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IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HEALTH AND :

HUMAN SERVICES, ET AL., :

Petitioners : No. 11-398

v. :

FLORIDA, ET AL. :

- - - - - x

Washington, D.C.

Monday, March 26, 2012

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

APPEARANCES:

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Court-appointed amicus curiae

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

Petitioners.

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

Respondents.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	ROBERT A. LONG, ESQ.	
4	For Court-appointed amicus curiae	3
5	ORAL ARGUMENT OF	
6	DONALD B. VERRILLI, JR., ESQ.	
7	On behalf of the Petitioners	30
8	ORAL ARGUMENT OF	
9	GREGORY G. KATSAS, ESQ.	
10	On behalf of the Respondents	55
11	REBUTTAL ARGUMENT OF	
12	ROBERT A. LONG, ESQ.	
13	For Court-appointed amicus curiae	72
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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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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24
25

A	56:19,22 57:17 59:4 62:19 63:13 64:7,10 72:9,22 74:21 75:14,20 action 8:10 9:8 9:12 56:12,21 57:9,17 58:20 59:2 73:9 actions 70:11,12 active 9:5 activities 72:11 actual 67:14 Act's 52:11 addition 6:25 21:4 44:4 additional 22:23 47:5 address 24:7 44:8 addressed 4:11 9:3 72:15,16 addressing 4:21 adjudicate 4:16 administer 22:20 administration 22:14 43:23 administrative 5:11 6:2,6 administratively 5:15 adopted 30:4 advance 17:25 60:9 adversarial 63:23 adverse 67:18 67:21 affidavits 67:16 affirmatively 62:20 63:3 afford 28:4,8 Affordable 29:11 29:16 30:25 31:10 32:18	38:4 53:2 agencies 44:24 agency 58:20 agree 35:19,20 38:14 53:5 agreed 53:6 agrees 42:21 72:6 ahead 48:25 71:16 AIA 15:7 17:16 17:17,23 20:10 21:4 29:15,17 30:2 32:10 64:3 akin 58:16 AL 1:4,7 alcohol 30:5 44:6 Alito 9:25 10:13 14:10 24:25 25:21 26:19 31:13,20 47:23 48:25 50:1,12 50:18,21,25 53:18 54:2,10 allow 37:4 allowed 5:19 38:18 allowing 12:9 61:21 allows 47:16 amend 25:2 amendments 11:19 13:19 75:14 Americans 26:6 amicus 1:17 2:4 2:13 3:8 33:13 64:9 72:5 amount 18:16 53:22 55:1 amounts 19:21 analogous 56:7 analogue 41:1,6 analysis 32:4,6 38:14,21,22	analyze 62:14 annual 18:16 answer 4:18 5:1 16:5 25:24 36:1 36:4 37:12 39:18 41:18 49:10 50:13 54:8 61:11 65:1 65:4 answers 43:18 Anthracite 11:1 anti-injunction 3:11,18 4:3 5:3 5:8,22 6:9,20 7:20 8:7,19,25 9:2 10:2,21 11:4,9,20 13:22 14:17,18 17:11 18:9,12 19:2,7 20:7 21:23 22:1 22:6,11 23:2,6 26:6 28:16 30:19,21 31:6,9 31:19 33:2,7,12 33:18,20 34:3,8 35:16 37:5,21 38:10,17 42:20 43:12 53:4,16 53:24 55:13,15 56:19 57:17 59:4 62:19 64:7 64:10 72:9,22 74:21 75:14,20 Anybody 25:17 anyone's 26:8 apart 45:2 apologize 33:22 41:1 apparatus 57:15 apparent 15:17 appeal 58:1 61:7 appeals 42:17,19 43:1 58:5,13,17 75:9,11 APPEARANC...	1:15 appellate 13:3 appendix 24:22 34:9,13 45:20 applicability 43:19 applicable 6:6,7 27:25 47:24 72:10 application 7:14 applied 17:21 23:6 applies 3:13,18 5:8 17:11,16,17 19:3 20:7 28:16 29:17 34:19 41:25 58:4,12 74:21 75:10 apply 5:3,23,23 6:3,9,12 7:2,6 14:19 19:10 22:6 23:2 33:8 56:20 58:19,25 60:15 64:8 applying 34:1 38:3 approach 30:4 argue 27:21 28:12 44:13 argued 8:6,21 arguing 31:14,15 argument 1:13 2:2,5,8,11 3:4,7 10:10 16:14 18:5 24:6,10,18 25:22 27:1 30:14 32:17 33:10,16 36:12 37:9,10 43:8,10 45:4 55:8 58:11 61:2,3 62:19,22 63:3 67:5 70:16 72:4,9 73:17 74:7,10,24 75:25
----------	---	---	---	--

arguments 18:3 18:4 32:14 70:7 70:9	a.m 1:14 3:2 76:1	beyond 32:11	c 2:1 3:1 44:1	76:1
arming 37:22	<hr/> B <hr/>	big 42:4	cabined 36:25	cases 4:16 7:9
Article 58:5,17	B 1:18 2:6 30:14	biggest 7:10	calculation 38:6	8:1,7 10:6,8,19
67:24	43:16	billion 19:21	53:21	11:11,16 13:8
artificial 65:2	back 5:10 12:1	bit 23:23 34:15	call 10:19 14:12	13:10 14:13
aside 18:6	12:11 14:9	43:21 70:21	64:19 75:1	15:5,13,20
asked 14:10 34:7	26:19 28:21	blood 60:4,17	called 20:5,23	23:19 31:21
35:11 49:7	31:15 41:5 43:2	26:25 33:6	31:23 52:20	32:8 33:20
asking 7:16	56:2,8 60:8	38:22	53:1	34:19 37:4
asks 16:5	backed 65:16	bond 71:20	Caplin's 20:17	42:17,23 58:23
assess 4:19	backwards 66:13	bonds 71:19	care 17:4 21:5,24	59:11 61:5,15
assessable 74:13	Bailey 32:8,16	bone 39:25	24:24 29:11,16	61:17,24 62:1
assessed 3:20	32:20,25 33:1	Bowles 13:2 58:6	31:1,10 32:18	62:14 63:12
4:1,21 5:5	bar 29:1 30:19	58:12,15,22	36:10 38:4	68:1
17:12 18:7,18	33:2	75:7	46:16 50:2,4,8	categories 20:20
20:22 53:19,21	barred 26:17	breaker 46:2	50:22 53:2	45:11
54:16 72:7	53:24 75:20	Breyer 16:13	66:18 74:6	category 47:17
74:15,24	barring 56:13	17:3,6,15 18:21	careful 54:16	65:19,20,22
assessing 4:23	bars 26:6 54:20	20:16 39:2,5,13	carefully 5:15	66:6 68:23
assessment 3:13	based 8:25 18:17	39:16 49:18,21	24:2 44:23	69:19
3:22 4:4,25	45:7	49:23,24 52:13	Carolina 12:15	cause 59:2
6:10 7:22 14:7	baseline 6:25	53:7 59:25 60:6	12:21 56:19	CBO 53:10
16:19 19:9	basic 33:15	61:1,10 73:14	68:9-71:17	center 24:2
22:21 23:11	60:13 63:5	74:18	carried 75:21	central 3:12 6:20
37:25 41:12	basically 29:9	Breyer's 23:13	carrying 29:13	certain 14:22
59:22 72:14,19	59:25	brief 11:25 20:18	case 3:4 5:2,24	16:25 38:19
72:22,25 73:5	basis 7:24	32:15 34:10	7:10,11,17 8:2	43:22 44:2 47:9
Assumes 15:18	bear 45:19	42:18 44:1,5,23	8:6 9:4 10:1,10	57:9,9
assuming 14:10	bears 3:23	45:20 47:7	11:1,2 12:6,16	certainly 10:5
15:6 50:14 65:5	began 36:11	54:11,21 73:1	12:25 13:6,17	15:12 19:20
attached 17:3,4	beginning 9:5,14	briefs 21:17	13:17 23:10,21	23:7 28:12 37:6
17:19 27:20	73:5	bring 67:11,12	24:16 25:8	51:6 73:17
attack 17:25	begs 59:25	brings 7:9 23:12	26:12,25 27:1	certificate 47:15
attorneys 36:11	behalf 1:19,21	52:18	30:18 32:11	certification 47:9
37:7	2:7,10 3:8	broad 18:13,13	36:5 38:2,7,16	47:13
authority 31:3	30:15 55:9	Brockamp 34:18	38:20,24 39:2	cetera 36:11
32:2 36:23,24	benefit 69:12	bu 41:14	39:17 40:22	52:22
38:9 39:7,8	70:4	business 19:17	41:15 42:14,24	challenge 5:17
automatically	Bennett 70:14	buy 27:14 28:8,9	42:24 53:12,14	5:24 24:21,23
17:22	best 11:11 12:21	44:10,11,15	54:20,23 55:3	33:2 56:18 64:4
available 62:19	20:16 28:13	64:5 66:1	56:14 57:22,22	67:12 68:2
69:15	36:15 41:18	buying 52:15	58:25 59:1	70:18,23 71:2
avoid 67:16	better 33:24 60:3	<hr/> C <hr/>	60:25 61:11	challenges 54:22
	61:20		62:22 63:17	61:18
			67:22 75:25	challenging 24:9

<p>24:10 45:6 71:1 71:5 chapter 17:19 43:16 52:22 73:16 chapters 72:13 72:14 character 55:25 characterization 59:15 characterizatio... 57:4 charged 44:24 Chief 3:3,9 7:6 11:21 12:5 30:12,16 37:17 38:5,13 48:10 48:17 53:5 55:5 55:7,10 64:13 64:16,17,23 65:25 71:16,24 72:1,2 75:18,24 child 32:8 choice 27:14 32:5 68:21 69:1 choose 69:15,18 70:19 circumstances 12:10 14:2 24:3 26:4 37:3 38:19 54:7 cite 73:1 cited 42:17 civil 8:10 9:8 23:19 42:25 claim 13:5,14 14:1,13 15:3 25:24 57:10 claims 10:4,15 10:22 42:7 clarity 27:22 61:8 class 15:13 69:4 classic 67:9 70:8 clause 68:3</p>	<p>clear 18:23,25 19:1 28:12 33:6 59:18 74:20 clearer 14:4 23:5 clearest 10:13 10:14 clearly 20:10 24:20 27:4 61:6 68:8 74:5,14 clerk 20:19 clever 15:16 27:6 clinic-based 46:11,20 Clintwood 30:22 close 21:15 58:14 closest 41:1,6 COA 58:1 coal 11:1 code 3:15 6:19 6:23 7:2 16:22 17:1 18:11,15 19:3,4 20:9,14 20:24 21:14,19 22:11 29:10,15 29:15 31:6,11 34:12 41:2 44:2 47:15 53:3 59:5 72:13 Codes 43:11 codified 18:14 codifying 7:20 38:17 coerced 70:13 coin 27:4 collateral 44:10 44:14 collect 4:19 22:20 26:15 74:1 collected 3:20 4:1 5:5 17:13 17:21 18:7,18 72:7 74:15,16 74:24</p>	<p>collecting 4:24 39:9 74:7 collection 3:13 4:4 6:11 7:23 14:7 16:19,23 18:1 20:16 21:3 22:22 23:11 26:7,8,18 39:10 39:21 41:13 59:23 64:14,18 72:14,19,22,25 73:16 come 10:9,20 13:19 15:22 40:17,19 42:2 56:2,8,14 61:21 comes 15:7 coming 9:16 61:16 command 27:19 27:20 41:9 64:23,24,25 comment 23:15 36:14 41:14 commerce 31:2 commissioners 54:11 common 6:18 7:1 Company 32:21 compare 34:11 competency 15:19 competent 36:10 complainants 24:12 complaint 24:20 25:2,3,6,8 42:11,25 completely 66:1 compliance 19:11 45:23 49:17,20 67:2 67:15 comply 21:18 66:11</p>	<p>complying 66:21 conceived 45:5 concerned 52:20 66:15 conclude 3:18 33:9 37:1 38:19 concluded 33:3 conclusion 46:4 conduct 31:24 32:1 confer 72:24 confused 70:22 70:22 71:13 confusion 33:23 Congress 3:15 3:19,21,25 5:16 9:22,25 11:17 11:23 12:2 13:16,20 14:5 16:20 17:11 18:12 20:2 21:6 21:25 22:3,5,16 22:19 23:1 27:17 28:6 29:2 29:14,20 31:3,7 32:2 46:23 47:18,21 48:5 51:2,6 56:13 60:6 61:5,16 62:7 63:13 65:17,21 66:3 66:10,14 73:19 75:6,13 Congress's 31:1 62:7 73:15 connection 43:22 consequence 44:11,21 45:2 49:2 51:10 consequences 44:10,14 65:7 67:22 consideration 30:20 54:16 59:9,13</p>	<p>considering 46:5 considers 54:22 consistent 11:24 12:5,13 42:19 constitute 33:19 Constitution 31:19 constitutional 24:11 31:22 54:22 61:18 constitutionality 7:12 32:17 70:18 construction 42:22 43:8,10 construe 36:6 62:16 construed 18:23 33:25 34:4 construing 32:5 contained 23:16 contains 47:11 context 34:23 41:19,20 48:8 continue 50:8,22 75:24 contradiction 62:12,13 contrary 3:17 9:23 contrast 8:22 contrasts 8:12 contributions 30:9 control 24:3 convert 68:4 converts 56:22 cooperation 9:5 9:13,14 copyright 55:22 55:24 56:2,4,5 60:15,16,17 core 23:24 corporation 39:3 39:6</p>
---	---	--	--	--

<p>corporations 44:3</p> <p>correct 20:14 26:23 32:12 34:5,22 35:14 35:21 44:20 48:4</p> <p>corresponding 27:12</p> <p>cost 25:19 51:24 66:17 69:20</p> <p>Counsel 9:24 59:6</p> <p>count 13:7</p> <p>counts 58:10</p> <p>couple 45:3 73:20</p> <p>course 7:15 36:6 38:10 61:4</p> <p>court 1:1,13 3:10 4:5 5:12,19 6:1 6:14 7:8,19,22 7:25 8:3,13,16 8:18,19,23 9:6 9:13,15,21 10:6 10:17,25 11:5 11:13 12:9,22 13:3,6,8 14:1,3 14:6 15:10,25 19:17 20:23 21:6 25:14 26:5 26:25 30:17,22 31:17,21 32:9 33:1,3,13,19 34:11,16,17 37:1 38:16 40:3 40:17,19 41:3 41:20,22 42:2 42:17,21,24 43:1,6,7 45:18 53:24 54:8,21 55:4,11 56:2,8 56:15 57:8,10 57:15 58:5,18 59:3,22 60:9</p>	<p>61:17,21,23 73:7,8,8 75:19 75:22</p> <p>courts 4:10,13 4:14 6:10,12 8:15 9:3 14:14 15:6 16:3 18:23 36:22 37:2 38:18 40:15 42:19 57:1 63:7 63:11 72:16,18 75:12</p> <p>court's 9:14 11:11,17 13:8 30:19 32:11 39:1 61:5 75:5</p> <p>Court-appointed 1:17 2:4,13 3:8 72:5</p> <p>court-directed 8:22</p> <p>cover 69:11</p> <p>coverage 23:4 24:21,24 25:9 25:11,15 26:12 30:25 38:3 47:25 48:3</p> <p>covered 35:12</p> <p>craft 36:23</p> <p>create 29:5</p> <p>created 40:15</p> <p>creates 28:19</p> <p>creating 33:23</p> <p>crime 65:3</p> <p>curiae 1:17 2:4 2:13 3:8 72:5</p> <p>current 69:24</p> <p>currently 69:3</p> <p>cut 12:11 59:15</p> <p>cuts 59:13</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1</p> <p>da 60:13,13,13</p> <p>dam 9:20</p>	<p>damages 56:24 57:16</p> <p>Davis 7:10,16,18 7:24 8:2,6 10:24 38:7,15 38:24 39:2,17 40:5 57:5 61:14 61:17,23,25</p> <p>day 32:24,25</p> <p>days 41:6</p> <p>deal 35:13 57:21</p> <p>dealing 14:23</p> <p>decade 58:9</p> <p>decide 33:19 35:22,24</p> <p>decided 7:19</p> <p>decides 61:20</p> <p>deciding 12:25 15:25</p> <p>decision 7:24 11:18 27:18 40:5</p> <p>decisions 8:3 9:18,23 75:5,8</p> <p>declarations 26:2</p> <p>declared 69:11</p> <p>deem 15:3</p> <p>deemed 20:24</p> <p>defend 75:19</p> <p>defending 37:19</p> <p>defense 15:8 33:11 60:12 61:22</p> <p>deficiency 5:20 73:11,12</p> <p>define 13:14 18:10</p> <p>defined 5:16 18:11 65:15,18 65:22</p> <p>definition 18:13</p> <p>degree 75:12</p> <p>delayed 57:13</p> <p>deliberately 65:8</p>	<p>delta 69:25</p> <p>denominated 19:24</p> <p>denominating 20:2,3</p> <p>department 1:3 1:19 3:4 44:25 45:1</p> <p>depend 52:4</p> <p>depends 4:6</p> <p>deprived 18:24</p> <p>derivative 4:2,7</p> <p>describe 59:21</p> <p>described 30:22 65:11</p> <p>designate 29:17</p> <p>designated 29:2 29:14,20</p> <p>designed 19:11</p> <p>despite 15:11 37:5</p> <p>detailed 74:20</p> <p>determination 24:13</p> <p>determinative 31:8</p> <p>determine 17:10 19:18</p> <p>device 21:3</p> <p>diesel 21:17</p> <p>difference 7:8 20:11,11 42:5 60:1 63:17 65:6 69:23 74:14</p> <p>differences 5:7 21:11</p> <p>different 5:5 9:1 9:7 10:2 21:2 22:3 25:8 27:12 27:13 31:25 32:22 41:16 42:3,13 46:13 46:15 52:22 54:1 55:2,20 58:23 65:9</p>	<p>67:13,14 74:1</p> <p>differently 10:9 10:21 46:4</p> <p>difficult 30:7</p> <p>direct 71:21</p> <p>directed 3:19,25 4:12 8:19 63:11</p> <p>direction 58:10</p> <p>directive 4:8,10</p> <p>directives 4:11</p> <p>directly 47:23 68:11 71:8 72:24</p> <p>disagree 53:20 62:12</p> <p>disclose 30:8</p> <p>discretion 38:19</p> <p>discussed 21:16 45:4</p> <p>discussing 28:15</p> <p>discussion 36:9</p> <p>dismiss 43:2</p> <p>dismissal 54:24</p> <p>dismissed 10:6 42:25</p> <p>dismissing 63:20</p> <p>disobey 25:23</p> <p>disobeying 44:15 44:16</p> <p>disparage 37:7</p> <p>dispositive 32:4 32:6</p> <p>dispute 5:2</p> <p>distinction 63:16 67:23</p> <p>distinguish 30:7</p> <p>distinguishing 10:14</p> <p>district 8:13 42:24 57:15 63:7 75:12</p> <p>disturbed 9:22 11:17</p> <p>dividing 42:7</p> <p>doctrine 6:19</p>
---	--	---	--	---

<p>doctrines 54:4,5 doing 4:14 23:3 38:17 66:12 Dolan 34:16,17 DONALD 1:18 2:6 30:14 doubt 11:15 18:20 67:17 draconian 66:20 drafted 47:3 drafting 46:23 draw 47:4 drawn 45:7 Drexel 32:20,25 drop 48:11 duties 64:12 D.C 1:9,16,19,21</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1 3:1,1 earlier 36:9 41:6 easier 23:9 25:2 easy 19:1 48:11 48:17 effect 26:23 32:4 32:6 53:18 effectively 8:2 64:9 either 20:21 27:14 53:20 63:10 eligibility 52:3,5 eligible 50:6,15 51:13 52:12 68:16,18,22 69:3,12,15,20 eligibles 68:24 Elkhorn 30:22 Elsevier 8:10,20 40:7,8,10,12 40:16,21 41:15 42:6,10 55:17 55:21 56:1 59:9 59:13,15 63:17 emergency 50:2</p>	<p>50:4,5,8 66:17 empower 37:2 enact 31:4 32:3 enacted 12:8 enforce 7:8,9 enforced 73:6 enforcement 65:7 enforcing 25:11 enjoin 8:13 26:7 26:8 73:9 enjoined 19:9 73:7 enjoining 7:22 enroll 50:6,10 51:3 67:19 68:19,24 69:24 71:7 enrolled 50:23 68:17,20 69:1,3 enrollees 69:24 enrolling 69:21 70:14 enrollment 47:16 ensues 44:21 ensure 47:24 entertain 57:8 entire 27:23 entirely 45:6 46:13 64:21 entitled 47:15 EPA's 21:18 equal 25:19 equitable 7:21 11:8 12:10,17 12:22 36:23 37:3 38:18 60:12 61:25 ESQ 1:16,18,21 2:3,6,9,12 essence 52:25 essential 28:15 47:25 48:3 essentially 3:14 23:24 32:18</p>	<p>33:9 40:17 estate 43:23 et 1:4,7 36:11 52:22 event 69:16 exaction 18:14 19:18,24 43:10 exactly 35:17 41:4 66:13 examination 22:23 example 66:6 73:2 exceedingly 30:23 41:22 exception 3:16 11:8 12:17,22 13:1 16:1 60:12 61:25 68:8 exceptions 12:10 12:10 13:12,21 13:23 17:17 27:12 36:23 40:13,14 45:16 59:14 65:18,18 72:21 73:20 75:6 excuse 31:9 45:23 exempt 28:3,7 46:7,18 47:13 48:13,20 66:7 exemption 28:1 29:1 45:18,22 46:1,24,25 47:19,20,21 66:9 exemptions 28:2 45:8,10,11,12 45:12,18 48:7 exercise 31:1,22 56:15 exercised 38:9 exhaust 5:11 54:24</p>	<p>exhausted 6:15 exhausting 6:2 exhaustion 6:7 6:13 54:5 55:1 57:2 exhortation 65:16 existence 37:5 exists 60:18 expect 66:10 expected 19:20 57:18 59:24 explain 64:22 explained 58:16 58:24 explains 41:24 58:6,6 explanation 24:1 explicit 20:12 explicitly 62:8 express 13:23 extend 64:10 extent 43:5 46:24 66:16 extraordinary 12:9 13:16 extremely 7:4</p> <hr/> <p style="text-align: center;">F</p> <p>F 22:13,19 face 50:16 facing 50:18 fact 21:3 41:5 42:23 48:20 52:18 53:6 60:23 71:1 74:12 factually 51:15 failing 26:15 37:11 fails 62:22 failure 30:8 44:10 54:24 fair 51:6 fairer 13:15</p>	<p>fairest 48:19,23 fairly 11:24 fairness 39:15 fall 17:6 20:20 26:14 30:1 43:15 52:21 68:8 far 16:15 19:4 29:13 33:24 34:15 39:13,18 39:20 52:19 54:22 63:9 68:7 favor 16:16 20:17 59:13 73:17 federal 3:12 15:25 16:2,10 21:8 24:4 30:24 42:25 49:7,8,13 60:10 61:19 64:5 70:19 71:22 75:11,11 fee 27:15 42:11 56:4 feels 10:17 fees 21:22 22:15 22:18,21 fewer 65:11 fewest 29:6 file 14:21 40:18 42:11 51:21 56:20,21 65:1 filed 25:6,7 54:11 73:12 filing 42:10 56:4 56:7,22 finally 68:6 75:3 financial 30:24 find 14:10 17:10 18:24 26:2 28:7 33:7 37:2,3 40:14 47:6 60:16 finding 60:23 findings 65:13</p>
--	--	--	--	--

finds 49:6	found 20:17	62:4,10,18	57:22 58:3,3,6	24:24 44:11,16
fine 50:6 61:10	29:18 34:9	65:16	good 40:5 66:18	45:1 46:11,16
finish 71:15	four 13:8	generally 31:11	67:9	46:17 50:3 64:5
first 3:11,19 4:18	fours 40:22	General's 28:19	gotten 19:17	66:11 67:8
5:8,9,18 6:24	framed 13:21	28:23 29:5,7	governed 43:17	healthcare 46:10
6:24 9:17 12:7	free-standing	30:4	governing 58:17	46:14
14:15,21 15:12	22:18 64:11	George 32:16	59:5	hear 3:3 13:6,17
17:8 24:19	friend 32:15	33:1	government 4:7	21:12 57:12
25:13 26:1 28:3	friends 47:4	getting 4:9 46:16	7:13 10:11 11:6	heard 58:1
40:25 41:8	fuel 21:17	Ginsburg 8:4 9:7	15:7,14,19 21:8	hearing 56:12
45:17 73:22	full 62:18	19:5 24:5 25:1	26:14 30:24	heart 52:23
five 58:8	function 41:21	33:15,23 34:7	36:10,17 37:19	held 31:17,21
flat-out 41:9	45:15	35:8,10,19	37:20,22 48:11	32:20 33:1
flood 54:12	fundamentally	37:16,17,18	48:18 60:4	34:16,18 41:3
Florida 1:7 3:5	38:25 42:3	38:1 40:7 42:6	61:15,19 62:1	41:23 55:16
69:5	Furniture 32:20	43:9 55:14,20	62:21,23	help 52:16,17
focus 69:2 74:9	33:1	56:3 69:17,23	government's	helpful 42:15
focusing 63:17	further 30:10	70:2	37:23	helps 11:23
follow 8:5 26:15	40:9 55:4 75:17	gist 75:8	grant 23:3	Helvering 7:18
34:6 65:21 66:4	future 48:12,18	give 5:13 49:10	grateful 75:22	7:24 61:14
following 6:14	68:24	50:22 53:1 57:9	Gravel 75:7	Henderson
20:10 26:22	G	61:2,2 66:5	great 16:12	41:20 58:15,24
74:8,11	G 1:21 2:9 3:1	71:2	30:18	HHS 45:21
footnote 42:18	55:8	given 9:17 13:13	greater 69:10	history 13:3,8,13
44:4 73:1	general 1:18	68:20 69:1 70:3	GREGORY 1:21	41:19,20 42:16
forced 67:8,19	10:25 13:9 21:5	gives 69:4	2:9 55:8	holder 71:23
71:6	29:9 30:13,16	go 5:12,12 6:1	grounds 15:6	holders 71:20
forces 68:10	31:13,20 32:7	9:4 14:9 37:4	guess 39:18	holding 61:24,25
foreign 44:3	32:13,24 33:22	38:2,20 39:25	40:25 47:1	honestly 16:9
forfeit 70:17	35:1,5,10,17	45:21 48:25	H	23:22
forfeiture 37:11	35:23 36:3,20	52:12 53:23	half 16:14	Honor 42:14
62:20	37:24 38:8,12	54:8 55:1 57:6	Hansen 42:24	47:2 48:6 53:11
forget 23:10	39:4,12,15,23	60:8,8 63:9	happen 15:24	horribles 14:12
form 32:3 56:12	40:1,6,24 41:12	71:16 74:25	16:9 65:7	16:2
75:13	41:17 42:12	goes 4:9,13	happens 64:25	hospital 50:5,9
formal 45:22	43:14 44:9,19	39:20 50:3,5	happy 69:2,2	50:21
46:8	47:1 48:4,16	55:25,25 72:10	hard 11:3 18:24	Human 1:4 3:5
formally 38:24	49:9,12,16,19	going 5:25 14:19	hardship 45:18	45:1
former 54:10,10	49:22,25 50:11	15:16,22,24,25	45:22	hurdle 7:10
formulas 8:17	50:20,24 51:5	16:1 28:21	harm 11:7	hypothetical
formulation 8:11	51:12,16,19	29:18 31:15	harmed 71:19	67:13
63:12,13	52:8,8,25 53:9	37:7,19 50:16	harsh 66:9	I
forth 12:1 73:22	54:1,14,25 55:5	52:10,17 54:12	health 1:3 3:5	idea 11:22 34:3
forward 5:25	55:6 61:7,22	73:14	17:4 21:24	60:11 64:18
37:4 38:20		Gonzalez 57:22		

<p>identical 34:21 identified 36:22 43:20 44:1,5,6 III 58:5,18 67:24 imagine 14:14 15:6 immediate 15:8 immediately 5:12 15:17 55:22 immunity 34:24 important 45:9 impose 14:1 27:24 44:2 imposed 3:16 6:19 43:11 65:13 71:3 imposes 3:11 inadvertence 62:21 inartful 46:23 inclined 9:15,19 include 18:14 included 3:22 including 61:18 73:8 75:13 income 18:16,18 51:17,25 52:2 incompatibility 68:3 inconceivable 52:10 inconsistency 12:7 inconsistent 12:18 39:1 incur 26:4 68:13 Indian 46:6,7,10 46:11,17 indicated 29:23 36:9 indication 35:8 45:14 47:6 74:21 indicia 3:24</p>	<p>indistinguishable 55:15 individual 23:4 27:25 47:12,13 47:24,25 55:1 70:23 individuals 24:23 47:9 67:15 induce 19:11 inevitable 26:13 27:3 infer 48:20 inference 47:3 inferences 45:7 information 70:3 infringement 8:10 9:8 56:5 initial 9:16 17:9 58:20 initiate 9:12 injunction 6:16 8:12,14,18,24 19:7,8,10 21:7 39:8 52:20 63:13 injured 67:2 68:9 68:15 69:8 71:21 injures 71:6 injury 67:5,6,9 69:5 70:8 inquiry 31:24,25 inquisitorial 63:24 insist 7:13 instance 61:18 instances 20:24 36:16 instituted 8:11 9:9,9 55:18,22 instituting 63:18 63:19 institutional 37:25 54:17 instruction 31:12</p>	<p>43:17 53:2,15 instructions 43:2 insurance 25:17 25:19,20 27:10 27:15 28:4,8,9 44:11,16 46:12 46:19 48:22 49:4 50:3 51:24 52:16 64:6 66:2 66:12,21 67:8 insuring 62:7 intelligent 15:25 16:3 intent 73:15 interaction 72:17 interest 5:10 30:23 41:22,25 interested 26:10 interests 36:15 37:25 38:6 42:3 54:17 interfere 17:25 interference 17:24 interfering 74:6 Internal 3:14 16:22 18:11,15 21:14 29:10 31:5,10 43:11 53:3 72:13 interpret 12:24 26:21 28:5 interpretation 11:11 35:21 44:24 53:23 54:12 interpreted 7:19 38:16 interpreting 11:12 12:23 44:25 intervene 39:16 invalid 33:4 invalidated 25:16</p>	<p>investment 43:23 invited 75:19 involve 20:22 33:21 35:15 46:12 involved 19:23 involving 58:19 IRC 73:23 74:3 irreparable 11:7 IRS 18:18 22:22 54:11 issuance 58:2 issue 7:13 8:9,20 10:18 13:10 32:23 35:24 42:23 43:6 71:18 issued 33:1 issuer 71:19 issuer/bond 71:23 issues 13:3 30:18 30:20 items 29:2</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job 15:7 John 75:7 Joint 24:22 Jones 8:1 19:16 19:23 26:25 33:7 38:22 JR 1:18 2:6 30:14 judge 60:10 63:21 judges 60:11 judgment 25:15 judicial 58:20 judicially 6:18 jurisdiction 9:18 13:5 14:6 16:15 16:17 18:22,24 35:22 40:3 42:7</p>	<p>43:3 59:3,21 63:6 72:24 73:9 75:3 jurisdictional 7:7 7:15 9:19,22 10:3,7,12,15 10:20 11:4,12 11:13,18 12:1 12:19,23 13:4 13:14,22 14:11 14:19 15:23,24 16:6 23:12,16 23:21 29:1 30:21 33:21 34:4,17,19 35:9 35:13,24 36:13 36:22 37:2,9 38:11 40:2,2 41:3,24 42:20 43:6 55:13 57:4 57:15,20 58:10 59:15,18,20 60:23 62:3,9,15 63:8,8 75:6,16 jurisdiction-ou... 57:18 Justice 1:19 3:3 3:9 4:6,18,23 6:5,12,22 7:6 8:4 9:7,24,25 10:13 11:21 12:5,14 13:2,11 13:18,25 14:9 14:10,25 15:2,5 15:10,18,21 16:8,13 17:3,6 17:15 18:19,21 19:5,23 20:1,8 20:16 21:21 22:7,10 23:9,13 24:5,25 25:1,21 26:19,20 27:8 28:18,25 29:12 29:23 30:1,12 30:16 31:13,20</p>
---	---	--	---	---

32:7,13,22 33:15,23 34:7 34:22 35:3,8,10 35:19,25 36:3,8 36:21 37:14,16 37:17,17,18 38:1,5,13 39:2 39:5,13,16,19 39:24 40:6,7,24 41:11,14 42:6 43:9 44:8,20 46:22 47:23 48:10,17,24,25 49:1,11,14,18 49:21,23,24 50:1,12,18,21 50:25 51:12,18 52:6,13 53:5,7 53:18 54:2,3,9 54:10,19 55:5,7 55:10,13,20 56:3,10,18 57:7 57:21,25 58:11 58:15 59:6,10 59:17,25 60:6 61:1,10 62:2,6 62:11,24 63:5 63:15,22 64:13 64:16,17,23 65:25 66:23 67:4,11 68:14 68:22 69:7,17 69:22 70:2,21 70:25 71:10,13 71:16,24 72:1,2 73:14 74:18 75:18,24 justifications 66:16	41:14 48:24 49:1,11,14 63:5 63:15,23 66:23 67:4,11 68:14 68:22 69:7 Katsas 1:21 2:9 55:7,8,10,24 56:6,17 57:13 57:24 58:3,14 59:8,12,19 60:5 61:1,13 62:5,9 62:13 63:1,5,9 63:22 64:16,21 65:4 66:3,23 67:1,6 68:15,19 68:23 69:13,22 70:5,24 71:4,11 71:14,17,25 72:1 keep 49:18 Kennedy 6:5,12 6:22 23:9 34:22 35:3,25 36:3,8 54:3 Kennedy's 26:20 key 3:23 75:4 keyed 51:17,19 kind 11:25 12:16 26:25 74:10 kinds 14:13 21:19 know 6:13 8:5 10:11,12 14:21 14:23 16:24 18:3 21:18 22:16 23:17,25 24:1 26:3 27:2 27:17 28:6,14 28:17 35:25 36:4 39:13 54:15 63:1 65:24 66:1 69:22,23 73:22 75:3 knowledge 62:18	knows 14:1 <hr/> L <hr/> labeled 31:4 labor 32:8 lack 15:18 lacking 53:17 landmark 61:19 language 8:5,7,9 9:1 22:6,19 23:1,15,15,24 26:21 31:7,8,9 34:8,12,20,21 35:3 40:8 57:25 59:18,20 60:1 60:19,20 73:21 largest 68:23 Laughter 36:2 law 6:18 7:1 19:12 20:19 25:22,23 40:5 44:15,16 46:2 46:17 48:12 49:8,8,13,17 49:20 57:8 60:15,18 65:6 65:21 66:5,5 69:9 70:19 74:1 lawsuit 56:1 64:4 lawsuits 63:25 lawyer 62:21 lead 54:12 leaning 16:16 leeway 73:19 legal 28:8 45:15 46:18,25 64:12 65:11 67:25 68:2,4,5,25 70:15 level 52:3 levy 73:5 liabilities 73:24 liability 18:16,17 73:25 license 31:21	life's 60:4,17 light 12:24 limit 30:21 limitation 57:1,3 57:5 limitations 6:3 34:18 limited 13:21 14:8 72:17 limits 7:5 57:20 line 52:9 75:4 list 20:18 54:21 litigant 59:2 63:19 litigants 9:4 litigate 3:12 5:9 6:25 16:10 36:17 litigation 6:21 24:3 54:13 75:20 little 34:15 39:7 43:21 45:24 51:21 70:21 long 1:16 2:3,12 3:6,7,9 4:17,25 6:8,17,23 7:18 8:4,23 9:11 10:5 11:10 12:4 12:20 13:2,3,18 14:5,15 15:1,4 15:9,12,21 16:8 17:2,5,8 18:5 18:20 19:2,5,16 19:25 20:4,13 21:13,21 22:5,9 22:13 23:22 24:5,18 25:5 26:1,24 27:8,21 28:21 29:4,22 29:25 30:3,12 34:7 43:21,25 44:6 49:14 53:6 54:4 66:8 72:2 72:4,6 74:11,19	75:4,18,23 longer 38:23 Long's 38:14 look 20:19 22:25 23:4 24:20 27:2 28:2 42:16 67:4 72:12 73:25 looked 13:3 looking 57:14 lose 16:14 lot 9:20 10:19 23:8 29:8 36:4 42:9 53:19 60:1 lots 22:14 Lujan 70:13 <hr/> M <hr/> magic 41:18 main 5:7 29:7 maintain 9:13 48:3 56:4 63:24 67:24 maintained 4:5 8:8,12,21 9:3,9 41:10 55:19 maintaining 63:18,20 making 51:20 73:4 malicious 23:19 mandate 48:13 50:9 64:18,24 65:1,9,11,17 65:19,23 66:8,9 66:15,16,19,22 66:24 67:3,7,20 68:10,10,12,13 70:23 71:5,6,9 mandatory 10:4 10:15,22 14:13 15:3 65:14 manner 3:21 4:2 4:13,14,15,20 4:21,24 5:5 17:13,18,20,21
--	---	--	---	---

<p>18:8 36:7 72:8 74:15,17,25 manufacturers 21:25 mapping 52:2 March 1:10 matter 1:12 5:1,4 5:14 6:18 9:16 41:19 42:1 43:3 45:14,15,17,23 46:8 52:8 61:3 76:2 matters 20:23 mean 6:13,20 7:1 8:23 9:4,11,15 12:20 16:9 17:8 17:15,16,17 18:2 19:2 21:13 22:5 23:17,23 24:19 25:5,13 26:1,22,24 29:4 29:6,8 37:19 48:1 63:15 65:24 69:10 70:8 74:11 means 25:11 26:22 66:12,21 meant 22:3 73:15 measure 19:13 31:4 Medicaid 50:6,6 50:15,23 51:7 51:13 52:3,11 52:12 66:22 67:19,20 68:11 69:4,14,19,20 71:1,7 medical 50:2,4 members 46:6,7 46:10 mention 73:2 mentioned 13:11 21:11 merely 57:9 merits 64:3</p>	<p>million 68:10 69:6,25 mind 60:3,22 73:18 minimum 24:21 25:9,11,15 26:12 30:25 38:3 47:25 48:3 63:10 minute 34:2 45:9 45:19 minutes 45:4 72:3 mistake 22:25 model 27:22 modeled 19:7 moment 30:18 52:4 Monday 1:10 money 39:6 51:21 52:14,15 56:23 57:16 60:8 months 5:14 7:3 moral 51:2 morning 3:4 34:15 Mortimer 20:17 move 5:18 multiple 9:21 40:21 must-buy 24:10 24:11,14,15</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrow 12:25 narrowly 18:23 natural 63:25 nature 27:7 31:24,25 41:24 42:13 49:1 necessarily 10:9 16:11 52:2 need 33:19 35:21</p>	<p>42:22 43:7 65:21 needs 53:14 neither 57:3 never 5:19 26:3 26:11 new 68:10 newly 68:18 NFIB 32:15 NIB 47:4 noncompliance 51:11 nonstop 60:24 nontax 64:12 non-jurisdictio... 55:17 61:4,6 Northrop 60:24 notice 5:20 notwithstanding 13:24 14:6 73:3 nullity 68:5 number 3:4 10:6 51:20 70:10 numbers 69:10 numerous 11:19 40:13,14 Nut 38:16</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obey 25:22 object 71:21 objection 29:7 objective 51:9 obligated 49:4 50:10 51:21 obligation 10:17 27:24 28:9 46:19,25 48:3 48:22 51:2 67:25 68:2,4,25 70:15 71:3 obtain 22:4 24:23 25:24 45:21 46:10 66:11</p>	<p>69:15,18 obtained 46:1 obviously 20:5 occurred 38:15 occurring 14:12 occurs 15:13 odd 69:7 offenses 30:6 offered 43:8 official 45:25 oh 23:1 28:22 Okay 60:13 71:11 old 23:23 omission 37:11 once 21:2 56:20 56:20 ones 43:20 71:20 one-of 62:16 open 37:10 opening 42:18 73:1 operative 65:12 opinions 58:8 opposed 63:20 option 37:23 oral 1:12 2:2,5,8 3:7 30:14 55:8 order 17:10 25:23 33:7 67:15,24 69:6 73:9 originally 35:5 ousted 57:11 ousters 18:22 outside 43:16 52:22 overlapping 43:21 overlook 37:21 overrule 7:16 overruled 8:2 38:25 overtaken 8:6 over-arching</p>	<p>73:18 owe 18:17 owed 55:2</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 Packing 7:25 11:2,13 12:6,12 12:15 33:6 38:21 62:1 page 2:2 20:18 24:22 34:9,13 44:4 45:19 46:5 47:6 paid 5:17 22:17 parade 14:11 16:2 paragraph 47:10 parallel 35:4 part 16:18,18 18:15,17 22:11 22:17 23:25 33:17 40:4 participate 70:20 particular 7:9 47:16 59:7 69:4 74:12 particularly 4:22 17:23 parties 63:24 72:8 parts 5:1 party 4:22 9:12 36:15 39:17 58:19 61:21 71:23 passed 11:19 18:12 Passman 57:5 pattern 8:14 pay 3:11 5:9,11 6:24 19:14 24:24 25:18,18 26:11 27:15,15 27:24 39:6,11</p>
--	---	--	--	--

40:20 42:10 49:12,14,16,19 50:22 52:16,17 56:8,21 paying 20:22 28:7 payment 39:22 44:12 pays 49:5 penalties 3:22 5:6 19:11 20:12 20:21,21 21:13 21:19,22 24:7 29:2 30:5 43:19 43:22 44:2 64:15 73:24 74:13,16,23 penalty 3:14,16 3:20,23 4:1,9 5:3,4,9,17,25 6:11 16:21 17:14 19:4,14 20:3 21:16 24:9 24:12,15,17,22 24:24 25:10,10 25:16,18,19 26:4,10,11,14 26:15 27:20,24 28:2,3,7 29:9 29:10,13,21 30:8 31:14,16 33:18 35:11 44:12,21 45:2 45:12,23 46:8 46:18,24 47:20 48:2,14,15,21 49:3,5,15,20 49:24 50:16,19 51:11,14,17,23 52:1,11,17,20 53:1,3,13,15 53:20,21,22 64:20 65:9,16 65:18,23 66:7 66:25 67:16	68:13 72:7 73:25 74:15 75:2 people 14:24 16:10 44:14 47:17 51:7,13 52:6,9,15 53:19 61:16 65:19,20 65:22 66:4,10 66:14,17 67:19 68:10,16,17,19 68:20 69:3,8,11 69:19,24 70:14 71:6 percent 51:25 perfect 27:22 period 7:19 12:6 12:8 permit 47:3 permitted 5:16 72:18 permitting 56:13 56:15 person 4:5 28:6 45:21 49:3,4,6 49:8,10 50:1,4 50:7,14,14,15 66:6,24 67:1,2 67:7 persons 46:16 perspective 34:1 petition 73:11,13 Petitioners 1:5 1:20 2:7 30:15 pharmaceutical 21:25 phrased 41:4 picks 22:14 place 24:4 52:12 54:18 74:4 placed 59:4,5 places 20:14 21:22 plaintiff 11:7 27:1 67:13	plaintiffs 15:15 25:14 26:10 67:14 Plaintiff's 24:20 planning 67:15 plans 21:24 pleading 27:6 please 3:10 30:17 55:11 plugged 22:19 Plus 60:23 pocketbook 67:9 69:5 70:8 point 11:25 16:25 17:8 18:7 24:8 41:11 46:19,22 50:9 52:13 56:8 64:13,14 75:1,4 pointed 40:10,12 48:6 points 4:7 11:22 38:13 policies 61:8 policy 61:3,12,13 61:13 62:7 political 30:9 poor 66:7,11,14 66:19,21 portions 29:16 poses 43:22 position 25:23 35:18 46:2 49:6 49:9 51:7 54:15 63:6 possible 70:5 possibly 30:8 poverty 52:9 power 13:6 31:1 31:2,4,18,22 32:2,11,18 33:4 52:19 57:11 59:3 powers 56:16 practical 5:1,4 45:14,17	precedent 75:13 75:13 precise 31:7 32:5 52:2 precisely 66:5 precondition 56:6,7 predecessor 38:7 predict 16:9 predicted 53:10 presence 59:14 present 52:3 57:16 presents 30:18 presumably 69:10 presume 34:24 presumption 75:15 pretty 16:16 74:5 prevent 17:24 26:17 64:14,17 66:17 previously 20:9 pre-statutory 7:21 primarily 19:18 19:19 primary 27:5 principal 71:4 72:8 principle 18:22 58:24 principles 7:21 38:18 prior 46:5 61:24 privacy 22:23 private 44:13 probably 16:16 29:5 30:5 probation 44:15 problem 16:17 25:2,7 28:20 32:16 34:24	36:21 67:21 problems 29:6 36:21 procedure 22:14 43:1 59:5 60:7 proceeding 4:15 8:15 73:5,7,9 proceedings 8:18 process 5:21 processing 10:4 10:16,22 13:5 13:14 14:2,13 15:3 42:7 57:10 program 47:16 prohibited 7:22 prohibition 6:10 73:6 prohibitory 32:9 promote 62:7 proper 60:11 73:7 proposed 33:25 proposition 75:19 prosecution 23:19 prospect 37:13 prospective 56:23 57:16 protect 41:21 protecting 30:23 prove 14:1 provide 17:16 22:16 provided 3:21 73:24 74:1 provides 4:3 31:11 45:20 47:8 provision 10:15 11:4 12:2 21:16 23:16,20 24:10 30:25 32:19,19 33:3 34:4,12 35:6 38:3 40:10
--	---	---	---	--

40:12 41:2,5 42:20 43:4 46:5 47:7,8 48:6 53:7 70:19 provisions 7:3 22:15 24:2 43:15,25 44:5 47:11 72:16,23 73:4 prudent 36:6 punishment 65:2 purchase 28:4 49:3 67:7 pure 13:5 purpose 4:4 12:24 19:9 23:10,17 26:20 26:22 27:5 53:4 64:4 purposes 3:22 16:22 31:6,18 33:17 43:12 53:7,17 61:20 pursuing 63:2,3 put 21:23 31:5 52:18 65:10 puts 25:22 puzzle 69:18	75:17 quickly 12:11 quite 7:11 8:25 19:6 35:3 43:14 63:9 quote 47:11 73:3 73:21	52:21 60:10,14 60:15,21 64:7 66:19 reasonable 27:23 28:5,10 reasonably 66:3 reasoning 60:18 60:20 61:2 reasons 3:17 17:23 18:20 24:19 54:2 55:14 REBUTTAL 2:11 72:4 receive 66:17 receiving 50:2 recognized 22:22 68:8 record 26:2 redetermination 73:11 Reed 8:9,20 40:7 40:8,9,12,16 40:21 41:15 42:6,10 55:17 55:21 56:1 59:8 59:13,14 63:17 refer 74:23 references 17:19 referred 20:9 22:10 75:2 reforms 52:12 refund 7:2 14:16 14:20,21 34:14 34:16,19,23 56:21 73:10 74:22 refuse 67:18 refutation 61:14 Regan 12:15,21 56:19 68:9 71:17 regardless 13:13 60:18 register 42:8	56:2,5 60:17 registered 55:23 55:25 registration 40:18 60:16 regulated 71:23 regulations 21:18 regulatory 19:19 27:19 rejected 7:25 related 21:15 54:5 relationship 71:22 release 44:17 relevant 60:1,2,2 relied 59:10 relief 56:12,23 57:16 rely 54:6 59:8 remaining 72:3 remains 25:17 remarkably 8:8 remedial 57:1,3 57:5 remedies 5:11 6:2,6,15 54:5 remedy 39:5 57:9 render 25:15 repeating 40:25 reply 47:7 reporting 44:3 representation 44:22,23 49:2 repudiated 38:21 38:22 require 50:23 required 67:7 requirement 17:4 23:5 24:14 24:21,23 25:10 25:12,16 26:13 26:16 45:6,13	45:16 47:14,21 47:22 57:2 64:5 64:5,6 65:11,14 66:1,11 requirements 44:3 52:5 requires 9:14 65:6 reserve 30:11 resist 24:12 69:21 resisting 24:17 resolved 5:14 respect 32:14 41:23 44:2 58:4 66:15 68:6 73:12 respects 40:21 respondents 1:22 2:10 44:13 55:9 response 15:22 18:4 21:12 responsibility 75:21 restrain 14:7 41:10 59:22 72:18,24 restraining 4:4 6:10 16:18 23:11 39:9,21 39:21 rests 58:4 result 10:1 22:3 26:13 28:22 results 70:10 return 18:16 22:18 51:22 revenue 3:14 16:22 17:24 18:11,15 19:10 19:12,15,19 21:6,7,14 29:10 31:6,11 43:11 53:3,8,10,11
<hr/> Q <hr/> qualify 43:12 57:19 question 14:10 14:25 15:2,11 16:4,5 20:6 23:12,13 26:20 28:15 32:1 33:16 34:7 35:13 40:10,16 40:18 43:18 44:9 49:7 55:12 61:11,12 64:3 67:10,11,23,25 questions 13:7 30:10 54:4 55:4	<hr/> R <hr/> R 3:1 75:7 raise 10:17 15:14 19:12,15,20 37:11 53:8,10 53:11,13 62:22 raised 62:24 raises 15:7 19:20 raising 19:9,19 ramifications 67:18 rank 61:6 ratified 75:5 rational 16:11 reach 14:14 15:6 15:11 42:22 reached 13:10 read 10:8 13:12 18:2 27:23 33:13,14 35:15 36:7 38:2 75:7 reading 28:19,23 29:5,7 35:14 44:20 48:8,9,19 48:23 reads 27:16,19 real 43:23 reality 37:8 51:10 really 21:14 26:9 36:10 45:8 48:1 51:1 73:15 74:6 75:5 reason 3:15 21:4 28:1 33:5 35:18 35:23 46:9 47:14 50:12			

<p>53:13 72:13 revenues 18:1 19:21 revenue-raising 19:13 61:20 review 25:24 58:20 revoked 44:18 rewrite 27:9 right 7:13 8:23 8:25 14:15 15:4 17:2,5 19:6 20:5,18 22:9,13 29:4,22,25 32:25 33:16 35:1,11,12 36:18 38:2 39:25 45:8 48:12 49:25,25 50:20,20,24 51:8 54:18 56:20 57:14,24 58:22 70:6,25 rights 23:19 rise 69:5 ROBERT 1:16 2:3,12 3:7 72:4 ROBERTS 3:3 7:6 11:21 30:12 37:17 38:5 48:10 53:5 55:5 55:7 64:13,17 64:23 65:25 71:16,24 72:2 75:18,24 role 60:22 rolls 68:11 room 50:2,4,5,9 66:17 route 33:24 rule 3:12 6:6,7 6:13 7:7 10:4 10:16,22 12:17 12:18 13:5,5,12 14:2,13 15:3,23</p>	<p>42:25 57:10 58:4,16 60:13 75:9 rules 5:23 16:6 22:20 runs 64:3 rush 5:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 sanction 27:11 sanctioned 38:9 Sand 75:7 satisfied 25:14 saying 9:2 10:6 13:23 14:16 23:1,6 25:15 36:12 37:22 39:10 47:18 48:1,5 49:18 52:24 54:11 65:21 says 4:20 6:24 6:24 7:1 8:13 8:14,20 14:5,20 16:18,21 17:18 27:14 29:9,13 29:16 41:8 42:8 47:12,21,23 50:5,7 55:18,21 56:1 57:8 66:8 73:3 74:1 Scalia 4:6,18,23 15:21 16:8 18:19 36:21 39:19,24 second 3:21 5:10 16:14,18,18 33:17 37:6 70:16 secretary 4:8,12 4:19 5:13,13,18 5:20 6:4 45:21 72:15 Secretary's</p>	<p>72:11 section 3:16,19 3:23,25 5:4,25 13:24 20:9 22:7 22:8 23:4 27:11 31:5,9 35:12 43:17 45:10 47:8,14,14,22 59:4 72:6 73:2 73:4 sections 22:17 27:10,13 44:1 65:10 Security 7:12 see 5:14 14:12 15:15 16:17 23:18 26:3 47:18 60:19 74:3,5,9 seek 67:12 seeking 24:13 56:23,23 58:19 seeks 64:9 selling 21:17 sends 5:20 sense 13:4 23:11 29:8 45:24 46:15 56:25 61:3 64:20 70:13,13 sensibly 61:19 sent 43:2 sentences 16:25 73:22 separate 11:22 25:9 32:11 64:19,21 65:2,8 65:10,22 67:23 74:4 separated 35:7 65:17 separately 24:14 series 8:1 22:23 24:2 serious 25:7</p>	<p>served 61:21 serves 30:22 Service 46:11,17 Services 1:4 3:5 45:1 set 22:20 42:3 sets 27:12 setting 18:6 shareholder 39:3 shifting 66:17 shoe 48:11 show 69:9,10 shows 61:17 side 10:23,24 63:4 sides 27:4 sign 51:7 significant 32:16 60:22 similar 7:11 8:9 14:18 26:25 40:8 similarities 40:9 41:15 similarity 60:19 Simon 38:22 simple 37:11 simply 4:14 6:11 7:20 8:5 10:21 11:16 28:22 58:12 69:5 72:10,12 73:2 74:25 single 27:24 59:20 situation 27:7 50:13,16 51:22 55:2 62:14 75:10 situations 5:16 58:19 72:18 slightest 37:8 slightly 46:4 sloughed 65:15 Social 7:12</p>	<p>sole 25:11 solely 29:2,21 Solicitor 1:18 10:25 13:9 21:5 28:19,23 29:5,7 29:9 30:4 38:8 61:22 62:4,10 62:18 somebody 69:17 somebody's 52:2 somewhat 11:3 18:10 23:20 sorry 15:1 28:23 48:25 sort 23:15 27:4 60:21 64:25 75:8 sorts 67:18 Sotomayor 9:24 13:2,18,25 14:9 14:25 15:2,5,10 15:18 19:23 20:1,8 28:18,25 29:12,23 30:1 32:7,14,22 37:14 44:8,20 46:22 51:12,18 52:6 54:9,19 56:10,18 57:7 57:21,25 58:11 58:15 59:6,10 59:17 62:2,6,11 62:24 70:21,25 71:10,13 sound 11:8 sources 17:24 South 12:15,21 56:18 68:9 71:17 sovereign 34:23 speak 59:2,18 61:8 speaks 59:1 Spear 70:14 special 3:16</p>
---	--	--	--	---

<p>12:25 58:4,16 75:8 specific 7:4,4 specifically 14:3 17:12 18:5 21:23 22:1,10 58:18 74:23 spend 45:9 spent 16:15 Sponte 10:18 stability 30:24 stake 21:8,10 42:3 stand 36:24 37:7 Standard 38:16 standing 25:17 66:25 67:11,24 68:2 70:6,7,10 70:17 71:2,5 stand-alone 45:7 start 5:21 starting 47:10 state 8:16,18 21:7 52:5 69:8 69:11,14 71:1,2 71:3,5,18,18 71:21 stated 24:14 statement 13:15 26:3 72:20,23 States 1:1,13 8:15 34:2 37:8 38:1,6 39:16 41:2 46:1 51:3 54:6,17 67:17 68:6,8,15 70:6 70:8,10,16,17 71:5 stating 11:18 statute 6:21 8:20 9:16,19,22 11:12,14,18 12:8,23,24 14:16,20,20 19:24 21:2</p>	<p>23:23 26:21 27:9,9,11,14 27:16,18,22,23 28:5,13 29:18 33:17,18,25 34:14,16,18,19 35:14,21 36:6 38:2 41:8,9 44:20,25 46:9 46:14 47:3 48:9 48:19,23 49:5 51:8 53:15 55:16,17,18,21 56:1 57:1 58:1 61:4,6 62:15,17 63:7,14 64:11 65:8,15 74:22 statutes 13:14 13:15 14:23 29:20 54:22 57:19 61:19 statutory 8:5 32:5 34:13 35:6 42:22 43:8,9 61:8 74:7 stay 8:15 sticking 73:16 strange 57:7 strike 23:20,22 striking 26:12 string 42:17 strong 30:23 41:22,23 60:14 stronger 48:9 strongest 35:7 strongly 58:9 structure 46:8 61:7 structured 51:9 studied 6:13 Sua 10:18 subchapter 43:16 73:24 74:2,13,16 subject 28:1</p>	<p>29:14 32:10 35:15 37:10 43:3 44:17 48:2 48:12 51:14,23 51:25 52:10 54:20,23 62:15 65:19,22,23 66:8,19,24,24 67:6,17,25 68:12,25 71:9 71:18,20 73:13 submission 17:9 submit 9:1 75:10 submitted 76:2 subsection 45:13 73:10 subsequent 8:1,3 substantial 19:21 33:10 substituting 60:11 subtitle 22:13,19 Sub-section 47:23 succeed 26:11 successful 19:13 succinctly 18:4 sue 42:8,9 sues 39:3 suffer 11:7 sufficient 61:8 70:3 sufficiently 41:23 suggest 22:3 27:13 33:13 69:8 suggested 40:7 54:3 55:14 suggesting 63:19 suit 4:3 8:8,11,20 9:2 11:6 15:16 23:17 24:8,9 26:7,17 27:3,5 41:9 45:5 55:18</p>	<p>55:18 56:4,7,11 56:22 57:13 59:1 64:14 67:24 suitor-directed 8:22 suits 37:20 Sunshine 11:1 supervised 44:17 suppose 48:10 49:3 50:1 63:16 supposed 27:17 46:20 Supreme 1:1,13 sure 12:3 65:4 surprise 18:10 system 46:12,13 46:15,21 63:23 66:22</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 24:4 25:3 26:19,21 30:3 34:2 41:11 48:14 50:25 taken 46:13 54:15 takes 53:18 talk 16:25 23:9 24:7 45:3 72:17 talked 34:14 57:23 talking 63:6 68:16,17 70:6 talks 73:22,23 tax 3:12,14,24 4:5,21,24 5:6,9 5:12,17,19 6:24 8:12,13,24 13:10 16:19,21 16:24 17:4,10 17:13,14,14,22 17:22 18:6,8,9 18:10,13,16</p>	<p>19:3,4,7,8,10 19:24 20:2,6,12 21:2,7,16 22:18 24:7 29:14,15 29:24 31:4,14 31:16,18,19,21 31:23 32:8,9,9 32:10 33:4,9,11 33:19,21 35:15 36:18 39:6,8,10 39:21,22 43:12 44:21 45:2 49:13,16,18,19 50:16,19 51:21 52:14,21 53:4 53:16 54:21 56:14 59:4 60:9 63:13 64:6,20 71:18,20,22 73:8,8,20,23 74:25 75:1 taxes 3:21,22 4:2 4:20 5:6 6:23 7:23 14:7,24 16:11,25 20:22 20:23,25 24:4 26:8,8 29:3,17 40:20 56:8,21 56:22 59:23 60:3 64:10,16 64:18 72:8,19 72:25 74:17 75:11 taxing 31:1,3,18 31:22 32:2,11 32:18 52:19 taxpayer 5:18 6:1 39:10 taxpayers 18:15 technical 39:7 tell 19:4 28:18 36:15 54:19 term 18:9 terms 6:3 13:22 34:8 62:12,13</p>
---	---	---	--	--

75:7	45:8,9,13 46:3	32:1,4	uncompensated	57:5 58:3 68:9
terribly 58:23	46:16 48:5,8,16	tomorrow 31:14	66:18	70:14 71:17
text 4:18 32:5	48:17,18 50:11	31:24 32:1 69:9	unconstitutional	vacated 43:1
55:14,16 58:22	50:12 51:5,6,8	75:25	24:15 26:16	validity 36:17
59:1 61:7 65:12	51:8 53:12 54:2	toothless 66:1	32:20	verb 65:14
textual 31:11	54:3,8,18 55:2	traditional 13:4	underlying 21:4	Verrilli 1:18 2:6
35:8	55:14 56:25	38:18	47:20 60:21	30:13,14,16
textural 45:14	57:2,8,14 61:14	treasury 4:8	understand 11:3	31:13,20 32:13
47:5 53:2,15	63:10,22,25	44:25	28:13 29:6	32:24 33:15,22
Thaler 58:3,16	64:7 65:20 66:4	treated 42:19	33:24 68:14	35:1,5,17,23
58:23	66:23 67:1	53:4,16	70:4	36:3,20 37:24
Thank 30:12	68:24 73:15	tribes 46:6,7,10	understanding	38:12 39:4,12
49:21,22 55:5,6	74:11,19,20	tried 60:15	7:23 12:21 39:1	39:15,23 40:1
71:24 72:1	75:4	triggered 22:1	understandings	40:24 41:12,17
75:23	thinking 12:18	triggers 4:2 33:9	58:17	42:12 43:14
theory 33:14	63:25	troubled 37:14	understands	44:19 47:1 48:4
71:4	third 3:23 5:15	troubling 34:5	40:3	48:16 49:9,12
thing 23:18 32:19	third-party 70:11	36:12,19 37:12	understood	49:16,19,22,25
60:2 73:16,18	70:12	true 23:7 26:9	12:16	50:11,20,24
things 22:24	thought 18:21	36:19 38:12,24	underway 23:18	51:5,16,19 52:8
29:17 36:4 42:9	51:12 71:15	45:10 53:12	unfettered 70:12	52:25 53:9 54:1
51:20 52:4 54:2	three 3:17 5:7	56:11 61:15	unique 62:17	54:14,25 55:6
55:21 60:2	13:10 20:23	71:8 72:25	United 1:1,13	versus 13:14
66:13	30:5 44:5 59:14	73:21	8:15 26:6 34:1	view 40:1 61:15
think 3:15 4:17	65:12	trusts 43:24	37:8,25 38:6	74:13
5:2 6:18 7:10	three-part 4:17	try 63:16 71:11	39:16 41:2 46:1	viewed 10:3,4
10:8,10 11:10	TIA 8:17	71:14	51:2 54:6,17	viewing 11:3
11:10 12:20	tightly 36:25	trying 19:18 23:7	unreasonable	violate 68:12
14:16,19 15:15	time 6:1 7:5 9:17	27:9,13 47:4	66:10	violated 49:7,8
15:21,22 16:6	14:22 16:15	60:7 74:5,9	unusual 23:20,23	49:13
16:11 18:25	18:12 30:11	turn 9:10 25:4	unwanted 67:9	violating 46:17
19:1,6 20:17	38:15 42:18	64:2,2	use 21:2 22:5	virtually 34:20
21:5,19 22:25	61:5 64:3 73:6	two 5:1 11:22	57:19 63:14	virtue 48:6,7
23:25 24:18	timely 15:14	20:22 24:19	65:13 73:19,23	67:20
25:6,8,9,13,20	73:10	27:4,10,12,13	uses 18:9 59:21	voluntarily 70:19
27:22 28:11,17	times 8:24 9:21	36:20 45:11	usually 7:21	voluntary 68:21
28:19 29:4,8	10:1 13:15	54:1,10,10	23:16	69:1
30:3,6 32:13,17	65:12,12,13	73:22	utterly 12:12	
33:5,12,24 34:5	timing 40:17,19	types 15:20	U.S.C 43:22 47:7	<hr/> W <hr/>
35:7 36:3,5,20	Title 40:11,11			wait 6:4 7:2
38:1,25 39:20	57:19	<hr/> U <hr/>		waivable 37:22
39:20 40:4,24	tobacco 44:6	unanimous 58:8	v 1:6 3:5 7:18,24	40:3
40:25 41:1,16	tobacco-related	unanimously	12:15,21 32:16	waive 7:16 21:9
41:18 42:4,12	30:5	55:16	32:20,25 33:1	36:18 38:9
42:15 43:5 45:3	today 9:17 31:13	unchanged 23:24	38:22 56:19	waived 7:13

10:11,16 15:15 34:25 waiver 10:25 11:2 13:9 60:21 61:23 62:16 waives 62:4,10 waiving 61:22 want 14:3 16:13 21:6,12 23:2 25:21 35:25 36:4,17,18 39:24 50:7,7 52:14 60:10 61:16,16 64:19 wanted 52:21 61:10,11 wanting 60:21 wants 50:4 51:6 69:11,14 Washington 1:9 1:16,19,21 wasn't 14:25 40:11 water 9:20 way 10:14 11:6 15:14,16 21:15 27:9,16,18,23 28:13 35:14 38:2 41:4 42:15 46:3 47:2 48:7 48:7 57:14 63:25 66:20 71:3,14 ways 65:9 went 22:21 weren't 51:13 we're 28:15 38:23 70:5 we've 11:25 34:14 42:17 43:20 54:15,15 54:16 74:4 wholly 66:9 Williams 7:25 11:2,13 12:6,12	12:15 33:6 38:21 62:1 win 11:6 62:17 word 16:21 17:7 21:2 59:21 73:19 wording 14:18 words 23:10 32:3 32:6 41:19 47:10 work 24:19 48:7 70:11 worse 60:3 wouldn't 15:17 22:2 25:19 28:12 43:17 63:9 68:20 69:1 written 13:23 64:11 65:8 wrong 40:23 51:14,15 54:13 67:10 68:7	1331 57:16 1346 57:17 16 20:18 16A 34:9 17 20:18 65:12 17A 34:14 18022(e) 47:8 1867 12:8 23:25	<hr/> 6 <hr/> 6 5:13 7:3 68:10 6038(a) 44:1 6213 73:2 63 72:13 64 72:13 6671(a) 43:18 68 17:19 43:16 73:16	<hr/> 7 <hr/> 70s 13:20 72 2:13 7421 13:24 14:6 20:10 35:12 41:21 7421(a) 34:9,21 35:2,9 41:4 73:4 7422 20:11 41:7 41:21,23 7422(a) 34:15,20 41:3.	<hr/> 8 <hr/> 8 51:25 857 43:22	<hr/> 9 <hr/> 90s 13:20 9008 22:8 9010 22:8
	<hr/> X <hr/> x 1:2,8 42:1	20 65:12 2000's 13:20 2012 1:10 22 44:4 2283 8:14 26 1:10 43:21 28 40:11,11 57:19	<hr/> 2 <hr/> 20 65:12 2000's 13:20 2012 1:10 22 44:4 2283 8:14 26 1:10 43:21 28 40:11,11 57:19	<hr/> 3 <hr/> 3 2:4 30 2:7 36 44:5	<hr/> 4 <hr/> 42 47:7	<hr/> 5 <hr/> 5 72:2 50 12:6,7 500 60:10 69:6 5000A 3:17,20 3:23,25 5:4,25 23:4 31:5,10 43:13 45:10 46:6 47:14,22 72:7 5000A(e)(1) 47:15,19 5000A(e)(3) 46:6 5114(c) 30:6 527(j) 30:8 55 2:10 5684 30:6 5761 30:6
	<hr/> Y <hr/> year 19:22 69:6 years 12:6,7 40:15 50:3					
	<hr/> \$ <hr/> \$4 19:21 \$600 69:6,25					
	<hr/> 1 <hr/> 10A 46:5 10:12 1:14 3:2 11 59:16 73:1 11A 45:20 11-398 1:5 3:4 11:41 76:1 12(b)(1) 43:3 12(b)(6) 43:1 122 24:22 13 47:6					