it explains the jurisdictional nature of that.  
25 The same interest applies here.

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

4           So we -- we do think that that makes a big  
5 difference. And --

6           JUSTICE GINSBURG: Why, in Reed Elsevier,  
7 you were dividing jurisdiction from claims processing,  
8 says you have to register before you can sue. There are  
9 a lot of things you have to do before you can sue. So  
10 why isn't Reed Elsevier like you have to pay a filing  
11 fee before you can file a complaint?

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

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

21           Again, if the Court agrees with our  
22 statutory construction, you don't need to reach this  
23 issue. But they have -- in fact, one of those cases,  
24 the Hansen case, the district court in that case had  
25 dismissed the complaint under Federal Rule of Civil

1 Procedure 12(b)(6). The Court of Appeals vacated and  
2 sent it back with instructions to dismiss under  
3 12(b)(1), which is the subject matter jurisdiction  
4 provision.

5 So I do think that, to the extent  
6 this issue is before the Court, it is jurisdictional,  
7 but it doesn't need to be before the Court because of  
8 the statutory construction argument that we had offered.

9 JUSTICE GINSBURG: On your statutory  
10 construction argument, is there any other exaction  
11 imposed under the Internal Revenue Codes that would not  
12 qualify as a tax for Anti-Injunction Act purposes, or is  
13 5000A just out there all by itself?

14 GENERAL VERRILLI: It's not quite out there  
15 all by itself. There are other provisions that fall  
16 outside of subchapter B of chapter 68 and, therefore,  
17 wouldn't be governed by the instruction in Section  
18 6671(a), which answers the question about the  
19 applicability of the act for most penalties.

20 The ones that we've identified, and I may be  
21 overlapping a little bit with Mr. Long here, one is 26  
22 U.S.C. 857, which poses certain penalties in connection  
23 with the administration of real estate investment  
24 trusts.

25 There are provisions that Mr. Long

1 identified in his brief, Sections 6038(a) through (c) of  
2 the Code, which impose certain penalties with respect to  
3 reporting requirements for foreign corporations.

4 We have, in addition, in footnote 22 at page  
5 36 of our brief, identified three provisions that Mr.  
6 Long also identified about -- about alcohol and tobacco.

7 Now --

8 JUSTICE SOTOMAYOR: Could we address,  
9 General, the question of whether there are any  
10 collateral consequences for the failure to buy -- to not  
11 buy health insurance? Is the only consequence the  
12 payment of the penalty?

13 The private respondents argue that there are  
14 other collateral consequences such as for people on  
15 probation who are disobeying the law, if they don't buy  
16 health insurance they would be disobeying the law and  
17 could be subject to having their supervised release  
18 revoked.

19 GENERAL VERRILLI: Yes. That is not a  
20 correct reading of the statute, Justice Sotomayor. The  
21 only consequence that ensues is the tax penalty. And  
22 the -- we have made a representation, and it was a  
23 carefully made representation, in our brief that it is  
24 the interpretation of the agencies charged with  
25 interpreting this statute, the treasury department and

1 the Department of Health and Human Services, that there  
2 is no other consequence apart from the tax penalty.

3 And I do think, if I could talk for a couple  
4 of minutes about the argument that was discussed as to  
5 whether this can be conceived of as a suit just  
6 challenging the requirement, which is entirely  
7 stand-alone based on inferences drawn from the  
8 exemptions. I really don't think that's right. And if  
9 I could spend a minute on it, I think it's important.

10 The exemptions in section 5000A, it is true  
11 that there are two categories of exemptions. There are  
12 exemptions to the penalty and exemptions to the  
13 subsection (a) requirement. But the -- but I think, not  
14 only as a practical matter, but as a textural indication  
15 and even as a legal matter, they -- both function as  
16 exceptions to the requirement.

17 First, as a practical matter, one of those  
18 exemptions is a hardship exemption. And if the Court  
19 will just bear with me for one minute here, it's at page  
20 11A of the appendix to our brief. It provides that a  
21 person can go to the secretary of HHS and obtain a  
22 hardship exemption for -- which would, as a formal  
23 matter here, excuse compliance with the penalty.

24 It seems to me to make very little sense to  
25 say that someone who has gone to an official of the

1 United States and obtained an exemption would,  
2 nonetheless, be in a position of being a law breaker.

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

7 Members of Indian tribes are exempt only  
8 from the penalty as a formal matter under the structure  
9 of the statute here; but, the reason for that is because  
10 members of Indian tribes obtain their healthcare through  
11 the Indian Health Service, which is a clinic-based  
12 system that doesn't involve insurance at all. It's an  
13 entirely different system. They were taken out of this  
14 statute because they get their healthcare through a  
15 different system. And it doesn't make any sense to  
16 think that persons getting their health care through the  
17 Indian Health Service are violating the law because --  
18 exempt only from the penalty, but still under a legal  
19 obligation to have insurance, when the whole point of  
20 this is that they're supposed to be in a clinic-based  
21 system.

22 JUSTICE SOTOMAYOR: Is your whole point that  
23 this was inartful drafting by Congress; that, to the  
24 extent that there is an exemption under the penalty,  
25 it's an exemption from the legal obligation?

1                   GENERAL VERRILLI: I guess what I would say  
2 about it, Your Honor, is that the way in which this  
3 statute is drafted doesn't permit the inference that my  
4 friends from the NIB are trying to draw from it.

5                   And there is an additional textural  
6 indication of that, which one can find at page 13 of our  
7 reply brief. This is a provision that is 42 U.S.C. A,  
8 section 18022(e). This is a provision that provides for  
9 a certification that certain individuals can get. And  
10 it's the paragraph starting with the words "other  
11 provisions," contains the quote.

12                   And it says: "An individual with a  
13 certification that the individual is exempt from the  
14 requirement under section 5000A, by reason of section  
15 5000A(e)(1) of such code, is entitled to a certificate  
16 that allows for enrollment in a particular program for  
17 this category of people."

18                   But you can see here, Congress is saying  
19 it's an exemption under 5000A(e)(1), which is the  
20 exemption from the penalty, and not the underlying  
21 requirement is, as Congress says, an exemption from the  
22 requirement of section 5000A.

23                   JUSTICE ALITO: Sub-section A says directly,  
24 "an applicable individual shall ensure that the  
25 individual has the minimum essential coverage." And you

1 are saying it doesn't really mean that, that if you're  
2 not subject to the penalty, you're not under the  
3 obligation to maintain the minimum essential coverage?

4 GENERAL VERRILLI: That's correct. And we  
5 think that is what Congress is saying, both in the  
6 provision I just pointed to, Your Honor, and by virtue  
7 of the way -- by virtue of the way the exemptions work.  
8 I just think that's the -- reading this in context, that  
9 is the stronger reading of the statute.

10 CHIEF JUSTICE ROBERTS: Suppose it makes it  
11 easy for the government to drop the other shoe in the  
12 future, right? You have been under the law subject to  
13 this mandate all along. You have been exempt from the  
14 penalty, so all they have to do is take away the  
15 penalty.

16 GENERAL VERRILLI: I don't -- I don't think  
17 so, Mr. Chief Justice. I don't think it makes it easy  
18 for the government in the future. We think this is the  
19 fairest reading of the statute, that the -- that the --  
20 you cannot infer from the fact that someone is exempt  
21 from the penalty, that they are still under an  
22 obligation to have insurance. That's just not the  
23 fairest reading of the statute.

24 JUSTICE KAGAN: Could I --

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



1 JUSTICE KAGAN: The nature of the  
2 representation you made, that the only consequence is  
3 the penalty, suppose a person does not purchase  
4 insurance, a person who is obligated to do so under the  
5 statute doesn't do it, pays the penalty instead, and  
6 that person finds herself in a position where she is  
7 asked the question, have you ever violated any federal  
8 law, would that person have violated a federal law?

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

11 JUSTICE KAGAN: And that's because --

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

14 JUSTICE KAGAN: But as long as they pay the  
15 penalty --

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

18 JUSTICE BREYER: Why do you keep saying tax?

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

21 JUSTICE BREYER: Thank you.

22 GENERAL VERRILLI: Thank you,  
23 Justice Breyer.

24 JUSTICE BREYER: The penalty.

25 GENERAL VERRILLI: Right. That's right.

1 JUSTICE ALITO: Suppose a person who has  
2 been receiving medical care in an emergency room -- has  
3 no health insurance but, over the years, goes to the  
4 emergency room when the person wants medical care --  
5 goes to the emergency room, and the hospital says, well,  
6 fine, you are eligible for Medicaid, enroll in Medicaid.  
7 And the person says, no, I don't want that. I want to  
8 continue to get -- just get care here from the emergency  
9 room. Will the hospital be able to point to the mandate  
10 and say, well, you're obligated to enroll?

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

18 JUSTICE ALITO: No, they are not facing the  
19 tax penalty.

20 GENERAL VERRILLI: Right, right.

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

24 GENERAL VERRILLI: Right.

25 JUSTICE ALITO: Will they be able to take

1 this out and say, well, you really should -- you have a  
2 moral obligation to do it; the Congress of the United  
3 States has said, you have to enroll? No, they can't  
4 say?

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

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

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

18 JUSTICE SOTOMAYOR: Yes.

19 GENERAL VERRILLI: And it's keyed to a  
20 number of things. One is, are -- are you making so  
21 little money that you aren't obligated to file a tax  
22 return. And if you're in that situation, you are not  
23 subject to the penalty.

24 It's also if the cost of insurance would be  
25 more than 8 percent of your income, you aren't subject

1 to the penalty. So there -- there -- there isn't  
2 necessarily a precise mapping between somebody's income  
3 level and their Medicaid eligibility at the present  
4 moment. That will depend on where things are and what  
5 the eligibility requirements are in the State.

6 JUSTICE SOTOMAYOR: But those people  
7 below --

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

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

23 Is that what the heart of what you are  
24 saying?

25 GENERAL VERRILLI: That's the essence they

1 called it a penalty. They didn't give any other  
2 textural instruction in the Affordable Care Act or in  
3 the Internal Revenue Code or that that penalty should be  
4 treated as a tax for the Anti-Injunction Act purpose.

5 CHIEF JUSTICE ROBERTS: You agree with  
6 Mr. Long, and, in fact, you just agreed with  
7 Justice Breyer that one of the purposes of the provision  
8 is to raise revenue.

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

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

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

9                   JUSTICE SOTOMAYOR: Well, why is it --

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

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

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

25                  GENERAL VERRILLI: Because we don't --

1 because the exhaustion would go to the individual amount  
2 owed, we think, and that's a different situation from  
3 this case.

4 If the Court has no further questions.

5 CHIEF JUSTICE ROBERTS: Thank you, General.

6 GENERAL VERRILLI: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Katsas.

8 ORAL ARGUMENT OF GREGORY G. KATSAS

9 ON BEHALF OF THE RESPONDENTS

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

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

20 JUSTICE GINSBURG: They are different  
21 things. This said the Reed Elsevier statute says  
22 immediately after instituted unless a copyright is  
23 registered.

24 MR. KATSAS: Unless the copyright is  
25 registered. And this goes -- this goes to the character

1 of the lawsuit. The statute in Reed Elsevier says,  
2 register your copyright and then come back to court.

3 JUSTICE GINSBURG: Why isn't that like a  
4 filing fee, before you can maintain a suit for copyright  
5 infringement, you have to register your copyright?

6 MR. KATSAS: It -- it's a precondition to  
7 filing suit. The -- the analogous precondition here is  
8 pay your taxes and then come back to court. The point  
9 is --

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

17 MR. KATSAS: It -- it has to be the same  
18 challenge, Justice Sotomayor, or else South  
19 Carolina v. Regan would say the Anti-Injunction Act  
20 doesn't apply. You are right that once you file -- once  
21 you pay your taxes and then file the refund action, the  
22 act of filing the taxes converts the suit from one  
23 seeking prospective relief and to one seeking money  
24 damages.

25 And in that sense, you could think of the



1 statute as a remedial limitation on the courts. But  
2 whether you think of it as an exhaustion requirement or  
3 a remedial limitation, neither of those  
4 characterizations is jurisdictional. In  
5 Davis v. Passman you said that a remedial limitation  
6 doesn't go --

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

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

21 JUSTICE SOTOMAYOR: How do you deal with  
22 this case and our Gonzalez -- our recent Gonzalez case  
23 where we talked about --

24 MR. KATSAS: Right.

25 JUSTICE SOTOMAYOR: -- the language of the

1 COA statute that no appeal will be heard absent the  
2 issuance of?

3 MR. KATSAS: Gonzalez -- Gonzalez v. Thaler  
4 rests on a special rule that applies with respect to  
5 appeals from one Article III court to another.  
6 That's -- that explains Gonzalez and it explains Bowles  
7 before it.

8 You have five unanimous opinions in the last  
9 decade in which you have strongly gone the other  
10 direction on what counts as jurisdictional.

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

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

22 So while you're right, the text in Bowles  
23 and Thaler are not terribly different, those cases are  
24 explained by that principle. Under Henderson it doesn't  
25 apply to this case.

1           The text in this case speaks to the suit,  
2 the cause of action of the litigant. It doesn't speak  
3 to the jurisdiction or power of the Court. The  
4 Anti-Injunction Act is placed in a section of the tax  
5 code governing procedure. It's not placed in --

6           JUSTICE SOTOMAYOR: Counsel, all of those --  
7 all of that in particular --

8           MR. KATSAS: You did rely on that in Reed  
9 Elsevier as one consideration.

10          JUSTICE SOTOMAYOR: And we haven't relied on  
11 it in other cases.

12          MR. KATSAS: And another -- another  
13 consideration in Reed Elsevier that cuts in our favor is  
14 the presence of exceptions. You said three in Reed  
15 Elsevier cut against jurisdictional characterization.  
16 Here there are 11. And --

17          JUSTICE SOTOMAYOR: Many of which themselves  
18 speak in very clear jurisdictional language.

19          MR. KATSAS: Well, some of them have no  
20 jurisdictional language at all, and not a single one of  
21 them uses the word "jurisdiction" to describe the  
22 ability of the Court to restrain the assessment and  
23 collection of taxes, which is what one would have  
24 expected --

25          JUSTICE BREYER: Basically it begs the

1 difference -- language is relevant, there are a lot of  
2 relevant things. But one thing that's relevant in my  
3 mind is that taxes are, for better or for worse, the  
4 life's blood of government.

5 MR. KATSAS: Yes.

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

14 And so there is strong reason that is there.  
15 You tried to apply that reason to the copyright law.  
16 You can't find it. Registration for the copyright  
17 register is not the life's blood of anything. Copyright  
18 law exists regardless. So the reasoning isn't there.

19 The language -- I see the similarity of  
20 language. I've got that. But it's the reasoning, the  
21 sort of underlying reason for not wanting a waiver here  
22 that --that is -- has a significant role in my mind of  
23 finding that it is jurisdictional. Plus the fact that  
24 we have said it nonstop since that Northrop or whatever  
25 that other case is.

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

10                   JUSTICE BREYER: That's fine. I just wanted  
11 to ask the question in case you wanted to answer the  
12 policy question.

13                   MR. KATSAS: As to policy -- as to policy I  
14 think Helvering against Davis is the refutation of this  
15 view. It is true that in most cases the government  
16 doesn't want and Congress doesn't want people coming  
17 into court. But Davis shows there may be some cases  
18 including, for instance, constitutional challenges to  
19 landmark Federal statutes where the government sensibly  
20 decides that its revenue-raising purposes are better  
21 served by allowing a party to come into court and  
22 waiving its defense. That's what the Solicitor General  
23 did in Davis, and this Court accepted that waiver.

24                   As for prior cases, we have the holding in  
25 Davis and the holding in all of the equitable exception

1 cases like Williams Packing. The government --

2 JUSTICE SOTOMAYOR: So why don't we say --  
3 why don't we say it's jurisdictional except when the  
4 Solicitor General waives?

5 MR. KATSAS: You have used --

6 JUSTICE SOTOMAYOR: Why would that not  
7 promote Congress's policy of insuring -- or Congress,  
8 explicitly --

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

11 JUSTICE SOTOMAYOR: Yes. It's a  
12 contradiction in terms. I don't disagree.

13 MR. KATSAS: It is a contradiction in terms.  
14 All of your cases analyze the situation as if the  
15 statute is jurisdictional, then it's not subject to  
16 waiver. If you were to construe this as such a one-of  
17 unique statute, it seems to me we would still win  
18 because the Solicitor General with full knowledge of the  
19 Anti-Injunction Act argument available to him  
20 affirmatively gave it up. This is not just a forfeiture  
21 where a government lawyer is -- through inadvertence  
22 fails to raise an argument. This is a case where the  
23 government --

24 JUSTICE SOTOMAYOR: They raised it and then  
25 gave it up.

1 MR. KATSAS: They made it below. They know  
2 what it is; and not only are they not pursuing it here,  
3 they are affirmatively pursuing an argument on the other  
4 side.

5 JUSTICE KAGAN: Mr. Katsas, is your basic  
6 position when we are talking about the jurisdiction of  
7 the district courts a statute has to say it's  
8 jurisdictional to be jurisdictional?

9 MR. KATSAS: I wouldn't go quite that far.  
10 I think at a minimum it has -- it has to either say that  
11 or at least be directed to the courts which is a  
12 formulation you have used in your cases and which is the  
13 formulation that Congress used in the Tax Injunction Act  
14 but did not use in this Statute.

15 JUSTICE KAGAN: Well, how would -- I mean, I  
16 suppose one could try to make a distinction between this  
17 case and Reed Elsevier by focusing on the difference  
18 between instituting something and maintaining something,  
19 and suggesting that instituting is more what a litigant  
20 does, and maintaining, as opposed to dismissing, is more  
21 of what judge does.

22 MR. KATSAS: I don't think so, Justice  
23 Kagan, because we -- we have an adversarial system, not  
24 an inquisitorial one. The parties maintain their  
25 lawsuits I think is the more natural way of thinking of

1 it.

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

4 The purpose of this lawsuit is to challenge  
5 a requirement -- a Federal requirement to buy health  
6 insurance. That requirement itself is not a tax. And  
7 for that reason alone, we think the Anti-Injunction Act  
8 doesn't apply.

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

13 CHIEF JUSTICE ROBERTS: The whole point --  
14 the whole point of the suit is to prevent the collection  
15 of penalties.

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

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

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

23 CHIEF JUSTICE ROBERTS: It's a command. A  
24 mandate is a command. If there is nothing behind the  
25 command. It's sort of well what happens if you don't



1 file the mandate? And the answer is nothing. It seems  
2 very artificial to separate the punishment from the  
3 crime.

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

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

17 Congress then separated out mandate  
18 exceptions from penalty exceptions. It defined one  
19 category of people not subject to the mandate. One  
20 would think those are the category of people as to whom  
21 Congress is saying: You need not follow this law. It  
22 then defined a separate category of people not subject  
23 to the penalty, but subject to the mandate. I don't  
24 know what that could mean other than --

25 CHIEF JUSTICE ROBERTS: Why would you have a

1 requirement that is completely toothless? You know, buy  
2 insurance or else. Or else what? Or else nothing.

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

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

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

1                   MR. KATSAS: Yes, I think that person would,  
2 because that person is injured by compliance with the  
3 mandate.

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

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

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

21                   So we don't have the problem of no adverse  
22 consequences in the case. And then, we have the  
23 separate distinction between the question of who has  
24 Article III standing in order to maintain a suit and the  
25 question of who is subject to a legal obligation. And

1 you've said in your cases that even if there may be no  
2 one who has standing to challenge a legal obligation  
3 like the incompatibility clause or something, that  
4 doesn't somehow convert the legal obligation into a  
5 legal nullity.

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

14           JUSTICE KAGAN: Could I just understand, Mr.  
15 Katsas, when the States say that they are injured, are  
16 they talking about the people who are eligible now who  
17 are not enrolled? Or are they also talking about people  
18 who will become newly eligible?

19           MR. KATSAS: It's people who will enroll,  
20 people who wouldn't have enrolled had they been given a  
21 voluntary choice.

22           JUSTICE KAGAN: But who are eligible now.

23           MR. KATSAS: That's the largest category. I  
24 think there could be future eligibles who would enroll  
25 because they are subject to a legal obligation but

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

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

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

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

17           JUSTICE GINSBURG: Why would somebody not  
18 choose to obtain it? Why -- that's one puzzle to me.  
19 There's this category of people who are Medicaid  
20 eligible; Medicaid doesn't cost them anything. Why  
21 would they resist enrolling?

22           MR. KATSAS: I -- I don't know, Justice  
23 Ginsburg. All I know is that the difference between  
24 current enrollees and people who could enroll but have  
25 not is, as I said, on the -- is a \$600 million delta.

1 And --

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

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

16 The second argument made against the States'  
17 standing is that the States somehow forfeit their  
18 ability to challenge the constitutionality of a  
19 provision of Federal law because they voluntarily choose  
20 to participate --

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

24 MR. KATSAS: Yes.

25 JUSTICE SOTOMAYOR: All right. What is --

1 the fact that the State is challenging Medicaid, how  
2 does it give the State standing to challenge an  
3 obligation that is not imposed on the State in any way?

4 MR. KATSAS: The -- the principal theory for  
5 State standing is the States are challenging the mandate  
6 because the mandate injures them when people are forced  
7 to enroll in Medicaid.

8 Now, it is true they are not directly  
9 subject to the mandate, but --

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

11 MR. KATSAS: Okay. Let me -- let me try to  
12 --

13 JUSTICE SOTOMAYOR: I'm confused by it.

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

16 CHIEF JUSTICE ROBERTS: Go ahead.

17 MR. KATSAS: In South Carolina v. Regan, the  
18 State was not subject to the tax at issue. The State  
19 was harmed because -- as the issuer of the bonds, and  
20 the bond holders were the ones subject to the tax. So  
21 the State is injured not because it is the direct object  
22 of the Federal tax, but because of its relationship to  
23 the regulated party as issuer/bond holder.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
25 Katsas.

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

2 CHIEF JUSTICE ROBERTS: Mr. Long, you have 5  
3 minutes remaining.

4 REBUTTAL ARGUMENT OF ROBERT A. LONG  
5 FOR COURT-APPOINTED AMICUS CURIAE

6 MR. LONG: Everyone agrees that the section  
7 5000A penalty shall be assessed and collected in the  
8 same manner as taxes. And the parties' principal  
9 argument why that does not make the Anti-Injunction Act  
10 applicable is that, well, that simply goes to the  
11 Secretary's activities.

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

20 There was a statement made that there  
21 aren't -- and many of the exceptions to the  
22 Anti-Injunction Act are in the assessment and collection  
23 provisions -- there was a statement made that none of  
24 these directly confer jurisdiction to restrain the  
25 assessment and collection of taxes. That's not true.



1 In footnote 11 of our opening brief, we cite several.  
2 I'll simply mention section 6213 as an example.

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

14 JUSTICE BREYER: And all that's going to  
15 really what I think Congress's intent was meant to be in  
16 sticking the collection thing into chapter 68, and --  
17 and it's certainly an argument in your favor. The --  
18 the over-arching thing in my mind is it's -- it's up to  
19 Congress within leeway. And they did not use that word  
20 "tax," and they did have a couple of exceptions. And it  
21 is true that all this language that you quote -- you  
22 know, the first two sentences and so forth, it talks  
23 about the use of tax in the IRC. It talks about the  
24 penalties and liabilities provided by this subchapter.  
25 And we look over here and it's a penalty and liability

1 provided by a different law, which says collect it  
2 through the subchapter, and it has nothing to do with  
3 the IRC. See?

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

8 Are you following me?

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

11 MR. LONG: I mean, I think I'm following  
12 you, but -- but the fact that it's not in the particular  
13 subchapter for assessable penalties in my view makes no  
14 difference, because they said it's still clearly -- it's  
15 assessed and collected in the same manner as the penalty  
16 in that subchapter, and those penalties are collected in  
17 the same manner as taxes.

18 JUSTICE BREYER: Yes, yes.

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

22 The -- the refund statute that does  
23 specifically refer to penalties, that has nothing to do  
24 with this argument that it's assessed and collected in  
25 the same manner as a tax. That would simply go to the

1 point that well, you can't just call it a tax, because  
2 they've referred to it as a penalty.

3           And finally, on jurisdiction, you know, I  
4 think the key point is we have a long line of this  
5 Court's decisions that's really been ratified by  
6 Congress with all these exceptions in jurisdictional  
7 terms. As I read Bowles and John R. Sand & Gravel, the  
8 -- the gist of these decisions was not any special sort  
9 of rule about appeals, it's that when we have that  
10 situation, which I would submit applies as much to  
11 Federal taxes as it does to appeals from Federal  
12 district courts when we have this degree of -- of  
13 precedent, including precedent from Congress in the form  
14 of amendments to this Anti-Injunction Act, that should  
15 be -- the presumption should be that this is  
16 jurisdictional.

17           If there are no further questions.

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

23           MR. LONG: Thank you.

24           CHIEF JUSTICE ROBERTS: We will continue  
25 argument in this case tomorrow.

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

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