

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CIC SERVICES, LLC,)
Petitioner,)
v.) No. 19-930
INTERNAL REVENUE SERVICE, ET AL.,)
Respondents.)
- - - - -

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INTERNAL REVENUE SERVICE, ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, December 1, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:31 a.m.

APPEARANCES:

CAMERON T. NORRIS, ESQUIRE, Arlington, Virginia;
on behalf of the Petitioner.

JONATHAN C. BOND, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	CAMERON T. NORRIS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JONATHAN C. BOND, ESQ.	
7	On behalf of the Respondents	31
8	REBUTTAL ARGUMENT OF:	
9	CAMERON T. NORRIS, ESQ.	
10	On behalf of the Petitioner	67
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-930, CIC Services versus the IRS.

Mr. Norris.

ORAL ARGUMENT OF CAMERON T. NORRIS

ON BEHALF OF THE PETITIONER

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

CIC Services wants to challenge an IRS notice under the APA. That guidance document subjects an entire industry to a burdensome reporting regime, but it never went through notice-and-comment rulemaking.

Congress did not exempt the IRS from the APA. And this Court has refused to carve out exceptions to APA review good for tax law only. While the Anti-Injunction Act bars many tax cases, it does not bar this ordinary administrative law case.

CIC's suit does not have the purpose of restraining the assessment or collection of taxes for three main reasons.

First, CIC is challenging the notice,

1 not the assessment or collection of any tax.
2 Under Direct Marketing, the reporting
3 requirements that the notice triggers do not
4 implicate assessment or collection. While these
5 requirements are enforced in part by tax
6 penalties, CIC does not challenge the penalties,
7 the IRS has not assessed any penalties, and CIC
8 is a law-abiding company that will never incur
9 any penalties.

10 At most, an order setting aside the
11 notice would prevent the IRS from collecting
12 future tax penalties if someone someday decided
13 to violate the reporting requirements. But that
14 kind of downstream attenuated effect on taxes
15 does not count under Direct Marketing.

16 Second, CIC's injuries have nothing to
17 do with tax liability. Its injuries are the
18 costs of complying with the notice's reporting
19 requirements and the loss of business that comes
20 with being labeled a reportable transaction.

21 Third, CIC cannot raise its claims in
22 a refund suit. There is no tax for CIC to pay
23 here. The notice is not a tax, and CIC is a
24 material advisor, not the taxpayer.

25 To file a refund suit, CIC would have

1 to gin up a tax by violating the reporting
2 requirements, risking criminal and professional
3 sanctions, and hoping the IRS agrees to assess
4 it a penalty. The Anti-Injunction Act cannot
5 require this, as this Court held in South
6 Carolina versus Regan.

7 CHIEF JUSTICE ROBERTS: Counsel, I --
8 I think I heard you say that you're asking that
9 the notice be set aside. But maybe it's a
10 technical matter, but that's not actually what
11 you're asking. You're asking for an injunction
12 against the enforcement of the notice. Does
13 that make a difference?

14 MR. NORRIS: I don't think so,
15 Mr. Chief Justice. I think it is a technical
16 matter. I think the way that a court would
17 enjoin enforcement in an APA case is under 5
18 U.S.C. 706, which says you set aside the
19 unlawful agency action.

20 But even if you didn't need to enjoin
21 the IRS from enforcing the notice as a technical
22 matter, that still would not be the purpose of
23 this lawsuit. The purpose, as this Court
24 explained in Bray, means what the lawsuit is
25 aimed at, not merely the incidental effect of

1 it. And, here, our suit is aimed at the notice.
2 That is the thing that's being challenged and
3 the thing we want the enforcement to be enjoined
4 for.

5 We did not ask for an injunction
6 related to tax penalties. We didn't challenge
7 the tax penalties. And no tax penalties are
8 pending or could possibly be assessed --

9 CHIEF JUSTICE ROBERTS: Well, these --

10 MR. NORRIS: -- in --

11 CHIEF JUSTICE ROBERTS: -- these are
12 -- these are tax penalties, that's what Congress
13 called them, with the consequences that that --
14 that entails. And I wonder if you think
15 Congress doesn't have the authority to refer to
16 it as a tax?

17 MR. NORRIS: That's not our argument,
18 Mr. Chief Justice. These are tax penalties.
19 They are taxes under the code. But what we're
20 challenging is a guidance document that imposes
21 reporting requirements. Those reporting
22 requirements appear in Chapter 61 of the Tax
23 Code, not Chapter 68, and so they are not deemed
24 taxes for purposes of -- of the Anti-Injunction
25 Act.

1 CHIEF JUSTICE ROBERTS: You --

2 MR. NORRIS: And I think --

3 CHIEF JUSTICE ROBERTS: -- you
4 certainly have to agree that, under its normal
5 meaning, that -- that your -- your approach
6 would, in fact, restrain the assessment or
7 collection, right? It would certainly make --
8 it would certainly be an impediment to just
9 that. That's the purpose -- that's the
10 significance, I suppose, of your asking for an
11 injunction.

12 MR. NORRIS: Well, I don't think
13 restraint means impediment, Mr. Chief Justice.
14 I think it carries the definition from Direct
15 Marketing. It would have to stop and the thing
16 that it would have to stop is the actual formal
17 process of assessment or collection. We don't
18 think our suit does that because we have not
19 violated the notice and the IRS has not begun or
20 even threatened assessment or collection yet.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Mr. Norris, the --
25 how do you respond to the argument that this is

1 just a way around -- to avoid the
2 Anti-Injunction Act?

3 MR. NORRIS: Your Honor, we don't
4 think the Anti-Injunction Act, as originally
5 understood and -- and -- and the meaning it has
6 today, says anything about a pre-enforce --
7 pre-enforcement challenge to a reporting
8 requirement.

9 Reporting requirements are not covered
10 by statutes like this, as this Court said in
11 Direct Marketing. And I think the party that's
12 engaged in sort of word play here is the
13 government. If you look at the first sentence
14 of the argument section of its brief, it has to
15 -- the way it has to fit our suit under the
16 Anti-Injunction Act is by describing it as an
17 attempt to violate reporting requirements
18 without paying tax penalties.

19 But, of course, this suit is not -- we
20 don't want to violate the notice with impunity.
21 We have brought a pre-enforcement challenge to
22 the notice itself. And we don't want its
23 reporting requirements to be reporting
24 requirements anymore. We have no intention of
25 ever violating the notice. We are a law-abiding

1 company that has no plan to incur tax penalties.

2 JUSTICE THOMAS: Have you ever
3 incurred a tax penalty?

4 MR. NORRIS: Not for violating Notice
5 16-66, Your Honor, and I'd point you to page 36
6 of the association's amicus brief. The industry
7 is not aware of any captive insurance provider
8 or material advisor who has ever violated Notice
9 16-66 or incurred any tax penalties.

10 JUSTICE THOMAS: Let me ask you, the
11 last clause in the Anti- -- the Anti-Injunction
12 Act reads as follows: "Whether or not such
13 person is the person against whom such tax was
14 assessed."

15 Does this suggest that there has to be
16 a -- a pending tax liability for the
17 Anti-Injunction Act to apply?

18 MR. NORRIS: Justice Thomas, I think
19 "was assessed" in the past tense gives you a
20 good sense of what the act core is, and the
21 core, of course, is where tax penalties have
22 been already assessed or the taxpayer has
23 already committed the taxable conduct and so tax
24 penalties are coming.

25 But that language, according to this

1 Court in Regan, is largely irrelevant to the
2 overall scope of the act. Regan said that that
3 language really was just taking care of a new
4 cause of action that the Congress created in
5 1966. It doesn't tell you too much, but, to the
6 extent it tells you anything, I think it
7 supports our interpretation.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: I'm thinking of your
12 having some way of getting their decision
13 reviewed. Why can't you state your underlying
14 claim, which is: You have to, IRS, promulgate
15 this kind of rule, reporting requirement, only
16 after having a rulemaking.

17 So what you do is you file a piece of
18 paper saying give us a rulemaking. And if they
19 say no, you go to court and say: That decision
20 was arbitrary, capricious, and abuse of
21 discretion because they have no other way of
22 doing what they wanted to except through a
23 rulemaking. And there you get exactly the
24 review that you're trying to get now.

25 MR. NORRIS: Justice Breyer, in South

1 Carolina versus Regan, this Court said that the
2 plaintiff must have an alternative way to raise
3 his claims in a refund suit or -- or in a -- in
4 a judicial suit.

5 JUSTICE BREYER: So I just told you
6 the alternative.

7 MR. NORRIS: Right. And -- and my
8 response to that, Justice Breyer, is that your
9 alternative does not allow us to raise our
10 claims. That would be a different --

11 JUSTICE BREYER: Why not?

12 MR. NORRIS: That would be a --

13 JUSTICE BREYER: Isn't your claim that
14 they should have done this through a rulemaking
15 and not through -- maybe I have that wrong, but
16 I thought that was your claim.

17 MR. NORRIS: That is our primary
18 claim. We've also --

19 JUSTICE BREYER: Okay.

20 MR. NORRIS: -- we've also raised
21 arbitrary --

22 JUSTICE BREYER: So what's the
23 problem? What's the problem? You go and you
24 raise that claim, just the route I just
25 described. Why can't you do that?

1 MR. NORRIS: Well, our claim, Justice
2 Breyer, is a challenge to Notice 16-66.

3 JUSTICE BREYER: Yeah.

4 MR. NORRIS: That route that you have
5 described would be a challenge to the denial of
6 our petition for rulemaking.

7 JUSTICE BREYER: Yes.

8 MR. NORRIS: And it would not be a
9 notice-and-comment challenge. It would be an
10 arbitrary and capricious challenge, as you
11 mentioned.

12 JUSTICE BREYER: Well, an arbitrary
13 and capricious challenge for failing to use
14 notice and comment.

15 MR. NORRIS: I think I disagree,
16 Justice Breyer. I think it would be about
17 whether it should have engaged in the
18 rulemaking. But, regardless, those sort of --

19 JUSTICE BREYER: Yeah.

20 MR. NORRIS: -- post-petition denial
21 cases have a very, very high standard, a high
22 version of the arbitrary and capricious
23 standard.

24 JUSTICE BREYER: I see. I see what
25 you're saying.

1 MR. NORRIS: It would be a different
2 type of claim.

3 JUSTICE BREYER: Okay. That's --
4 that's all I have.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: You offer several
7 theories for why the text of the Anti-Injunction
8 Act does not bar this suit.

9 It would be helpful to me if you could
10 just complete this sentence, and assume this is
11 something we would write in an opinion: "A suit
12 challenging an IRS regulation is barred by the
13 Anti-Injunction Act when"?

14 MR. NORRIS: I think a suit like ours,
15 Justice Alito, is barred when the taxpayer or
16 the person subject to the notice has already
17 violated the regulatory requirement such that
18 tax penalties will imminently be assessed or
19 they have been assessed already. Then you truly
20 can say the plaintiff's purpose is to restrain
21 the assessment or collection of the tax penalty.

22 But, in a pre-enforcement challenge to
23 solely the regulation itself, that would not be
24 true.

25 JUSTICE ALITO: Well, is that a -- is

1 that a restatement of your Regan argument, or is
2 that something else?

3 MR. NORRIS: I don't think it's a
4 restatement, though I think -- I think Regan and
5 several of those cases -- or several of this
6 Court's cases are all getting to the same point,
7 which is, what is the purpose of the suit?

8 And what this Court asked is, what is
9 it that the plaintiff is challenging? Is that
10 the assessment or collection of taxes or not?
11 Why did the plaintiff bring the suit?
12 Specifically what are its injuries? And are
13 those injuries tax liability or not?

14 And, third, does the plaintiff have
15 the traditional refund suit option available?

16 We know that a case is about a tax if
17 the plaintiff can simply pay the tax and sue for
18 a refund, which none of those factors point in
19 the direction of the Anti-Injunct --
20 Anti-Injunction Act applying here.

21 JUSTICE ALITO: Well, there seem to be
22 several factors packed into the answer that you
23 just gave. If it's -- if purpose is what is
24 key, I'm not quite sure how a court can separate
25 out the purposes that are at issue in a

1 situation like this.

2 MR. NORRIS: Well, Justice Alito, it's
3 not a subjective inquiry. We think the
4 Anti-Injunction Act is a procedural threshold
5 statute. It has to be an objective inquiry.
6 And it has to be able -- it has to be something
7 a court can determine on the face of the
8 complaint.

9 And if you look at Direct Marketing,
10 Bob Jones, and Regan, I think those cases point
11 you to the questions that I raised, which are,
12 what is being challenged, what are the injuries,
13 and does the plaintiff have a refund suit? And
14 all of those are entirely objective inquiries
15 that you could determine on the face of the
16 complaint and the relevant statutes.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, I go back
21 to your answer -- to the answer you gave to the
22 Chief Justice. Your complaint asks to declare
23 the notice invalid and, hence, a declaration
24 that penalties can't be assessed against you. I
25 don't see how you get around our cases --

1 Bailey, Alexander, and several other cases --
2 where we have said a taxpayer can't plead around
3 the AIA simply by alleging the tax is unlawful.

4 MR. NORRIS: Justice Sotomayor, our
5 complaint asked to -- to challenge the
6 enforcement of the notice; it did not ask for an
7 injunction restraining tax penalties. And
8 that's because the notice --

9 JUSTICE SOTOMAYOR: So what's the --
10 the consequence of enforcing the notice is that
11 you don't have to report and the government
12 can't collect taxes. If you're talking about
13 looking at practical consequences, your failure
14 to provide the notice results in a tax.

15 MR. NORRIS: That's right, Justice
16 Sotomayor. And I would regive my first answer,
17 which is, under the APA, all the Court would
18 have to do is set aside the notice.

19 But even -- even more directly to your
20 point, I would point you to -- to Judge
21 Silberman's opinion in Seven-Sky. The statute
22 asks what the purpose of the suit is, and
23 purpose, as this Court said in Bray, means aimed
24 at. We're aimed at the notice.

25 The act of --

1 JUSTICE SOTOMAYOR: So, counsel, how
2 do we -- how do we get past Bob Jones and
3 Alexander, where the purpose was to stop the
4 declaration of -- the IRS's declaration that
5 certain entities didn't qualify, that those
6 entities at issue didn't qualify for a
7 charitable deduction? That wasn't having to do
8 directly with tax collection, but the
9 consequence would have been tax collection. How
10 do we get around those cases?

11 MR. NORRIS: That's right, Justice
12 Sotomayor. That's superficially like our case.
13 But, unlike our case, in those cases, the
14 revocation of tax-exempt status, the thing being
15 challenged, did not injure those plaintiffs.

16 The sole injuries alleged in their
17 complaint were their tax liability. And another
18 important distinction between those cases and
19 ours --

20 JUSTICE SOTOMAYOR: Counsel, that
21 seems -- that seems like a worse case for your
22 argument. It would seem to me that if a lawsuit
23 stops the IRS from collecting taxes from you,
24 that that's exactly what the Anti-Injunction Act
25 was intended to prohibit.

1 MR. NORRIS: We disagree, Your Honor.
2 I think another factor in Bob Jones and
3 Americans United that's missing here is that the
4 Court said those plaintiffs, because their
5 injury is tax liability, they could simply pay
6 the underlying income, unemployment, and Social
7 Security taxes and then sue for a refund.

8 We don't have that option. There's no
9 tax available for us to simply pay because our
10 injuries are not tax liability.

11 JUSTICE SOTOMAYOR: Thank you,
12 counsel.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 JUSTICE KAGAN: Mr. Norris, I'm
15 wondering if you could help me out on the role
16 that South Carolina v. Regan plays in your
17 argument.

18 As I understood it coming into this
19 argument, what you were saying is that even if
20 I'm with the government sort of every step of
21 the way as to what the AIA requires, that
22 there's still a kind of back-end equitable
23 exception that's created by that case.

24 Is -- is that what you're saying, or
25 are you saying something different?

1 MR. NORRIS: That's our argument,
2 Justice Kagan. I meant to say just that, when
3 you're assessing a suit's purpose, the fact that
4 a tax is not available to pay for a refund suit
5 is also relevant. But your -- you described
6 Regan correctly. It is an exception to the act.

7 JUSTICE KAGAN: Okay. So I -- I guess
8 what I'd like to know is where does that
9 exception come from, and -- and -- and what
10 justification would we have to extend that
11 exception to a case like yours?

12 MR. NORRIS: So I think our case is
13 maybe the easiest justification for the
14 exception. So I read Regan to be an application
15 of the whole code canon, that Congress does not
16 require you to violate one provision of the tax
17 code in order to sue for a refund. That's
18 contradictory and something -- not a way that
19 you would reasonably read the tax code to
20 operate.

21 And so, in a normal Anti-Injunction
22 Act case, the Anti-Injunction Act tells you to
23 comply with the tax code, to pay your taxes, and
24 then go sue for a refund. But in a case like --

25 JUSTICE KAGAN: You're not suggesting

1 that that -- that that is the rationale that's
2 used in South Carolina v. Regan, are you?

3 To me, the rationale that is used in
4 that case is really equitable in nature. It
5 doesn't refer to the statute. It doesn't ask
6 about how we should interpret the statute. It
7 just says this seems fair to us.

8 MR. NORRIS: Regan may not be the most
9 tax-based opinion, but the same could be said of
10 -- of Bob Jones. Sometimes I -- I think the
11 rigor that was present in Direct Marketing is
12 missing from these cases, but I think Regan was
13 correct that Congress never meant the
14 Anti-Injunction Act to apply without a refund
15 suit because those two provisions have always
16 been side by side. And that was the logic of
17 that decision. And we think that extends neatly
18 to the situation where the government would
19 require us to violate the tax code in order to
20 trigger a refund.

21 JUSTICE KAGAN: And -- and -- and I
22 guess this goes back to Justice Breyer's
23 question, but it seems to me that your suit is
24 different from Regan in two ways. One is that
25 there was a constitutional claim there, and the

1 second was that the Court kept on saying in
2 Regan that there's absolutely no alternative
3 remedy available. It's not just a -- a favored
4 alternative. I mean, there's no alternative
5 remedy -- remedy.

6 Do you take issue with either of those
7 two differences?

8 MR. NORRIS: I don't disagree that
9 those are differences, Justice Kagan. I just
10 don't think that they matter. This Court has
11 said over and over that the constitutional
12 versus non-constitutional nature of the claim is
13 irrelevant for purposes of the Anti-Injunction
14 Act. And I think, while South Carolina truly
15 had no refund suit available, we are in the same
16 situation in the sense that the only way we can
17 get a refund is by committing a crime, risking
18 imprisonment and massive fines, and violating
19 our professional obligations as attorneys and
20 accountants.

21 JUSTICE KAGAN: Thank you, Mr. Norris.

22 MR. NORRIS: So a refund is not
23 available to us either.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch.

1 JUSTICE GORSUCH: Good morning,
2 Mr. Norris. I'd like to get your response or
3 thoughts on Judge Sutton's concurrence in the
4 denial of rehearing en banc, and he expressed
5 one concern that, given the fact that the
6 Anti-Injunction Act and Tax Injunction Act are
7 so often interpreted in parallel, that by
8 vindicating a taxpayer -- federal taxpayer's
9 interests today, we might slight state sovereign
10 concerns tomorrow, creating the risk that too
11 much haste in stopping one abuse of power might
12 open the door to another.

13 I'd like your thoughts in response to
14 that.

15 MR. NORRIS: Yes, Justice Gorsuch.
16 The Anti-Injunction Act and the Tax Injunction
17 Act have been linked for a long time, and I
18 don't think that link is something that can be
19 undone. The Tax Injunction Act was modeled on
20 the Anti-Injunction Act. They use the same
21 terms in the same way. This Court has
22 frequently linked them.

23 But, if the concern is that by saying
24 the Anti-Injunction Act does not apply here,
25 that that will make it less applicable to state

1 taxes, I think in terms of the facts of our case
2 that ship has largely sailed. Direct Marketing
3 allows pre-enforcement challenges to state tax
4 reporting requirements, and it allows them
5 despite an uncontested assertion from Colorado
6 that that lawsuit would have cost it 100 million
7 dollars in tax revenue every year.

8 And I -- and I think what this Court
9 has to do is look at the precise language of
10 each statute and apply it only as far as the
11 language goes. And neither statute, as this
12 Court said in Direct Marketing, was meant to
13 cover the entire waterfront of all cases
14 involving taxes. They were specifically
15 targeted to suits to enjoin assessment or
16 collection.

17 JUSTICE GORSUCH: So the ship's
18 already sailed on the state side, and the only
19 question is whether federal taxpayers get
20 essentially the same benefit?

21 MR. NORRIS: That's right. And it's
22 -- it's worse than that because most of what the
23 IRS does via regulation and guidance documents
24 is enforced in some way by tax penalties. So if
25 -- if -- if the government is correct here, then

1 the IRS is going to be largely exempt from APA
2 review because of the Anti-Injunction Act.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh.

6 JUSTICE KAVANAUGH: Thank you, Chief
7 Justice.

8 And good morning, counsel. I wanted
9 to give you my thought about how I'm looking at
10 this and get your reaction.

11 So, on the tax, I see this as a
12 Subchapter 68 penalty that, therefore, qualifies
13 as a tax for purposes of the Anti-Injunction
14 Act.

15 On Direct Marketing, it seems to me
16 that that's arguably distinct because the
17 penalty there was not a tax. Here, it is so
18 defined as a tax and, therefore, comes within
19 the scope of the Anti-Injunction Act.

20 Then we get to the question -- and
21 there's -- and there's other questions -- but
22 the regulatory tax question, the Bob Jones and
23 Alexander cases, and I want to get your reaction
24 to this, which is I think reading those cases as
25 they are poses a problem for you, but I'm not

1 sure those cases are -- should be read for all
2 they're worth.

3 In other words, I'm wondering whether
4 those cases -- we should back away from some of
5 the implications of those cases for challenges
6 to regulatory taxes for the reasons, some of the
7 reasons you've given here, that it seems
8 somewhat unfair, as it did even in those cases,
9 somewhat unfair to force someone to go through
10 the process that you're talking about here.

11 So should we back away from Bob Jones
12 and Alexander? How would we do that best
13 without flat-out overruling them, or -- or
14 should we go that far?

15 MR. NORRIS: So, Justice Kavanaugh, I
16 think the way to cut through all of that is our
17 South Carolina versus Regan argument, and I
18 would just note that in the Florida Bankers case
19 in the D.C. Circuit, Regan was not an argument
20 raised by the plaintiffs, and, in fact, the
21 government pointed out that it had been waived
22 there.

23 And I think that's the key difference.
24 Bob Jones and Americans United said that those
25 plaintiffs, because they were challenging their

1 tax liability, really could simply pay the
2 underlying taxes, which is a lawful act, and go
3 sue for a refund. And --

4 JUSTICE KAVANAUGH: But isn't -- isn't
5 that, as Justice Sotomayor pointed out, just a
6 pleading exercise of how you frame it in your
7 complaint? I'm challenging actually the
8 regulatory part of the regulatory tax, as
9 opposed to the enforcement of the liability
10 itself?

11 MR. NORRIS: I don't think so, Justice
12 Kavanaugh. I agree that a case involving a
13 regulatory tax truly would be difficult. So
14 perhaps NFIB can be understood as such a case
15 because, there, the statute -- the individual
16 mandate was upheld because it was treated as a
17 tax itself.

18 But, here, we don't have a regulatory
19 tax. We have a reporting requirement that
20 exists in an independent statutory provision
21 that uses the word "shall" and has the force of
22 law.

23 JUSTICE KAVANAUGH: Well, it's a reg
24 -- a regulation that's enforced by a penalty, so
25 it is regulatory, a reporting requirement

1 enforced by a penalty that in turn Congress has
2 defined as a tax. So it does seem like a
3 regulatory tax in that sense.

4 MR. NORRIS: I don't disagree with
5 that, Justice Kavanaugh, but it is also enforced
6 by criminal sanctions. So that's how you know
7 it is not just a tax. Or it's not really a tax
8 at all. It is an independent regulatory
9 requirement.

10 I think that makes all the difference
11 because, when you're asking what the purpose of
12 a suit is, you want to know what it's aimed at,
13 and if it's aimed at a regulatory tax, that's a
14 much different case than aimed at a regulation
15 that is not itself a tax and that merely has tax
16 penalties as one consequence for violating it.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett.

19 JUSTICE BARRETT: I want to follow up
20 on Justice Alito's question. He asked you to
21 state a test, essentially, to help us decide,
22 you know, when something falls within the AIA
23 and not. And, you know, the government's
24 approach in thinking about why this is different
25 from Direct Marketing is pretty straightforward.

1 If it's called a tax, you know, Congress put
2 this -- it called it a tax -- even though it's a
3 penalty, it called it a tax, which seems to
4 indicate Congress's desire to bring it within
5 the AIA.

6 But you're saying it's more -- it's
7 more subtle than that, it's more complicated,
8 you know, this is -- we can't -- we don't have a
9 choice of just paying it and then seeking a
10 refund later.

11 So could you be a little bit more
12 specific than you were with Justice Alito of
13 what test do we use to figure out if it's within
14 the AIA or not?

15 MR. NORRIS: Yes, Justice Barrett. I
16 think the IRS's position is simple in that if
17 any regulation is attached -- has a tax penalty
18 attached, it triggers the Anti-Injunction Act,
19 but that largely, as I said before, exempts the
20 IRS from APA review.

21 So the -- the -- the text of the
22 Anti-Injunction Act asks whether your purpose is
23 restraining assessment or collection. And we
24 know what "restrain," "assess," and "collect"
25 mean from Direct Marketing already. So we think

1 the way to establish the purpose of a lawsuit,
2 which we admit is fairly unusual language for a
3 statute, but the way to view purpose comes from
4 this Court's cases, and what you would look at
5 is what action is the plaintiff challenging and
6 whether that's assessment or collection or not,
7 what are the plaintiff's injuries and are they
8 independent from tax liability or not, and what
9 else -- how else could the plaintiff bring the
10 lawsuit, did they have a traditional refund suit
11 available or not?

12 And we -- we get those from -- from
13 Bob Jones, Direct Marketing, and Regan. And I
14 think those three questions will answer just
15 about every Anti-Injunction Act case. And,
16 here, they all point in the same direction and
17 demonstrate that that is not our purpose.

18 JUSTICE BARRETT: Would it be cleaner
19 for us to go the Regan route but maybe, you
20 know, phrase it this way, that this is covered
21 by the AIA; however, because you would have to
22 incur criminal penalties in -- in -- in order to
23 sue, that you have no adequate alternative
24 remedy, so even though the AIA applies, it
25 doesn't bar your suit? Would you be satisfied

1 with that approach?

2 MR. NORRIS: We would, Justice
3 Barrett. We just want to go litigate our APA
4 claims, and that -- that resolution would be
5 fine with us.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: A minute to
8 wrap up, Mr. Norris.

9 MR. NORRIS: Thank you, Mr. Chief
10 Justice.

11 Notice 16-66 labels my client's
12 industry a reportable transaction, a kind of
13 scarlet letter that triggers burdensome
14 reporting requirements and makes it much harder
15 to attract clients.

16 Labeling something a reportable
17 transaction is serious, which is why Congress
18 told the IRS to use notice-and-comment
19 rulemaking. When the IRS refused to do that,
20 CIC did precisely what we want law-abiding
21 citizens to do: It filed a pre-enforcement suit
22 under the APA, and it is fully complying with
23 the reporting requirements while its case is
24 pending.

25 According to the government, however,

1 what CIC should have done is deliberately
2 violate the tax code. The government's path
3 would require CIC's members to commit a crime,
4 violate their ethical obligations, and convince
5 the IRS to assess it tax penalties. No
6 law-abiding company or individual would ever do
7 this.

8 Ruling for the government, thus, does
9 not delay judicial review, it denies it
10 altogether. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Bond.

14 ORAL ARGUMENT OF JONATHAN C. BOND
15 ON BEHALF OF THE RESPONDENTS

16 MR. BOND: Mr. Chief Justice, and may
17 it please the Court:

18 At the heart of this case are two code
19 provisions that are unambiguous and a third
20 whose scope is disputed. The first clear
21 provision is the Anti-Injunction Act, which bars
22 a suit for the purpose of restraining the
23 assessment or collection of any tax.

24 That text and this Court's decisions
25 make clear that a suit cannot proceed if the

1 relief it seeks would legally bar the IRS from
2 collecting a tax, regardless of the plaintiff's
3 objective or motive for bringing suit, as I
4 understand Petitioner now to acknowledge.

5 The second unambiguous provision is
6 6671, which provides that penalties imposed in
7 subchapter 68(b) are treated as taxes. And by
8 far, the most important consequence of that
9 provision is that 68(b) penalties are subject to
10 the AIA, which precludes pre-enforcement review
11 and instead channels disputes to refund suits.

12 Together, those two provisions resolve
13 this case because Petitioner's complaint on its
14 face at page 16 seeks to enjoin the enforcement
15 of reporting requirements that are enforced by
16 68(b) penalties.

17 Petitioner leans heavily on a third
18 provision, Section 7203, which makes certain
19 willful violations a misdemeanor and which it
20 says requires committing a crime to obtain
21 judicial review. But Petitioner misreads that
22 provision, which does not criminalize the very
23 avenue of review this Court commended 93 years
24 ago in Sullivan and has reaffirmed since, of
25 filing a timely return that asserts a good faith

1 objection to reporting certain information in
2 order to obtain review.

3 Petitioner can do that by incurring
4 the penalty, paying it, and suing for a refund.
5 But even if 7203's application were ambiguous,
6 the way to harmonize all three provisions is to
7 hold that Congress meant what it said
8 unambiguously in 6671 and the AIA, that these
9 penalties are treated as taxes that must be
10 litigated in refund suits, and resolve any
11 lingering dispute about "willfully" to preserve
12 Congress's choice.

13 Petitioner's approach of leveraging
14 one disputed word in another provision to
15 override the clear text of 6671 and the AIA has
16 things backwards. And Petitioner has offered no
17 limiting principle to avoid subjecting many
18 other similar requirements enforced by taxes to
19 pre-enforcement suits.

20 CHIEF JUSTICE ROBERTS: Mr. -- Mr.
21 Bond, I think Direct Marketing is a -- a real
22 problem for you, except you have one big answer
23 to it, which is that that -- that case -- that
24 case did not involve a tax penalty and this one
25 does.

1 So I'm curious about how much weight
2 you think that can -- can hold. If -- if
3 Congress passed a law saying that there's a one
4 dollar tax penalty for the violation of any IRS
5 regulation, does that mean that there would be
6 no pre-enforcement review at all for any tax
7 regulation?

8 MR. BOND: Yes, if the penalty imposed
9 is designated by Congress as a tax, then that
10 suit would be barred by the AIA. We think that
11 difference from Direct Marketing is dispositive
12 because of the text of the statute, as this
13 Court has repeatedly construed it.

14 Of course, that -- that issue was not
15 presented in Direct Marketing, so we don't think
16 the decision speaks directly to it, but we think
17 this Court's other decisions do, that regardless
18 of what the plaintiff's subjective motive is,
19 whether it claims that the tax is really
20 exerting some regulatory effect, this Court has
21 time and again rejected those arguments and
22 looked instead to what Americans United called
23 the relief requested.

24 If that relief would legally bar the
25 collection of a tax, then, yes, Congress made

1 the determination to channel that dispute to
2 refund suits. It's not eliminating review.
3 It's simply channeling it to a different forum.

4 And we know that that review is real
5 because that's been the case throughout the
6 AIA's history, going back to Bailey versus
7 George, that the same day that the Court held
8 the pre-enforcement suit barred, the Court
9 reached the merits in a refund suit.

10 The same with Bob Jones. It decided
11 not to hear the pre-enforcement challenge, but
12 several years later Bob Jones was able to
13 litigate the merits. And on --

14 CHIEF JUSTICE ROBERTS: Do you think
15 that there -- there is a presumption in favor of
16 pre-enforcement review?

17 MR. BOND: We think at least that any
18 presumption in favor of pre-enforcement review,
19 as this Court said in Illinois Council, much
20 weaker than the general presumption of having
21 some review at some point.

22 The Court has repeatedly made clear in
23 Thunder Basin and Alexander --

24 CHIEF JUSTICE ROBERTS: So is that a
25 -- is that -- is that a yes, there is a

1 presumption in favor of pre-enforcement review?

2 MR. BOND: I don't think this Court's
3 decisions establish a presumption in favor of
4 pre-enforcement review, but whatever you --
5 however you characterize the presumption, it is
6 overcome by the text of these statutes because
7 Congress said in 6671 that these penalties are
8 taxes. And virtually the only consequence of
9 that choice is to subject --

10 CHIEF JUSTICE ROBERTS: Is there any
11 significance to calling these penalties a tax?
12 I mean, it's -- it's the same, right? I mean,
13 it's -- if it were a penalty, the consequences
14 apart from the issue we're talking about would
15 be the same?

16 MR. BOND: There are very few and very
17 minor consequences apart from the AIA. And we
18 think that cuts strongly in our favor, that
19 because Congress classified these as taxes,
20 knowing that the elephant-in-the-room
21 consequence is that they would be subject to the
22 AIA, that Congress made the determination that
23 the AIA should apply.

24 If there were lots of consequences,
25 that would be a much weaker inference. I do

1 think --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 Mr. Bond, the -- how would you define
8 the word or the verb "to assess"?

9 MR. BOND: So, for purposes of this
10 take, we -- case, we take the Court's
11 definitions in Direct Marketing as given. We're
12 not challenging those for purposes of this case.

13 We accept assessment -- assessment for
14 purposes of this case, as the Court defined it
15 in the Court's opinion, as involving that final
16 step prior to collection. Our point here is not
17 that assessment should be read more broadly for
18 purposes of the AIA here.

19 We're saying that even if you take all
20 of those definitions as given, the relief that
21 Petitioner's complaint seeks on its face would
22 restrain the assessment or collection of --

23 JUSTICE THOMAS: So how attenuated or
24 how indirect can an action be and -- and --
25 before it ceases to be -- to affect the

1 assessment or collection?

2 MR. BOND: Well, I think the way to
3 think about that is that the text of the statute
4 says we're looking at the purpose of the suit.
5 And so we look, as the Court has done before, to
6 the relief requested as the best evidence of
7 what the suit's purpose is.

8 So at least in a case like this one
9 where the suit on its face seeks to enjoin
10 enforcement, which is done by assessing taxes,
11 you would say the suit is one to restrain those
12 taxes.

13 I think you get into difficult
14 line-drawing problems when you get further and
15 further removed. So, for example, the example
16 that we discuss in our brief of the EPA diesel
17 regulations, I think you could have too
18 attenuated a chain of connection in order to
19 impute the purpose of the suit to be restraining
20 the -- the downstream tax where, for example,
21 the plaintiff challenges only an independent
22 regulatory regime enforced completely separately
23 by an additional agency that also is
24 incorporated in part into the tax code in some
25 indirect way.

1 The first suit may have some
2 downstream consequence, but we accept that that
3 may be too attenuated to say that the purpose of
4 the suit is to restrain the assessment or
5 collection of a tax.

6 But you don't have any of those
7 difficult line-drawing questions here.
8 Petitioner says you should determine what the
9 suit is aimed at, but the complaint on its face
10 tells you what it's aimed at.

11 If Petitioner prevails, the IRS will
12 be unable to enforce this -- this notice
13 requirement and -- or this reporting
14 requirement, and it does so by assessing taxes.
15 And that, I think, is the end of the case.

16 JUSTICE THOMAS: Well, normally, when
17 you think of taxes, Mr. Bond, you think of a tax
18 liability or a tax based on some business
19 activity or income-generating activity,
20 recordkeeping related to that activity.

21 Where -- where's the income here and
22 where is the tax liability?

23 MR. BOND: Well, I'd say a few things.
24 First, the concrete point about where the income
25 and liability are, I think this particular

1 penalty that the Congress denominated a tax
2 functions in a way as a substitute tax for
3 taxpayers who don't report this information that
4 the IRS thinks may pertain to a tax evasion
5 strategy.

6 JUSTICE THOMAS: Counsel, how is this
7 tax different from any ordinary fine or penalty?

8 MR. BOND: Well, I -- I'd say two
9 things. First, Congress denominated it as a
10 tax, and the point of a statutory definition
11 like this is to say that something that is not
12 ordinarily thought of to be a tax is to be
13 treated as a tax.

14 And I think the Court has for a
15 century recognized that Congress can do exactly
16 that. The Court rejected the argument that I
17 think underlies that question in George 98 years
18 ago, where -- where the point was: Look, the --
19 the argument was made: This is not really, in a
20 child labor tax, an effort to raise revenue.
21 This is really just an effort to penalize people
22 engaged in certain child labor practices.

23 And the Chief Justice's past opinion
24 makes clear that doesn't change the outcome
25 under the text of the Anti-Injunction Act.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Breyer.

5 JUSTICE BREYER: Well, I think their
6 point or a point is Lincoln's point. I mean,
7 calling something a tax doesn't make it one.
8 There are still differences. And one of the
9 differences, they say, is this: If the IRS
10 tells me I owe some money, I pay it, but I can
11 get it back. If the IRS -- if it -- if it's
12 illegal.

13 If the IRS here tells me spend
14 \$100,000 gathering this information and give it
15 to them, I can't get that money back. I can't
16 declare it illegal. There's no way to do it.
17 There's no way to do it. I have to keep doing
18 it year after year. Of course, I'll have to
19 follow it. I'm not going to violate it. So
20 that's a big difference.

21 And normally we presume there is some
22 method of getting judicial review for an action
23 requiring me to do something by the government
24 when that action is not lawful. So what's the
25 way?

1 MR. BOND: The way is --

2 JUSTICE BREYER: How do they get
3 review of it?

4 MR. BOND: The way here is to follow
5 the approach Justice Holmes wrote for the Court
6 in Sullivan 93 years ago and that the Court
7 reaffirmed in a case called Garner versus United
8 States, where what you do is you don't simply
9 fail to file a return. You don't violate it in
10 that sense.

11 Instead, what you do -- and the Court
12 has upheld this in the context of Fifth
13 Amendment objections -- is you file a return and
14 state your specific objection to particular
15 information that you don't want to provide
16 because you believe in good faith that it is not
17 legally required.

18 The IRS can then assess a penalty
19 which then you can sue over in a refund suit.
20 And in our understanding --

21 JUSTICE BREYER: That is quite a lot
22 of money. They don't want to risk the vast --
23 what they think of as a vast amount of money, so
24 they won't pay the penalty. They don't want to
25 pay the penalty. They want to follow it.

1 So you mean, if they follow the rule,
2 they can say we're doing it under protest and
3 then file to get back a penalty they've never
4 paid? I'm missing something.

5 MR. BOND: Well, I think that's the
6 same logic that underlies the argument the Court
7 rejected in *George* involving the child labor tax
8 law. I think, in that circumstance, the
9 argument was made, look, surely Congress
10 intended there to be -- to be compliance with
11 these requirements and didn't intend to raise
12 revenue along those lines. And that's the
13 argument the Court rejected.

14 And, here, I think --

15 JUSTICE BREYER: I'm not saying it's
16 not a tax. I'm simply asking how do they get
17 judicial review without paying the tax -- the
18 penalty, which I'll call a tax, how do they get
19 judicial review of the lawfulness of the order
20 that says -- or the report that says give us the
21 information? How do they do it?

22 MR. BOND: They have to engage in the
23 conduct that they say -- that they believe to be
24 lawful. They simply know that the government
25 disagrees with that. And until the Declaratory

1 Judgment Act, that was the normal way litigation
2 proceeded.

3 JUSTICE BREYER: No, I don't
4 understand it. You'll have to do it more
5 slowly. I'm sorry. They follow the report and
6 give you the information. Okay, that's what
7 you're saying?

8 MR. BOND: No, Your Honor. What they
9 do is they file their ordinary tax return or, in
10 the case of a material advisor, they just send
11 us a letter objecting to providing this
12 information.

13 JUSTICE BREYER: And do they -- do
14 they -- do they give you the information or not?

15 MR. BOND: No, they withhold the
16 information and would seek to --

17 JUSTICE BREYER: They withhold the
18 information. Therefore, they have violated the
19 reporting requirement. Therefore, they are
20 subject to paying an enormous fine called a tax.
21 That's what they don't want to do.

22 MR. BOND: So I'd say two things, Your
23 Honor. First, if they are right that their
24 conduct is, in fact, lawful because they
25 disagree with us about that, then, when they get

1 their judicial determination, the result will be
2 that they never violated the law.

3 Our view is different, and they run
4 that risk. But, if they are right about the
5 underlying merits, they will --

6 JUSTICE BREYER: So that's the answer
7 to my question.

8 CHIEF JUSTICE ROBERTS: Thank you.
9 Justice -- Justice Alito.

10 JUSTICE ALITO: The code says that
11 willfully failing to comply with the reporting
12 requirement is a crime. So I really don't see
13 how they can get review without committing a
14 crime.

15 MR. BOND: And I think the answer is
16 in this Court's decisions in Sullivan and
17 subsequently in Garner, where the Court said in
18 -- in both the precursor of 7203 and 7203, that
19 it is not a willful violation to file a return
20 or to subject yourself to examination and assert
21 your good-faith objection to providing the
22 information.

23 JUSTICE ALITO: Well, why is it not a
24 willful violation? Under Cheek, it's certainly
25 willful. They say, look, I understand that

1 under this guidance and under IRS regulations
2 I'm required to do this, but I sincerely believe
3 that it's unlawful.

4 Isn't that exactly the situation in
5 Cheek, where somebody says I'm not going to file
6 a tax return, although I know that the Internal
7 Revenue Code requires me to file a tax return,
8 but I sincerely believe that the Internal
9 Revenue Code and the Internal Revenue Service
10 are unconstitutional. I don't see the
11 difference.

12 MR. BOND: Well, I'd say a couple of
13 things. First, Cheek -- Cheek in Footnote 10
14 expressly distinguished the kind of procedure
15 that we're describing from Sullivan and later
16 cases. It cites a case called Murdock that is
17 to the same effect.

18 The second, to the line you're drawing
19 between -- you're suggesting between saying the
20 action is unlawful versus I don't believe I'm
21 actually required to do it, I don't think that
22 line works in Petitioner's favor here.

23 Petitioner's argument at bottom is
24 that it is not required to provide this
25 information because the statute only requires it

1 to submit information covered by regulations.

2 And, here, the IRS has not issued a
3 valid regulation. I think Petitioner's argument
4 falls on the first side of that line.

5 Now I understand the concern that the
6 divide --

7 JUSTICE ALITO: I don't understand --
8 I don't understand that at all. They say that
9 -- that I am not required to do this because the
10 guidance is unlawful, right?

11 MR. BOND: They say that the guidance
12 is not a regulation and only regulations can
13 require them to supply information. That is
14 their --

15 JUSTICE ALITO: Yeah, and that's -- is
16 there a difference between what you just said
17 and saying that the guidance is unlawful?

18 MR. BOND: I think it's a fine
19 distinction that was the focus of the debate
20 between the majority and the concurrence in
21 Cheek.

22 And to the extent you think there's
23 some uncertainty, I think the way to resolve it
24 is to say: Look, we know what Congress intended
25 to happen to these penalties because it said in

1 6671 they are taxes and that means they're
2 subject to the AIA.

3 So I think you would resolve any
4 tension by saying, whatever "willfully" means in
5 some other context, in this context, it does not
6 criminalize the avenue of review that Congress
7 clearly made the avenue for this particular kind
8 of penalty.

9 And I think the other --

10 JUSTICE ALITO: So this is a rule of
11 willfulness that applies only to -- only under
12 the Internal Revenue Code?

13 MR. BOND: Well, I think that's what
14 Cheek recognizes, that "willfulness," as the
15 Court has said in other contexts, depends --
16 takes its meaning from context.

17 And the Court in the majority in Cheek
18 was clear that the meaning of "willfulness" is
19 particular in the tax context. It has a
20 heightened meaning. And although Cheek doesn't
21 flesh out exactly what that means in the context
22 of the procedure that we've identified that
23 Sullivan and Garner approved, means I don't
24 think Cheek disturbed that.

25 So I don't think that it's remarkable

1 to say that the meaning of "willfulness" is
2 different in this context. It has been
3 different for decades under this Court's
4 decisions. And we're simply applying that
5 consistent with what this Court has said is the
6 appropriate avenue for a taxpayer to raise its
7 challenges to requirements it believes are
8 invalid.

9 And I think it's not any -- any
10 different from any taxpayer who believes that a
11 particular tax, a substantive tax, is invalid if
12 --

13 JUSTICE ALITO: All right. I -- I
14 understand the position of the United States.
15 Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Counsel, in the
19 normal situation, and I say normal, when I have
20 to report something so that they can assess
21 taxes against me, and I have a claim that I
22 don't owe the tax, but you say I do, I pay the
23 tax, I then can sue to say that I should have
24 not had to pay the tax, how many laws are there
25 like this one, disclosure laws where I wouldn't

1 have to pay a tax, I only have to report certain
2 information so that someone else can pay a tax?

3 Do you have any idea how many laws
4 there are like that?

5 MR. BOND: So I can't give you a
6 precise number, but it's true that within the
7 Internal Revenue Code there are a number of
8 third-party or informational reporting
9 requirements that -- that fit that description,
10 and I think that that cuts strongly in our
11 favor.

12 JUSTICE SOTOMAYOR: All right. But
13 could you hold on, counsel? The reason I'm
14 asking this question is -- is something that
15 Justice Breyer was getting at, which is, if they
16 -- if they give you the information you need,
17 they may have spent \$50,000, but they don't need
18 to pay the tax.

19 And we never have said that -- that
20 someone has to spend money to not pay a tax they
21 don't owe. Does that make any sense to you?
22 They can never get that money back if they -- if
23 they give you the information or if they don't
24 give you the information.

25 MR. BOND: Well, here's the way I

1 think the Court should look at it, Your Honor.
2 I think it's no different fundamentally than any
3 taxpayer who wants to engage in a particular
4 transaction and wants to know in advance, would
5 prefer to know before it undertakes the
6 preparatory steps of the transaction or commits
7 to the transaction, what the tax consequences
8 will be. And if it's afraid of losing in the
9 tax dispute that might follow, it might forego
10 that opportunity.

11 JUSTICE SOTOMAYOR: That's all right.
12 That -- I see less -- I -- I see less problem
13 for -- for them getting the \$50,000 back
14 because, you're right, to prepare for
15 disclosure, we all spend money and we never get
16 it back if we didn't have to make it.

17 But the idea is that committing the
18 crime, they would have to fail to pay the tax
19 and then pay this enormous amount more because
20 they thought they were legitimately entitled not
21 to provide you with the information.

22 MR. BOND: Well, I'd say a couple of
23 things. First, I don't think it's true that
24 they have to pay some enormous penalty in order
25 for this to happen for two reasons.

1 First, they could choose to -- to
2 follow the procedure outlined in Sullivan with
3 respect to a single penalty and comply with
4 respect to the rest, and they wouldn't face the
5 tax penalty with respect to all of the other
6 items.

7 And, in addition, in our
8 understanding, this penalty is what -- what's
9 known in tax law as divisible, meaning that you
10 can pay only a single part and then seek a
11 refund over that and the government has to
12 cross-claim for the rest. So it's not like
13 they're immediately on the hook for massive
14 liability the minute they choose to follow the
15 procedure Congress outlined to obtain review.

16 And, in addition, I think it's clear
17 from this Court's cases going back a century
18 that the mere fact that there would be a large
19 liability to pay if you follow the refund
20 procedure does not mean that this is a violation
21 of due process or otherwise warrant departing
22 from the text of the AIA.

23 There are often --

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Mr. Bond, I'd like to

1 talk to you about this language "for the purpose
2 of." You said in one of your prior answers that
3 the key to that language is we should look at
4 the relief requested.

5 And that seems reasonable enough. The
6 only problem is I'm not sure it really helps you
7 here. If I think about this lawsuit, it seems
8 to me that the relief that's being requested is
9 the invalidation of a reporting requirement.

10 Now it's true that if it's successful
11 in invalidating a reporting requirement, then
12 you don't get to enforce that reporting
13 requirement through a tax penalty.

14 But the more simple way of thinking
15 about this suit, and I think truly what
16 plaintiffs here are doing, is to say they're
17 trying to invalidate a demand that they disclose
18 information.

19 So how does that fit under the AIA?

20 MR. BOND: I would point you to the
21 top of page 16 of the complaint and the two --
22 aside from the boilerplate requests, the two
23 items of relief they seek are to permanently
24 enjoin the enforcement of this notice, and we
25 know that notice -- that this notice is enforced

1 by tax penalties, and then they seek a
2 declaratory judgment, a judgment declaring that
3 the notice is unlawful.

4 But under the --

5 JUSTICE KAGAN: Well, suppose that
6 they -- that they wrote a complaint with my
7 views in mind and they just said this is what
8 we're seeking; we're seeking to invalidate the
9 reporting requirement. So does that fall under
10 the AIA or not?

11 MR. BOND: We do and -- we do think it
12 falls under the AIA. It certainly falls under
13 the tax exception to the Declaratory Judgment
14 Act, which Petitioner concedes in Footnote 1 has
15 the same scope and its claim rises or falls
16 under declaratory relief with the claim for
17 injunctive relief. So we think that would be
18 barred.

19 JUSTICE KAGAN: I -- I guess what I'm
20 asking is, isn't the tax penalty here completely
21 derivative and what they're really seeking is
22 what they're objecting to, what they have
23 problems with, is the demand that they disclose
24 information?

25 And remember that that demand is

1 backed up not only by the tax penalty but also
2 by a provision that allows criminal penalties,
3 you know, put you in jail, fine you. So why --
4 why shouldn't we understand that that's an
5 independent regulatory requirement, independent
6 of the tax that they're objecting to, so it's
7 not for the purpose of stopping a tax?

8 MR. BOND: I think you need to
9 determine the purpose of the suit from what
10 relief the suit would obtain if Petitioner
11 prevailed, and that relief here is barring
12 enforcement.

13 And I'd say in addition that
14 although --

15 JUSTICE KAGAN: I mean, I -- I think
16 that we're just -- you know, that I think it's
17 not. It's invalidating the notice. That's the
18 relief, invalidating the notice. And it's true,
19 you'll never be able to enforce an invalid
20 notice, but that's not the essential purport of
21 the suit.

22 MR. BOND: I'd say two things. First,
23 if -- even if you just view the suit as seeking
24 to invalidate the notice, I think it's still
25 fair to impute to the purpose -- as the purpose

1 of the suit preventing enforcement because
2 that's the real-world reason why Petitioner is
3 bringing this suit in the first place. They
4 don't want to face the penalties for
5 non-compliance.

6 JUSTICE KAGAN: It may or may not be
7 the real-world reason. I mean, suppose that the
8 penalty here was five dollars, you know.
9 Congress just put this tax penalty in to try to
10 make sure that it was put under the AIA.

11 So the real purpose is not to avoid
12 the five dollars; the real purpose is to avoid
13 hiring a lawyer and spending all the money to
14 disclose information that you want to keep
15 secret.

16 MR. BOND: And the reason Petitioner
17 cannot do that, as it alleges in paragraph 40 of
18 its complaint, is the penalties. If there were
19 no penalties, there would be nothing for
20 Petitioner to sue about because it would --
21 arguably would not even have Article III
22 standing. So I think that is the way to look at
23 the suit.

24 Even if its ultimate goal is to get
25 rid of the burdens of compliance and just be --

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice -- Justice Gorsuch.

3 JUSTICE GORSUCH: Good morning,
4 Mr. Bond. APA was promised as a solution to the
5 growing power of administrative agencies over
6 the national economy. And the promise was, in
7 part, that agencies would have to follow certain
8 basic due process requirements like telling the
9 public in advance what it intends to do and
10 giving them an opportunity to comment.

11 Today, of course, the IRS regulates
12 enormous swaths of the national economy, from
13 our medical care to our pensions, to the entire
14 nonprofit sector, a lot of the educational
15 sector, child care. And some estimate that the
16 IRS today fails to comply with
17 notice-and-comment requirements of the APA about
18 40 percent of the time.

19 Should we be concerned?

20 MR. BOND: I don't think you should be
21 concerned because Congress did not preclude
22 review of these. It channeled them to a
23 particular forum, and real-world suits happen in
24 which the kinds of claims you're describing can
25 be litigated.

1 We cite in our brief a Mann
2 Construction case, which is pending in district
3 court right now, and just recently the district
4 court denied a motion to dismiss on an APA
5 claim.

6 So our view is not that these kind of
7 challenges can't be brought or that the IRS
8 should be insulated from review entirely. The
9 point is simply that Congress made a
10 determination of how that review should proceed,
11 and it said those -- that this kind of review of
12 things that Congress deems to be taxes should
13 happen in a post-payment world of a refund suit.

14 And I think the concerns on the other
15 side would effectively negate that determination
16 that by designating these penalties as taxes,
17 they should be treated like taxes and litigated
18 in the way that taxes historically have been.

19 JUSTICE GORSUCH: Mr. Bond, if we were
20 to find that the avenues that you've outlined to
21 Justice Alito are, I -- I -- I don't know, hard
22 to square with the statute or are insufficient,
23 like going to jail, we don't normally require
24 somebody to exercise their notice-and-comment
25 rights from -- from -- from federal prison, what

1 -- what do we do then?

2 MR. BOND: Well, I think for the
3 reasons we've outlined, that's not the way to
4 read the statute. But if you -- if you conclude
5 that that's a possibility, we invite you to say
6 in your opinion that that's not what 7203 means,
7 because that's what the Court -- that's not what
8 the Court has understood it to mean for nearly a
9 century. And I think that, in that
10 circumstance, you should say that there is this
11 other avenue to review and that there's no due
12 process entitlement to have pre-enforcement
13 review.

14 But, in all events, I think the
15 concern that there would be this massive burden
16 of facing financial penalties is simply
17 overstated. Petitioner can incur a single unit
18 of the penalty or can pay a single unit because
19 we -- in our view, this penalty is divisible.

20 JUSTICE GORSUCH: Right. I got --

21 MR. BOND: I just don't --

22 JUSTICE GORSUCH: -- I got those
23 arguments. Thank you, Mr. Bond.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Thank you.

2 And good afternoon, Mr. Bond. I'm
3 going to tell you where I'm -- I think I'm with
4 you and where I think I have a problem.

5 On the text of the Anti-Injunction
6 Act, I think you have a strong argument,
7 Subchapter 68 and how that fits here. This
8 penalty is designated a tax; therefore, it fits
9 within the AIA.

10 Direct Marketing, I think you have a
11 good point. That was not subject -- that
12 penalty was not denominated a tax and,
13 therefore, the reason the two cases would be
14 different is that the text of the statutes is
15 different. You make a good point there, I
16 think.

17 In terms of the Regan point, how you
18 would do this, you say you file a letter
19 objecting to it, and you then have post- -- you
20 have proceedings after the IRS assesses the
21 penalty. That all makes sense to me as well.

22 The criminal point, Justice Alito's
23 point, you just said the Court could flat-out
24 say that it's not a willful violation when
25 you're challenging the reporting requirement

1 being unlawful. So that -- we could -- we could
2 say that.

3 Here's where I think I have a concern:
4 On Bailey and Bob Jones and Alexander, those
5 cases, you were having a discussion with Justice
6 Kagan, either/or, are you challenging the
7 regulatory aspect of this or the reporting
8 aspect of this, or are you challenging the tax
9 aspect?

10 I think you're challenging both as a
11 plaintiff really. And what Bailey and Bob Jones
12 and Alexander seem to say -- and this supports
13 you -- is that when you're doing that, you have
14 to go -- the AIA applies. And I -- I agree with
15 you that those cases support you.

16 But I also think Justice Gorsuch makes
17 a very good point that the current philosophy
18 that's -- those cases are from a different era.
19 The current philosophy of challenging
20 administrative action is different, as the Chief
21 Justice said, with presumptions.

22 And, here, where I really think Bailey
23 and Bob Jones and Alexander may be different is
24 when the penalties are so high if you lose. In
25 other words, you have to bet, and if you bet and

1 lose, penalties are so high that it's going to
2 deter you from challenging the regulatory or
3 reporting aspect in the first place.

4 So the bottom -- long-wind up,
5 bottom-line question. Shouldn't -- as a matter
6 of fairness, modern era of administrative law,
7 presumptions, shouldn't we carve out an
8 exception from Bob Jones, Alexander, Bailey,
9 when the penalties for trying to challenge
10 something are so high that it's going to be
11 coercive and effectively deter you from bringing
12 this kind of challenge in the first place?

13 MR. BOND: Although I agree that that
14 would be a way to limit an adverse ruling, I
15 don't think that's the way to approach this.
16 And let me say a couple of things about that
17 specifically.

18 I don't think it's right to view Bob
19 Jones and George as out of step with modern
20 interpretation, in particular, because those
21 cases applied the text of the statute and they
22 specifically repudiated brief departures in this
23 Court's history from following the text. As Bob
24 Jones explained at some length, from page 742
25 onward, there were periods briefly where the

1 Court didn't follow the text, contrary to what
2 it had done for the first 50 years of the
3 statute. And the Court returned to that in Bob
4 Jones. That's what the Court does today, and
5 that's the way the Court should approach this.

6 And in terms of the onset of modern
7 administrative law, I think the APA and Abbott
8 Laboratories are fully consistent with this.
9 Both of those sources recognize that when
10 Congress chooses to make an exception to
11 pre-enforcement review or to -- to channel
12 review in a particular way, that neither the APA
13 nor the principles that Abbott Labs discuss
14 stand in the way. They expressly recognize that
15 Congress can do that.

16 CHIEF JUSTICE ROBERTS: Justice --

17 MR. BOND: And, finally --

18 CHIEF JUSTICE ROBERTS: -- Barrett.

19 JUSTICE BARRETT: Mr. Bond, earlier
20 you said and you say in your brief that
21 something like the, you know, tax penalties
22 associated with the EPA's fuel standards might
23 be too far downstream to come within this.

24 What is the test for that? I mean, I
25 understand you articulated some of the

1 differences, that this is, you know, housed in
2 another agency but also enforced by these, you
3 know, penalties that are considered taxes.

4 I mean, otherwise you have a pretty
5 bright line. If it's called a tax, then the AIA
6 applies. If it's called a penalty, it's not.

7 So, if you're willing to say that
8 there should be some exception or some carveout
9 in that context, like the EPA's fuel standards
10 requirement, well, what would it be and why
11 should we go with a bright line in this
12 circumstance?

13 MR. BOND: So I think -- well, I would
14 put it a little bit differently. I'd say that
15 there is a bright-line rule that covers cases
16 where the complaint on its face seeks relief
17 that would restrain a tax. That's this case.

18 The question is, how much further
19 beyond that, if at all, does the AIA extend?
20 Now, in our view, it would extend to some extent
21 beyond that where, for example, the suit seeks a
22 declaration that a particular requirement that
23 is backed by taxes is invalid and unlawful and
24 can't be enforced, even if a suit on its face
25 doesn't take the additional step of requesting

1 injunctive relief, because, of course, that
2 declaratory judgment will have the inevitable
3 effect of barring enforcement by the IRS through
4 taxes and it's still fairly imputed to the -- to
5 the suit as a purpose.

6 I think, as you move further along
7 that spectrum, it does become more attenuated.
8 And I think it depends, in particular, on how
9 that other regime works and how it is
10 incorporated into tax law and what relief the
11 plaintiff seeks.

12 But I think the easy path here is to
13 reserve all of those questions and say when the
14 suit on its face seeks to enjoin enforcement by
15 taxes, and that's what Petitioner's suit seeks,
16 it is barred. And I think you can leave open
17 the question of what happens when a plaintiff
18 seeks relief against one method of enforcement
19 of a requirement that is also enforced by other
20 means.

21 I think the easy way to resolve this
22 case is to apply the text to the situation in
23 front of you, which is straightforward, and
24 leave any of those lingering questions for a
25 different case.

1 JUSTICE BARRETT: Thank you, Mr. Bond.

2 CHIEF JUSTICE ROBERTS: A minute to
3 wrap up, Mr. Bond.

4 MR. BOND: Thank you.

5 Petitioner is free to litigate in a
6 refund suit its challenges to the reporting
7 requirements, as other litigants are currently
8 doing with respect to other similar
9 requirements. And as the Court explained nearly
10 a century ago in Sullivan, pursuing that avenue
11 will not subject it to criminal liability.

12 The Court can avoid any doubt on that
13 score by saying as much in its opinion. But one
14 thing we know for certain from the statutory
15 text in 6671 is that Congress intended the
16 penalties that Petitioner's suit seeks to render
17 uncollectable to be treated as taxes, the
18 principal effect of which is to make them
19 subject to the AIA.

20 That provision thus represents
21 Congress's judgment that disputes over those
22 penalties belong in refund suits. Petitioner
23 hasn't offered any way to square its position
24 with that statutory text and the congressional
25 judgment it embodies, nor has it offered any

1 limiting principle that would stop short of
2 subjecting many other reporting requirements
3 backed by taxes to pre-enforcement suits.

4 As it has done in its prior AIA cases,
5 the Court should instead adhere to the statutory
6 text. The court of appeals' judgment should be
7 affirmed.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Mr. Norris?

11 REBUTTAL ARGUMENT OF CAMERON T. NORRIS

12 ON BEHALF OF PETITIONER

13 MR. NORRIS: Thank you, Mr. Chief
14 Justice.

15 It's not every day that the United
16 States Government asks citizens to deliberately
17 violate the tax code, but that's my friend's
18 position in this case, and that's a critical
19 distinction for purposes of reaching the right
20 decision here.

21 This is not, as the Anti-Injunction
22 Act normally tells litigants, pay now, litigate
23 later. This is violate the tax code now, risk
24 jail time and your professional license, and if
25 the IRS agrees to give you a penalty, then

1 litigate later.

2 And the IRS, by the way, the one that
3 has to make the decision about whether you
4 should receive a penalty, is the would-be
5 defendant. And if my friend is right that we
6 cannot file a single report and just get a
7 \$50,000 penalty instead of the tens of millions
8 of dollars of penalties that taking an entire
9 tax year off would cost us, then that gives the
10 IRS a big incentive to never assess that penalty
11 and to deny us our right to go to court.

12 The government's only response to all
13 of this is that it would not be a crime for us
14 to take the route that it offers. But
15 criminality only really goes to our due process
16 argument. Our South Carolina versus Regan
17 argument just requires that the governor -- the
18 government's avenue be illegal. And violating
19 the statutory reporting requirements would
20 certainly be illegal. My friend never said
21 otherwise in his argument.

22 He did cite a case, Sullivan, about
23 the Fifth Amendment privilege, but that case
24 actually confirms that it is, in fact, unlawful
25 not to file your reports.

1 And Cheek in Footnote 10 distinguishes
2 Fifth Amendment privilege cases and says those
3 are fundamentally different.

4 Now as to -- this -- the government
5 invites this Court to say that it would not be
6 willful for us to take this path, but it has not
7 asked this Court to overrule Cheek, and that's
8 what the Court would have to do to reach that
9 outcome.

10 Cheek draws a clear distinction
11 between taxpayers who do not understand whether
12 the tax code applies to them and taxpayers who
13 know that -- know that it applies to them but
14 believe a provision is invalid.

15 That latter camp, which is clearly
16 where we fall, is a willful violation and would
17 subject us to criminal risks.

18 And I would just close by saying this
19 Court frequently hears arguments from the
20 government that -- don't worry, we won't apply a
21 criminal statute according to its text, but
22 those types of arguments rarely succeed.

23 They've been rejected in cases like
24 Marinello, Stevens, and others. And this
25 version of that argument from the government is

1 particularly unsatisfying because it took the
2 government until the Supreme Court to make it.
3 It never said that it wouldn't be a crime
4 anywhere below.

5 And the government's argument now
6 directly contradicts Sections 40.05 and 10.05 of
7 the Criminal Tax Manual, which adopts our
8 reading of Cheek and is what live prosecutors
9 would actually use to make charging decisions.

10 We ask that you reverse the judgment
11 of the Sixth Circuit.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 12:34 p.m., the case
15 was submitted.)

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Official - Subject to Final Review

\$			
\$100,000 [1] 41:14	44:1 54:14 60:6 67:22	Anti [1] 9:11	attract [1] 30:15
\$50,000 [3] 50:17 51:13 68:7	action [5] 5:19 10:4 29:5 37:24 41:22,24 46:20 61:20	Anti-Injunct [1] 14:19	authority [1] 6:15
1	activity [3] 39:19,19,20	Anti-Injunction [31] 3:19 5:4 6:24 8:2,4,16 9:11,17 13:7,13 14:20 15:4 17:24 19:21,22 20:14 21:13 22:6,16,20,24 24:2,13,19 28:18,22 29:15 31:21 40:25 60:5 67:21	available [7] 14:15 18:9 19:4 21:3,15,23 29:11
1 [2] 1:11 54:14	actual [1] 7:16	APA [14] 3:12,17,18 5:17 16:17 24:1 28:20 30:3,22 57:4,17 58:4 63:7,12	avenue [7] 32:23 48:6,7 49:6 59:11 66:10 68:18
10 [2] 46:13 69:1	actually [5] 5:10 26:7 46:21 68:24 70:9	apart [2] 36:14,17	avenues [1] 58:20
10.05 [1] 70:6	addition [3] 52:7,16 55:13	appeals [1] 67:6	avoid [5] 8:1 33:17 56:11,12 66:12
100 [1] 23:6	additional [2] 38:23 64:25	appear [1] 6:22	aware [1] 9:7
11:31 [2] 1:15 3:2	adequate [1] 29:23	APPEARANCES [1] 1:17	away [2] 25:4,11
12:34 [1] 70:14	adhere [1] 67:5	applicable [1] 22:25	B
16 [2] 32:14 53:21	administrative [5] 3:21 57:5 61:20 62:6 63:7	application [2] 19:14 33:5	back [12] 15:20 20:22 25:4,11 35:6 41:11,15 43:3 50:22 51:13,16 52:17
16-66 [4] 9:5,9 12:2 30:11	admit [1] 29:2	applied [1] 62:21	back-end [1] 18:22
19-930 [1] 3:4	adopts [1] 70:7	applies [6] 29:24 48:11 61:14 64:6 69:12,13	backed [3] 55:1 64:23 67:3
1966 [1] 10:5	advance [2] 51:4 57:9	apply [7] 9:17 20:14 22:24 23:10 36:23 65:22 69:20	backwards [1] 33:16
2	adverse [1] 62:14	approach [7] 7:5 27:24 30:1 33:13 42:5 62:15 63:5	Bailey [6] 16:1 35:6 61:4,11,22 62:8
2020 [1] 1:11	advisor [3] 4:24 9:8 44:10	appropriate [1] 49:6	banc [1] 22:4
3	affect [1] 37:25	approved [1] 48:23	Bankers [1] 25:18
3 [1] 2:4	affirmed [1] 67:7	arbitrary [5] 10:20 11:21 12:10,12,22	bar [5] 3:20 13:8 29:25 32:1 34:24
31 [1] 2:7	afraid [1] 51:8	arguably [2] 24:16 56:21	barred [6] 13:12,15 34:10 35:8 54:18 65:16
36 [1] 9:5	afternoon [1] 60:2	argument [31] 1:14 2:2,5,8 3:4,7 6:17 7:25 8:14 14:1 17:22 18:17,19 19:1 25:17,19 31:14 40:16,19 43:6,9,13 46:23 47:3 60:6 67:11 68:16,17,21 69:25 70:5	Barrett [9] 27:18,19 28:15 29:18 30:3,6 63:18,19 66:1
4	agencies [2] 57:5,7	arguments [4] 34:21 59:23 69:19,22	barring [2] 55:11 65:3
40 [2] 56:17 57:18	agency [3] 5:19 38:23 64:2	Arlington [1] 1:18	bars [2] 3:19 31:21
40.05 [1] 70:6	ago [4] 32:24 40:18 42:6 66:10	around [4] 8:1 15:25 16:2 17:10	based [1] 39:18
5	agree [4] 7:4 26:12 61:14 62:13	Article [1] 56:21	basic [1] 57:8
5 [1] 5:17	agrees [2] 5:3 67:25	articulated [1] 63:25	Basin [1] 35:23
50 [1] 63:2	AIA [27] 16:3 18:21 27:22 28:5,14 29:21,24 32:10 33:8,15 34:10 36:17,22,23 37:18 48:2 52:22 53:19 54:10,12 56:10 60:9 61:14 64:5,19 66:19 67:4	aside [5] 4:10 5:9,18 16:18 53:22	become [1] 65:7
6	AIA's [1] 35:6	asks [4] 15:22 16:22 28:22 67:16	begun [1] 7:19
61 [1] 6:22	aimed [9] 5:25 6:1 16:23,24 27:12,13,14 39:9,10	aspect [4] 61:7,8,9 62:3	behalf [8] 1:19,22 2:4,7,10 3:8 31:15 67:12
6671 [6] 32:6 33:8,15 36:7 48:1 66:15	AL [1] 1:6	assert [1] 45:20	believe [6] 42:16 43:23 46:2,8,20 69:14
67 [1] 2:10	Alexander [9] 16:1 17:3 24:23 25:12 35:23 61:4,12,23 62:8	assertion [1] 23:5	believes [2] 49:7,10
68 [3] 6:23 24:12 60:7	Alito [16] 13:5,6,15,25 14:21 15:2,17 28:12 45:9,10,23 47:7,15 48:10 49:13 58:21	assess [7] 5:3 28:24 31:5 37:8 42:18 49:20 68:10	belongs [1] 66:22
68(b) [3] 32:7,9,16	Alito's [2] 27:20 60:22	assessed [8] 4:7 6:8 9:14,19,22 13:18,19 15:24	below [1] 70:4
7	alleged [1] 17:16	assesses [1] 60:20	benefit [1] 23:20
706 [1] 5:18	alleges [1] 56:17	assessing [3] 19:3 38:10 39:14	best [2] 25:12 38:6
7203 [4] 32:18 45:18,18 59:6	alleging [1] 16:3	assessment [18] 3:23 4:1,4 7:6,17,20 13:21 14:10 23:15 28:23 29:6 31:23 37:13,13,17,22 38:1 39:4	bet [2] 61:25,25
7203's [1] 33:5	allow [1] 11:9	Assistant [1] 1:20	between [6] 17:18 46:19,19 47:16,20 69:11
742 [1] 62:24	allows [3] 23:3,4 55:2	associated [1] 63:22	beyond [2] 64:19,21
9	already [6] 9:22,23 13:16,19 23:18 28:25	association's [1] 9:6	big [3] 33:22 41:20 68:10
93 [2] 32:23 42:6	alternative [7] 11:2,6,9 21:2,4,4 29:23	assume [1] 13:10	bit [2] 28:11 64:14
98 [1] 40:17	although [4] 46:6 48:20 55:14 62:13	attached [2] 28:17,18	Bob [17] 15:10 17:2 18:2 20:10 24:22 25:11,24 29:13 35:10,12 61:4,11,23 62:8,18,23 63:3
A	altogether [1] 31:10	attempt [1] 8:17	boilerplate [1] 53:22
a.m [2] 1:15 3:2	ambiguous [1] 33:5	attenuated [5] 4:14 37:23 38:18 39:3 65:7	BOND [51] 1:20 2:6 31:13,14,16 33:21 34:8 35:17 36:2,16 37:7,9 38:2 39:17,23 40:8 42:1,4 43:5,22 44:8,15,22 45:15 46:12 47:11,18 48:13 50:5,25 51:22 52:25 53:20 54:11 55:8,22 56:16 57:4,20 58:19 59:2,21,23 60:2 62:13 63:17,19 64:13 66:1,3,4
Abbott [2] 63:7,13	Amendment [3] 42:13 68:23 69:2	attorneys [1] 21:19	both [3] 45:18 61:10 63:9
able [3] 15:6 35:12 55:19	Americans [3] 18:3 25:24 34:22		bottom [2] 46:23 62:4
above-entitled [1] 1:13	amicus [1] 9:6		bottom-line [1] 62:5
absolutely [1] 21:2	amount [2] 42:23 51:19		
abuse [2] 10:20 22:11	another [5] 17:17 18:2 22:12 33:14 64:2		
accept [2] 37:13 39:2	answer [8] 14:22 15:21,21 16:16 29:14 33:22 45:6,15		
accepting [3] 9:25 30:25 69:21	answers [1] 53:2		
accountants [1] 21:20			
acknowledge [1] 32:4			
Act [41] 3:19 5:4 6:25 8:2,4,16 9:12,17,20 10:2 13:8,13 14:20 15:4 16:25 17:24 19:6,22,22 20:14 21:14 22:6,6,16,17,19,20,24 24:2,14,19 26:2 28:18,22 29:15 31:21 40:25			

Official - Subject to Final Review

<p>Bray [2] 5:24 16:23 Breyer [27] 10:10,11,25 11:5,8,11, 13,19,22 12:2,3,7,12,16,19,24 13: 3 41:4,5 42:2,21 43:15 44:3,13,17 45:6 50:15 Breyer's [1] 20:22 brief [6] 8:14 9:6 38:16 58:1 62:22 63:20 briefly [1] 62:25 bright [2] 64:5,11 bright-line [1] 64:15 bring [3] 14:11 28:4 29:9 bringing [3] 32:3 56:3 62:11 broadly [1] 37:17 brought [2] 8:21 58:7 burden [1] 59:15 burdens [1] 56:25 burdensome [2] 3:13 30:13 business [2] 4:19 39:18</p>	<p>challenged [3] 6:2 15:12 17:15 challenges [6] 23:3 25:5 38:21 49: 7 58:7 66:6 challenging [14] 3:25 6:20 13:12 14:9 25:25 26:7 29:5 37:12 60:25 61:6,8,10,19 62:2 change [1] 40:24 channel [2] 35:1 63:11 channeled [1] 57:22 channeling [1] 35:3 channels [1] 32:11 Chapter [2] 6:22,23 characterize [1] 36:5 charging [1] 70:9 charitable [1] 17:7 Cheek [13] 45:24 46:5,13,13 47:21 48:14,17,20,24 69:1,7,10 70:8 CHIEF [44] 3:3,9 5:7,15 6:9,11,18 7:1,3,13,21 10:9 13:5 15:18,22 18: 13 21:24 24:4,6 27:17 30:7,9 31: 11,16 33:20 35:14,24 36:10 37:2, 5 40:23 41:2 45:8 49:16 52:24 57: 1 59:24 61:20 63:16,18 66:2 67:8, 13 70:12 child [4] 40:20,22 43:7 57:15 choice [3] 28:9 33:12 36:9 choose [2] 52:1,14 chooses [1] 63:10 CIC [12] 1:3 3:4,11,25 4:6,7,21,22, 23,25 30:20 31:1 CIC's [3] 3:22 4:16 31:3 Circuit [2] 25:19 70:11 circumstance [3] 43:8 59:10 64: 12 cite [2] 58:1 68:22 cites [1] 46:16 citizens [2] 30:21 67:16 claim [13] 10:14 11:13,16,18,24 12: 1 13:2 20:25 21:12 49:21 54:15, 16 58:5 claims [6] 4:21 11:3,10 30:4 34:19 57:24 classified [1] 36:19 clause [1] 9:11 cleaner [1] 29:18 clear [8] 31:20,25 33:15 35:22 40: 24 48:18 52:16 69:10 clearly [2] 48:7 69:15 client's [1] 30:11 clients [1] 30:15 close [1] 69:18 code [18] 6:19,23 19:15,17,19,23 20:19 31:2,18 38:24 45:10 46:7,9 48:12 50:7 67:17,23 69:12 coercive [1] 62:11 collect [2] 16:12 28:24 collecting [3] 4:11 17:23 32:2 collection [19] 3:23 4:1,4 7:7,17, 20 13:21 14:10 17:8,9 23:16 28: 23 29:6 31:23 34:25 37:16,22 38: 1 39:5 Colorado [1] 23:5 come [2] 19:9 63:23 comes [3] 4:19 24:18 29:3</p>	<p>coming [2] 9:24 18:18 commended [1] 32:23 comment [2] 12:14 57:10 commit [1] 31:3 commits [1] 51:6 committed [1] 9:23 committing [4] 21:17 32:20 45:13 51:17 company [3] 4:8 9:1 31:6 complaint [13] 15:8,16,22 16:5 17: 17 26:7 32:13 37:21 39:9 53:21 54:6 56:18 64:16 complete [1] 13:10 completely [2] 38:22 54:20 compliance [2] 43:10 56:25 complicated [1] 28:7 comply [4] 19:23 45:11 52:3 57:16 complying [2] 4:18 30:22 concedes [1] 54:14 concern [5] 22:5,23 47:5 59:15 61: 3 concerned [2] 57:19,21 concerns [2] 22:10 58:14 conclude [1] 59:4 concrete [1] 39:24 concurrence [2] 22:3 47:20 conduct [3] 9:23 43:23 44:24 confirms [1] 68:24 Congress [30] 3:16 6:12,15 10:4 19:15 20:13 27:1 28:1 30:17 33:7 34:3,9,25 36:7,19,22 40:1,9,15 43: 9 47:24 48:6 52:15 56:9 57:21 58: 9,12 63:10,15 66:15 Congress's [3] 28:4 33:12 66:21 congressional [1] 66:24 connection [1] 38:18 consequence [7] 16:10 17:9 27: 16 32:8 36:8,21 39:2 consequences [6] 6:13 16:13 36: 13,17,24 51:7 considered [1] 64:3 consistent [2] 49:5 63:8 constitutional [2] 20:25 21:11 Construction [1] 58:2 construed [1] 34:13 context [8] 42:12 48:5,5,16,19,21 49:2 64:9 contexts [1] 48:15 contradictory [1] 19:18 contradicts [1] 70:6 contrary [1] 63:1 convince [1] 31:4 core [2] 9:20,21 correct [2] 20:13 23:25 correctly [1] 19:6 cost [2] 23:6 68:9 costs [1] 4:18 Council [1] 35:19 Counsel [15] 5:7 7:22 15:20 17:1, 20 18:12 24:8 31:12 37:3 40:6 41: 3 49:18 50:13 67:9 70:13 count [1] 4:15 couple [3] 46:12 51:22 62:16 course [6] 8:19 9:21 34:14 41:18</p>	<p>57:11 65:1 COURT [63] 1:1,14 3:10,17 5:5,16, 23 8:10 10:1,19 11:1 14:8,24 15:7 16:17,23 18:4 21:1,10 22:21 23:8, 12 31:17 32:23 34:13,20 35:7,8, 19,22 37:14 38:5 40:14,16 42:5,6, 11 43:6,13 45:17 48:15,17 49:5 51:1 58:3,4 59:7,8 60:23 63:1,3,4, 5 66:9,12 67:5,6 68:11 69:5,7,8, 19 70:2 Court's [11] 14:6 29:4 31:24 34:17 36:2 37:10,15 45:16 49:3 52:17 62:23 cover [1] 23:13 covered [3] 8:9 29:20 47:1 covers [1] 64:15 created [2] 10:4 18:23 creating [1] 22:10 crime [8] 21:17 31:3 32:20 45:12, 14 51:18 68:13 70:3 criminal [9] 5:2 27:6 29:22 55:2 60:22 66:11 69:17,21 70:7 criminality [1] 68:15 criminalize [2] 32:22 48:6 critical [1] 67:18 cross-claim [1] 52:12 curious [1] 34:1 current [2] 61:17,19 currently [1] 66:7 cut [1] 25:16 cuts [2] 36:18 50:10</p> <hr/> <p style="text-align: center;">D</p> <p>D.C [3] 1:10,21 25:19 day [2] 35:7 67:15 debate [1] 47:19 decades [1] 49:3 December [1] 1:11 decide [1] 27:21 decided [2] 4:12 35:10 decision [6] 10:12,19 20:17 34:16 67:20 68:3 decisions [6] 31:24 34:17 36:3 45: 16 49:4 70:9 declaration [4] 15:23 17:4,4 64: 22 Declaratory [5] 43:25 54:2,13,16 65:2 declare [2] 15:22 41:16 declaring [1] 54:2 deduction [1] 17:7 deemed [1] 6:23 deems [1] 58:12 defendant [1] 68:5 define [1] 37:7 defined [3] 24:18 27:2 37:14 definition [2] 7:14 40:10 definitions [2] 37:11,20 delay [1] 31:9 deliberately [2] 31:1 67:16 demand [3] 53:17 54:23,25 demonstrate [1] 29:17 denial [3] 12:5,20 22:4 denied [1] 58:4</p>
---	---	--	---

Official - Subject to Final Review

<p>denies ^[1] 31:9 denominated ^[3] 40:1,9 60:12 deny ^[1] 68:11 departing ^[1] 52:21 Department ^[1] 1:21 departures ^[1] 62:22 depends ^[2] 48:15 65:8 derivative ^[1] 54:21 described ^[3] 11:25 12:5 19:5 describing ^[3] 8:16 46:15 57:24 description ^[1] 50:9 designated ^[2] 34:9 60:8 designating ^[1] 58:16 desire ^[1] 28:4 despite ^[1] 23:5 deter ^[2] 62:2,11 determination ^[5] 35:1 36:22 45:1 58:10,15 determine ^[4] 15:7,15 39:8 55:9 diesel ^[1] 38:16 difference ^[7] 5:13 25:23 27:10 34:11 41:20 46:11 47:16 differences ^[5] 21:7,9 41:8,9 64:1 different ^[20] 11:10 13:1 18:25 20:24 27:14,24 35:3 40:7 45:3 49:2,3,10 51:2 60:14,15 61:18,20,23 65:25 69:3 differently ^[1] 64:14 difficult ^[3] 26:13 38:13 39:7 Direct ^[17] 4:2,15 7:14 8:11 15:9 20:11 23:2,12 24:15 27:25 28:25 29:13 33:21 34:11,15 37:11 60:10 direction ^[2] 14:19 29:16 directly ^[4] 16:19 17:8 34:16 70:6 disagree ^[5] 12:15 18:1 21:8 27:4 44:25 disagrees ^[1] 43:25 disclose ^[3] 53:17 54:23 56:14 disclosure ^[2] 49:25 51:15 discretion ^[1] 10:21 discuss ^[2] 38:16 63:13 discussion ^[1] 61:5 dismiss ^[1] 58:4 dispositive ^[1] 34:11 dispute ^[3] 33:11 35:1 51:9 disputed ^[2] 31:20 33:14 disputes ^[2] 32:11 66:21 distinct ^[1] 24:16 distinction ^[4] 17:18 47:19 67:19 69:10 distinguished ^[1] 46:14 distinguishes ^[1] 69:1 district ^[2] 58:2,3 disturbed ^[1] 48:24 divide ^[1] 47:6 divisible ^[2] 52:9 59:19 document ^[2] 3:12 6:20 documents ^[1] 23:23 doing ^[6] 10:22 41:17 43:2 53:16 61:13 66:8 dollar ^[1] 34:4 dollars ^[4] 23:7 56:8,12 68:8 done ^[6] 11:14 31:1 38:5,10 63:2 67:4</p>	<p>door ^[1] 22:12 doubt ^[1] 66:12 downstream ^[4] 4:14 38:20 39:2 63:23 drawing ^[1] 46:18 draws ^[1] 69:10 due ^[4] 52:21 57:8 59:11 68:15</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[1] 23:10 earlier ^[1] 63:19 easiest ^[1] 19:13 easy ^[2] 65:12,21 economy ^[2] 57:6,12 educational ^[1] 57:14 effect ^[6] 4:14 5:25 34:20 46:17 65:3 66:18 effectively ^[2] 58:15 62:11 effort ^[2] 40:20,21 either ^[2] 21:6,23 either/or ^[1] 61:6 elephant-in-the-room ^[1] 36:20 eliminating ^[1] 35:2 embodies ^[1] 66:25 en ^[1] 22:4 end ^[1] 39:15 enforce ^[3] 39:12 53:12 55:19 enforced ^[12] 4:5 23:24 26:24 27:1,5 32:15 33:18 38:22 53:25 64:2,24 65:19 enforcement ^[13] 5:12,17 6:3 16:6 26:9 32:14 38:10 53:24 55:12 56:1 65:3,14,18 enforcing ^[2] 5:21 16:10 engage ^[2] 43:22 51:3 engaged ^[3] 8:12 12:17 40:22 enjoin ^[7] 5:17,20 23:15 32:14 38:9 53:24 65:14 enjoined ^[1] 6:3 enormous ^[4] 44:20 51:19,24 57:12 enough ^[1] 53:5 entails ^[1] 6:14 entire ^[4] 3:13 23:13 57:13 68:8 entirely ^[2] 15:14 58:8 entities ^[2] 17:5,6 entitled ^[1] 51:20 entitlement ^[1] 59:12 EPA ^[1] 38:16 EPA's ^[2] 63:22 64:9 equitable ^[2] 18:22 20:4 era ^[2] 61:18 62:6 ESQ ^[3] 2:3,6,9 ESQUIRE ^[1] 1:18 essential ^[1] 55:20 essentially ^[2] 23:20 27:21 establish ^[2] 29:1 36:3 estimate ^[1] 57:15 ET ^[1] 1:6 ethical ^[1] 31:4 evasion ^[1] 40:4 even ^[14] 5:20 7:20 16:19,19 18:19 25:8 28:2 29:24 33:5 37:19 55:23 56:21,24 64:24</p>	<p>events ^[1] 59:14 evidence ^[1] 38:6 exactly ^[5] 10:23 17:24 40:15 46:4 48:21 examination ^[1] 45:20 example ^[4] 38:15,15,20 64:21 except ^[2] 10:22 33:22 exception ^[9] 18:23 19:6,9,11,14 54:13 62:8 63:10 64:8 exceptions ^[1] 3:18 exempt ^[2] 3:16 24:1 exempts ^[1] 28:19 exercise ^[2] 26:6 58:24 exerting ^[1] 34:20 exists ^[1] 26:20 explained ^[3] 5:24 62:24 66:9 expressed ^[1] 22:4 expressly ^[2] 46:14 63:14 extend ^[3] 19:10 64:19,20 extends ^[1] 20:17 extent ^[3] 10:6 47:22 64:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face ^[11] 15:7,15 32:14 37:21 38:9 39:9 52:4 56:4 64:16,24 65:14 facing ^[1] 59:16 fact ^[7] 7:6 19:3 22:5 25:20 44:24 52:18 68:24 factor ^[1] 18:2 factors ^[2] 14:18,22 facts ^[1] 23:1 fail ^[2] 42:9 51:18 failing ^[2] 12:13 45:11 fails ^[1] 57:16 failure ^[1] 16:13 fair ^[2] 20:7 55:25 fairly ^[2] 29:2 65:4 fairness ^[1] 62:6 faith ^[2] 32:25 42:16 fall ^[2] 54:9 69:16 falls ^[5] 27:22 47:4 54:12,12,15 far ^[4] 23:10 25:14 32:8 63:23 favor ^[7] 35:15,18 36:1,3,18 46:22 50:11 favor ^[1] 21:3 federal ^[3] 22:8 23:19 58:25 few ^[2] 36:16 39:23 Fifth ^[3] 42:12 68:23 69:2 figure ^[1] 28:13 file ^[12] 4:25 10:17 42:9,13 43:3 44:9 45:19 46:5,7 60:18 68:6,25 filed ^[1] 30:21 filing ^[1] 32:25 final ^[1] 37:15 finally ^[1] 63:17 financial ^[1] 59:16 find ^[1] 58:20 fine ^[5] 30:5 40:7 44:20 47:18 55:3 finer ^[1] 21:18 First ^[17] 3:25 8:13 16:16 31:20 39:1,24 40:9 44:23 46:13 47:4 51:23 52:1 55:22 56:3 62:3,12 63:2 fit ^[3] 8:15 50:9 53:19 fits ^[2] 60:7,8</p>	<p>five ^[2] 56:8,12 flat-out ^[2] 25:13 60:23 flesh ^[1] 48:21 Florida ^[1] 25:18 focus ^[1] 47:19 follow ^[12] 27:19 41:19 42:4,25 43:1 44:5 51:9 52:2,14,19 57:7 63:1 following ^[1] 62:23 follows ^[1] 9:12 Footnote ^[3] 46:13 54:14 69:1 force ^[2] 25:9 26:21 forego ^[1] 51:9 formal ^[1] 7:16 forum ^[2] 35:3 57:23 frame ^[1] 26:6 free ^[1] 66:5 frequently ^[2] 22:22 69:19 friend ^[2] 68:5,20 friend's ^[1] 67:17 front ^[1] 65:23 fuel ^[2] 63:22 64:9 fully ^[2] 30:22 63:8 functions ^[1] 40:2 fundamentally ^[2] 51:2 69:3 further ^[4] 38:14,15 64:18 65:6 future ^[1] 4:12</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>Garner ^[3] 42:7 45:17 48:23 gathering ^[1] 41:14 gave ^[2] 14:23 15:21 General ^[2] 1:20 35:20 George ^[4] 35:7 40:17 43:7 62:19 getting ^[5] 10:12 14:6 41:22 50:15 51:13 gin ^[1] 5:1 give ^[11] 10:18 24:9 41:14 43:20 44:6,14 50:5,16,23,24 67:25 given ^[4] 22:5 25:7 37:11,20 gives ^[2] 9:19 68:9 giving ^[1] 57:10 goal ^[1] 56:24 good-faith ^[1] 45:21 Gorsuch ^[11] 21:25 22:1,15 23:17 24:3 57:2,3 58:19 59:20,22 61:16 got ^[2] 59:20,22 government ^[16] 8:13 16:11 18:20 20:18 23:25 25:21 30:25 31:8 41:23 43:24 52:11 67:16 69:4,20,25 70:2 government's ^[5] 27:23 31:2 68:12,18 70:5 governor ^[1] 68:17 growing ^[1] 57:5 guess ^[3] 19:7 20:22 54:19 guidance ^[7] 3:12 6:20 23:23 46:1 47:10,11,17</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>happen ^[4] 47:25 51:25 57:23 58:13 happens ^[1] 65:17 hard ^[1] 58:21 harder ^[1] 30:14</p>
---	---	--	--

Official - Subject to Final Review

<p>harmonize ^[1] 33:6</p> <p>haste ^[1] 22:11</p> <p>hear ^[2] 3:3 35:11</p> <p>heard ^[1] 5:8</p> <p>hears ^[1] 69:19</p> <p>heart ^[1] 31:18</p> <p>heavily ^[1] 32:17</p> <p>heightened ^[1] 48:20</p> <p>held ^[2] 5:5 35:7</p> <p>help ^[2] 18:15 27:21</p> <p>helpful ^[1] 13:9</p> <p>helps ^[1] 53:6</p> <p>hence ^[1] 15:23</p> <p>high ^[5] 12:21,21 61:24 62:1,10</p> <p>hiring ^[1] 56:13</p> <p>historically ^[1] 58:18</p> <p>history ^[2] 35:6 62:23</p> <p>hold ^[3] 33:7 34:2 50:13</p> <p>Holmes ^[1] 42:5</p> <p>Honor ^[6] 8:3 9:5 18:1 44:8,23 51:1</p> <p>hook ^[1] 52:13</p> <p>hoping ^[1] 5:3</p> <p>housed ^[1] 64:1</p> <p>however ^[3] 29:21 30:25 36:5</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea ^[2] 50:3 51:17</p> <p>identified ^[1] 48:22</p> <p>Ill ^[1] 56:21</p> <p>illegal ^[4] 41:12,16 68:18,20</p> <p>Illinois ^[1] 35:19</p> <p>immediately ^[1] 52:13</p> <p>imminently ^[1] 13:18</p> <p>impediment ^[2] 7:8,13</p> <p>implicate ^[1] 4:4</p> <p>implications ^[1] 25:5</p> <p>important ^[2] 17:18 32:8</p> <p>imposed ^[2] 32:6 34:8</p> <p>imposes ^[1] 6:20</p> <p>imprisonment ^[1] 21:18</p> <p>impunity ^[1] 8:20</p> <p>impute ^[2] 38:19 55:25</p> <p>imputed ^[1] 65:4</p> <p>incentive ^[1] 68:10</p> <p>incidental ^[1] 5:25</p> <p>income ^[3] 18:6 39:21,24</p> <p>income-generating ^[1] 39:19</p> <p>incorporated ^[2] 38:24 65:10</p> <p>incur ^[4] 4:8 9:1 29:22 59:17</p> <p>incurred ^[2] 9:3,9</p> <p>incurring ^[1] 33:3</p> <p>independent ^[6] 26:20 27:8 29:8 38:21 55:5,5</p> <p>indicate ^[1] 28:4</p> <p>indirect ^[2] 37:24 38:25</p> <p>individual ^[2] 26:15 31:6</p> <p>industry ^[3] 3:13 9:6 30:12</p> <p>inevitable ^[1] 65:2</p> <p>inference ^[1] 36:25</p> <p>information ^[22] 33:1 40:3 41:14 42:15 43:21 44:6,12,14,16,18 45:22 46:25 47:1,13 50:2,16,23,24 51:21 53:18 54:24 56:14</p>	<p>informational ^[1] 50:8</p> <p>injunction ^[7] 5:11 6:5 7:11 16:7 22:6,16,19</p> <p>injunctive ^[2] 54:17 65:1</p> <p>injure ^[1] 17:15</p> <p>injuries ^[8] 4:16,17 14:12,13 15:12 17:16 18:10 29:7</p> <p>injury ^[1] 18:5</p> <p>inquiries ^[1] 15:14</p> <p>inquiry ^[2] 15:3,5</p> <p>instead ^[5] 32:11 34:22 42:11 67:5 68:7</p> <p>insufficient ^[1] 58:22</p> <p>insulated ^[1] 58:8</p> <p>insurance ^[1] 9:7</p> <p>intend ^[1] 43:11</p> <p>intended ^[4] 17:25 43:10 47:24 66:15</p> <p>intends ^[1] 57:9</p> <p>intention ^[1] 8:24</p> <p>interests ^[1] 22:9</p> <p>INTERNAL ^[6] 1:6 46:6,8,9 48:12 50:7</p> <p>interpret ^[1] 20:6</p> <p>interpretation ^[2] 10:7 62:20</p> <p>interpreted ^[1] 22:7</p> <p>invalid ^[6] 15:23 49:8,11 55:19 64:23 69:14</p> <p>invalidate ^[3] 53:17 54:8 55:24</p> <p>invalidating ^[3] 53:11 55:17,18</p> <p>invalidation ^[1] 53:9</p> <p>invite ^[1] 59:5</p> <p>invites ^[1] 69:5</p> <p>involve ^[1] 33:24</p> <p>involving ^[4] 23:14 26:12 37:15 43:7</p> <p>irrelevant ^[2] 10:1 21:13</p> <p>IRS ^[35] 3:5,11,16 4:7,11 5:3,21 7:19 10:14 13:12 17:23 23:23 24:1 28:20 30:18,19 31:5 32:1 34:4 39:11 40:4 41:9,11,13 42:18 46:1 47:2 57:11,16 58:7 60:20 65:3 67:25 68:2,10</p> <p>IRS's ^[2] 17:4 28:16</p> <p>Isn't ^[5] 11:13 26:4,4 46:4 54:20</p> <p>issue ^[5] 14:25 17:6 21:6 34:14 36:14</p> <p>issued ^[1] 47:2</p> <p>items ^[2] 52:6 53:23</p> <p>itself ^[5] 8:22 13:23 26:10,17 27:15</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail ^[3] 55:3 58:23 67:24</p> <p>JONATHAN ^[3] 1:20 2:6 31:14</p> <p>Jones ^[17] 15:10 17:2 18:2 20:10 24:22 25:11,24 29:13 35:10,12 61:4,11,23 62:8,19,24 63:4</p> <p>Judge ^[2] 16:20 22:3</p> <p>Judgment ^[9] 44:1 54:2,2,13 65:2 66:21,25 67:6 70:10</p> <p>judicial ^[7] 11:4 31:9 32:21 41:22 43:17,19 45:1</p> <p>Justice ^[163] 1:21 3:3,9 5:7,15 6:9,</p>	<p>11,18 7:1,3,13,21,23,24 9:2,10,18 10:8,9,9,11,25 11:5,8,11,13,19,22 12:1,3,7,12,16,19,24 13:3,5,5,6,15,25 14:21 15:2,17,18,18,20,22 16:4,9,15 17:1,11,20 18:11,13,13,14 19:2,7,25 20:21,22 21:9,21,24,24 22:1,15 23:17 24:3,4,4,6,7 25:15 26:4,5,11,23 27:5,17,17,19,20 28:12,15 29:18 30:2,6,7,10 31:11,16 33:20 35:14,24 36:10 37:2,4,5,6,23 39:16 40:6 41:1,2,4,5 42:2,5,21 43:15 44:3,13,17 45:6,8,9,9,10,23 47:7,15 48:10 49:13,16,16,18 50:12,15 51:11 52:24,24,25 54:5,19 55:15 56:6 57:1,2,2,3 58:19,21 59:20,22,24,24 60:1,22 61:5,16,21 63:16,16,18,19 66:1,2 67:8,14 70:12</p> <p>Justice's ^[1] 40:23</p> <p>justification ^[2] 19:10,13</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan ^[15] 18:13,14 19:2,7,25 20:21 21:9,21 52:24,25 54:5,19 55:15 56:6 61:6</p> <p>Kavanaugh ^[9] 24:5,6 25:15 26:4,12,23 27:5 59:25 60:1</p> <p>keep ^[2] 41:17 56:14</p> <p>kept ^[1] 21:1</p> <p>key ^[3] 14:24 25:23 53:3</p> <p>kind ^[9] 4:14 10:15 18:22 30:12 46:14 48:7 58:6,11 62:12</p> <p>kinds ^[1] 57:24</p> <p>knowing ^[1] 36:20</p> <p>known ^[1] 52:9</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labeled ^[1] 4:20</p> <p>Labeling ^[1] 30:16</p> <p>labels ^[1] 30:11</p> <p>labor ^[3] 40:20,22 43:7</p> <p>Laboratories ^[1] 63:8</p> <p>Labs ^[1] 63:13</p> <p>language ^[7] 9:25 10:3 23:9,11 29:2 53:1,3</p> <p>large ^[1] 52:18</p> <p>largely ^[4] 10:1 23:2 24:1 28:19</p> <p>last ^[1] 9:11</p> <p>later ^[5] 28:10 35:12 46:15 67:23 68:1</p> <p>latter ^[1] 69:15</p> <p>law ^[10] 3:18,21 26:22 34:3 43:8 45:2 52:9 62:6 63:7 65:10</p> <p>law-abiding ^[4] 4:8 8:25 30:20 31:6</p> <p>lawful ^[4] 26:2 41:24 43:24 44:24</p> <p>lawfulness ^[1] 43:19</p> <p>laws ^[3] 49:24,25 50:3</p> <p>lawsuit ^[7] 5:23,24 17:22 23:6 29:1,10 53:7</p> <p>lawyer ^[1] 56:13</p> <p>leans ^[1] 32:17</p> <p>least ^[2] 35:17 38:8</p> <p>leave ^[2] 65:16,24</p> <p>legally ^[3] 32:1 34:24 42:17</p>	<p>legitimately ^[1] 51:20</p> <p>length ^[1] 62:24</p> <p>less ^[3] 22:25 51:12,12</p> <p>letter ^[3] 30:13 44:11 60:18</p> <p>leveraging ^[1] 33:13</p> <p>liability ^[15] 4:17 9:16 14:13 17:17 18:5,10 26:1,9 29:8 39:18,22,25 52:14,19 66:11</p> <p>license ^[1] 67:24</p> <p>limit ^[1] 62:14</p> <p>limiting ^[2] 33:17 67:1</p> <p>Lincoln's ^[1] 41:6</p> <p>line ^[5] 46:18,22 47:4 64:5,11</p> <p>line-drawing ^[2] 38:14 39:7</p> <p>lines ^[1] 43:12</p> <p>lingering ^[2] 33:11 65:24</p> <p>link ^[1] 22:18</p> <p>linked ^[2] 22:17,22</p> <p>litigants ^[2] 66:7 67:22</p> <p>litigate ^[5] 30:3 35:13 66:5 67:22 68:1</p> <p>litigated ^[3] 33:10 57:25 58:17</p> <p>litigation ^[1] 44:1</p> <p>little ^[2] 28:11 64:14</p> <p>live ^[1] 70:8</p> <p>LLC ^[1] 1:3</p> <p>logic ^[2] 20:16 43:6</p> <p>long ^[1] 22:17</p> <p>long-wind ^[1] 62:4</p> <p>look ^[12] 8:13 15:9 23:9 29:4 38:5 40:18 43:9 45:25 47:24 51:1 53:3 56:22</p> <p>looked ^[1] 34:22</p> <p>looking ^[3] 16:13 24:9 38:4</p> <p>lose ^[2] 61:24 62:1</p> <p>losing ^[1] 51:8</p> <p>loss ^[1] 4:19</p> <p>lot ^[2] 42:21 57:14</p> <p>lots ^[1] 36:24</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[7] 34:25 35:22 36:22 40:19 43:9 48:7 58:9</p> <p>main ^[1] 3:24</p> <p>majority ^[2] 47:20 48:17</p> <p>mandate ^[1] 26:16</p> <p>Mann ^[1] 58:1</p> <p>Manual ^[1] 70:7</p> <p>many ^[5] 3:19 33:17 49:24 50:3 67:2</p> <p>Marinello ^[1] 69:24</p> <p>Marketing ^[17] 4:2,15 7:15 8:11 15:9 20:11 23:2,12 24:15 27:25 28:25 29:13 33:21 34:11,15 37:11 60:10</p> <p>massive ^[3] 21:18 52:13 59:15</p> <p>material ^[3] 4:24 9:8 44:10</p> <p>matter ^[6] 1:13 5:10,16,22 21:10 62:5</p> <p>mean ^[13] 21:4 28:25 34:5 36:12,12 41:6 43:1 52:20 55:15 56:7 59:8 63:24 64:4</p> <p>meaning ^[7] 7:5 8:5 48:16,18,20 49:1 52:9</p>
---	---	---	--

Official - Subject to Final Review

<p>means ^[9] 5:24 7:13 16:23 48:1,4, 21,23 59:6 65:20 meant ^[4] 19:2 20:13 23:12 33:7 medical ^[1] 57:13 members ^[1] 31:3 mentioned ^[1] 12:11 mere ^[1] 52:18 merely ^[2] 5:25 27:15 merits ^[3] 35:9,13 45:5 method ^[2] 41:22 65:18 might ^[5] 22:9,11 51:9,9 63:22 million ^[1] 23:6 millions ^[1] 68:7 mind ^[1] 54:7 minor ^[1] 36:17 minute ^[3] 30:7 52:14 66:2 misdemeanor ^[1] 32:19 misreads ^[1] 32:21 missing ^[3] 18:3 20:12 43:4 modeled ^[1] 22:19 modern ^[3] 62:6,19 63:6 money ^[8] 41:10,15 42:22,23 50:20,22 51:15 56:13 morning ^[3] 22:1 24:8 57:3 most ^[4] 4:10 20:8 23:22 32:8 motion ^[1] 58:4 motive ^[2] 32:3 34:18 move ^[1] 65:6 much ^[9] 10:5 22:11 27:14 30:14 34:1 35:19 36:25 64:18 66:13 Murdock ^[1] 46:16 must ^[2] 11:2 33:9</p>	<p>nothing ^[2] 4:16 56:19 notice ^[35] 3:12,25 4:3,11,23 5:9, 12,21 6:1 7:19 8:20,22,25 9:4,8 12:2,14 13:16 15:23 16:6,8,10,14, 18,24 30:11 39:12 53:24,25,25 54:3 55:17,18,20,24 notice's ^[1] 4:18 notice-and-comment ^[5] 3:15 12:9 30:18 57:17 58:24 number ^[2] 50:6,7</p>	<p style="text-align: center;">P</p> <p>p.m. ^[1] 70:14 packed ^[1] 14:22 PAGE ^[5] 2:2 9:5 32:14 53:21 62:24 paid ^[1] 43:4 paper ^[1] 10:18 paragraph ^[1] 56:17 parallel ^[1] 22:7 part ^[5] 4:5 26:8 38:24 52:10 57:7 particular ^[11] 39:25 42:14 48:7, 19 49:11 51:3 57:23 62:20 63:12 64:22 65:8 particularly ^[1] 70:1 party ^[1] 8:11 passed ^[1] 34:3 past ^[3] 9:19 17:2 40:23 path ^[3] 31:2 65:12 69:6 pay ^[23] 4:22 14:17 18:5,9 19:4,23 26:1 41:10 42:24,25 49:22,24 50:1,2,18,20 51:18,19,24 52:10,19 59:18 67:22 paying ^[5] 8:18 28:9 33:4 43:17 44:20 penalize ^[1] 40:21 penalties ^[44] 4:6,6,7,9,12 6:6,7,7, 12,18 8:18 9:1,9,21,24 13:18 15:24 16:7 23:24 27:16 29:22 31:5 32:6,9,16 33:9 36:7,11 47:25 54:1 55:2 56:4,18,19 58:16 59:16 61:24 62:1,9 63:21 64:3 66:16,22 68:8 penalty ^[41] 5:4 9:3 13:21 24:12, 17 26:24 27:1 28:3,17 33:4,24 34:4,8 36:13 40:1,7 42:18,24,25 43:3, 18 48:8 51:24 52:3,5,8 53:13 54:20 55:1 56:8,9 59:18,19 60:8,12, 21 64:6 67:25 68:4,7,10 pending ^[4] 6:8 9:16 30:24 58:2 pensions ^[1] 57:13 people ^[1] 40:21 percent ^[1] 57:18 perhaps ^[1] 26:14 periods ^[1] 62:25 permanently ^[1] 53:23 person ^[3] 9:13,13 13:16 pertain ^[1] 40:4 petition ^[1] 12:6 Petitioner ^[21] 1:4,19 2:4,10 3:8 32:4,17,21 33:3,16 39:8,11 54:14 55:10 56:2,16,20 59:17 66:5,22 67:12 Petitioner's ^[8] 32:13 33:13 37:21 46:22,23 47:3 65:15 66:16 philosophy ^[2] 61:17,19 phrase ^[1] 29:20 piece ^[1] 10:17 place ^[3] 56:3 62:3,12 plaintiff ^[12] 11:2 14:9,11,14,17 15:13 29:5,9 38:21 61:11 65:11,17 plaintiff's ^[4] 13:20 29:7 32:2 34:18 plaintiffs ^[5] 17:15 18:4 25:20,25</p>	<p>53:16 plan ^[1] 9:1 play ^[1] 8:12 plays ^[1] 18:16 plead ^[1] 16:2 pleading ^[1] 26:6 please ^[2] 3:10 31:17 point ^[23] 9:5 14:6,18 15:10 16:20, 20 29:16 35:21 37:16 39:24 40:10, 18 41:6,6,6 53:20 58:9 60:11,15, 17,22,23 61:17 pointed ^[2] 25:21 26:5 poses ^[1] 24:25 position ^[4] 28:16 49:14 66:23 67:18 possibility ^[1] 59:5 possibly ^[1] 6:8 post ^[1] 60:19 post-payment ^[1] 58:13 post-petition ^[1] 12:20 power ^[2] 22:11 57:5 practical ^[1] 16:13 practices ^[1] 40:22 pre-enforce ^[1] 8:6 pre-enforcement ^[17] 8:7,21 13:22 23:3 30:21 32:10 33:19 34:6 35:8,11,16,18 36:1,4 59:12 63:11 67:3 precise ^[2] 23:9 50:6 precisely ^[1] 30:20 preclude ^[1] 57:21 precludes ^[1] 32:10 precursor ^[1] 45:18 prefer ^[1] 51:5 preparatory ^[1] 51:6 prepare ^[1] 51:14 present ^[1] 20:11 presented ^[1] 34:15 preserve ^[1] 33:11 presume ^[1] 41:21 presumption ^[6] 35:15,18,20 36:1, 3,5 presumptions ^[2] 61:21 62:7 pretty ^[2] 27:25 64:4 prevailed ^[1] 55:11 prevails ^[1] 39:11 prevent ^[1] 4:11 preventing ^[1] 56:1 primary ^[1] 11:17 principal ^[1] 66:18 principle ^[2] 33:17 67:1 principles ^[1] 63:13 prior ^[3] 37:16 53:2 67:4 prison ^[1] 58:25 privilege ^[2] 68:23 69:2 problem ^[7] 11:23,23 24:25 33:22 51:12 53:6 60:4 problems ^[2] 38:14 54:23 procedural ^[1] 15:4 procedure ^[5] 46:14 48:22 52:2, 15,20 proceed ^[2] 31:25 58:10 proceeded ^[1] 44:2 proceedings ^[1] 60:20</p>
<p style="text-align: center;">N</p> <p>national ^[2] 57:6,12 nature ^[2] 20:4 21:12 nearly ^[2] 59:8 66:9 neatly ^[1] 20:17 need ^[4] 5:20 50:16,17 55:8 negate ^[1] 58:15 neither ^[2] 23:11 63:12 never ^[12] 3:14 4:8 20:13 43:3 45:2 50:19,22 51:15 55:19 68:10,20 70:3 new ^[1] 10:3 next ^[1] 3:4 NFIB ^[1] 26:14 non-compliance ^[1] 56:5 non-constitutional ^[1] 21:12 none ^[1] 14:18 nonprofit ^[1] 57:14 nor ^[2] 63:13 66:25 normal ^[5] 7:4 19:21 44:1 49:19, 19 normally ^[4] 39:16 41:21 58:23 67:22 NORRIS ^[53] 1:18 2:3,9 3:6,7,9 5:14 6:10,17 7:2,12,24 8:3 9:4,18 10:25 11:7,12,17,20 12:1,4,8,15, 20 13:1,14 14:3 15:2 16:4,15 17:11 18:1,14 19:1,12 20:8 21:8,21, 22 22:2,15 23:21 25:15 26:11 27:4 28:15 30:2,8,9 67:10,11,13 note ^[1] 25:18</p>	<p style="text-align: center;">O</p> <p>objecting ^[4] 44:11 54:22 55:6 60:19 objection ^[3] 33:1 42:14 45:21 objections ^[1] 42:13 objective ^[3] 15:5,14 32:3 obligations ^[2] 21:19 31:4 obtain ^[4] 32:20 33:2 52:15 55:10 offer ^[1] 13:6 offered ^[3] 33:16 66:23,25 offers ^[1] 68:14 often ^[2] 22:7 52:23 Okay ^[4] 11:19 13:3 19:7 44:6 one ^[18] 19:16 20:24 22:5,11 27:16 33:14,22,24 34:3 38:8,11 41:7,8 49:25 53:2 65:18 66:13 68:2 only ^[17] 3:19 10:15 21:16 23:10, 18 36:8 38:21 46:25 47:12 48:11, 11 50:1 52:10 53:6 55:1 68:12,15 onset ^[1] 63:6 onward ^[1] 62:25 open ^[2] 22:12 65:16 operate ^[1] 19:20 opinion ^[7] 13:11 16:21 20:9 37:15 40:23 59:6 66:13 opportunity ^[2] 51:10 57:10 opposed ^[1] 26:9 option ^[2] 14:15 18:8 oral ^[5] 1:14 2:2,5 3:7 31:14 order ^[8] 4:10 19:17 20:19 29:22 33:2 38:18 43:19 51:24 ordinarily ^[1] 40:12 ordinary ^[3] 3:20 40:7 44:9 originally ^[1] 8:4 other ^[18] 10:21 16:1 24:21 25:3 33:18 34:17 48:5,9,15 52:5 58:14 59:11 61:25 65:9,19 66:7,8 67:2 others ^[1] 69:24 otherwise ^[3] 52:21 64:4 68:21 out ^[9] 3:18 14:25 18:15 25:21 26:5 28:13 48:21 62:7,19 outcome ^[2] 40:24 69:9 outlined ^[4] 52:2,15 58:20 59:3 over ^[6] 21:11,11 42:19 52:11 57:5 66:21 overall ^[1] 10:2 overcome ^[1] 36:6 override ^[1] 33:15 overrule ^[1] 69:7 overruling ^[1] 25:13 overstated ^[1] 59:17 owe ^[3] 41:10 49:22 50:21</p>		

Official - Subject to Final Review

<p>process ^[6] 7:17 25:10 52:21 57:8 59:12 68:15</p> <p>professional ^[3] 5:2 21:19 67:24</p> <p>prohibit ^[1] 17:25</p> <p>promise ^[1] 57:6</p> <p>promised ^[1] 57:4</p> <p>promulgate ^[1] 10:14</p> <p>prosecutors ^[1] 70:8</p> <p>protest ^[1] 43:2</p> <p>provide ^[4] 16:14 42:15 46:24 51: 21</p> <p>provider ^[1] 9:7</p> <p>provides ^[1] 32:6</p> <p>providing ^[2] 44:11 45:21</p> <p>provision ^[1] 19:16 26:20 31:21 32:5,9,18,22 33:14 55:2 66:20 69: 14</p> <p>provisions ^[4] 20:15 31:19 32:12 33:6</p> <p>public ^[1] 57:9</p> <p>purport ^[1] 55:20</p> <p>purpose ^[29] 3:22 5:22,23 7:9 13: 20 14:7,23 16:22,23 17:3 19:3 27: 11 28:22 29:1,3,17 31:22 38:4,7, 19 39:3 53:1 55:7,9,25,25 56:11, 12 65:5</p> <p>purposes ^[9] 6:24 14:25 21:13 24: 13 37:9,12,14,18 67:19</p> <p>pursuing ^[1] 66:10</p> <p>put ^[5] 28:1 55:3 56:9,10 64:14</p> <p style="text-align: center;">Q</p> <p>qualifies ^[1] 24:12</p> <p>qualify ^[2] 17:5,6</p> <p>question ^[1] 20:23 23:19 24:20, 22 27:20 40:17 45:7 50:14 62:5 64:18 65:17</p> <p>questions ^[6] 15:11 24:21 29:14 39:7 65:13,24</p> <p>quite ^[2] 14:24 42:21</p> <p style="text-align: center;">R</p> <p>raise ^[7] 4:21 11:2,9,24 40:20 43: 11 49:6</p> <p>raised ^[3] 11:20 15:11 25:20</p> <p>rarely ^[1] 69:22</p> <p>rationale ^[2] 20:1,3</p> <p>reach ^[1] 69:8</p> <p>reached ^[1] 35:9</p> <p>reaching ^[1] 67:19</p> <p>reaction ^[2] 24:10,23</p> <p>read ^[5] 19:14,19 25:1 37:17 59:4</p> <p>reading ^[2] 24:24 70:8</p> <p>reads ^[1] 9:12</p> <p>reaffirmed ^[2] 32:24 42:7</p> <p>real ^[4] 33:21 35:4 56:11,12</p> <p>real-world ^[3] 56:2,7 57:23</p> <p>really ^[13] 10:3 20:4 26:1 27:7 34: 19 40:19,21 45:12 53:6 54:21 61: 11,22 68:15</p> <p>reason ^[5] 50:13 56:2,7,16 60:13</p> <p>reasonable ^[1] 53:5</p> <p>reasonably ^[1] 19:19</p> <p>reasons ^[5] 3:24 25:6,7 51:25 59:</p>	<p>3</p> <p>REBUTTAL ^[3] 2:8 67:10,11</p> <p>receive ^[1] 68:4</p> <p>recently ^[1] 58:3</p> <p>recognize ^[2] 63:9,14</p> <p>recognized ^[1] 40:15</p> <p>recognizes ^[1] 48:14</p> <p>recordkeeping ^[1] 39:20</p> <p>refer ^[2] 6:15 20:5</p> <p>refund ^[29] 4:22,25 11:3 14:15,18 15:13 18:7 19:4,17,24 20:14,20 21:15,17,22 26:3 28:10 29:10 32: 11 33:4,10 35:2,9 42:19 52:11,19 58:13 66:6,22</p> <p>refused ^[2] 3:17 30:19</p> <p>reg ^[1] 26:23</p> <p>Regan ^[2] 5:6 10:1,2 11:1 14:1,4 15:10 18:16 19:6,14 20:2,8,12,24 21:2 25:17,19 29:13,19 60:17 68: 16</p> <p>regardless ^[3] 12:18 32:2 34:17</p> <p>regime ^[3] 3:14 38:22 65:9</p> <p>regive ^[1] 16:16</p> <p>regulates ^[1] 57:11</p> <p>regulation ^[10] 13:12,23 23:23 26: 24 27:14 28:17 34:5,7 47:3,12</p> <p>regulations ^[4] 38:17 46:1 47:1, 12</p> <p>regulatory ^[16] 13:17 24:22 25:6 26:8,8,13,18,25 27:3,8,13 34:20 38:22 55:5 61:7 62:2</p> <p>rehearing ^[1] 22:4</p> <p>rejected ^[5] 34:21 40:16 43:7,13 69:23</p> <p>related ^[2] 6:6 39:20</p> <p>relevant ^[2] 15:16 19:5</p> <p>relief ^[17] 32:1 34:23,24 37:20 38:6 53:4,8,23 54:16,17 55:10,11,18 64:16 65:1,10,18</p> <p>remarkable ^[1] 48:25</p> <p>remedy ^[4] 21:3,5,5 29:24</p> <p>remember ^[1] 54:25</p> <p>removed ^[1] 38:15</p> <p>render ^[1] 66:16</p> <p>repeatedly ^[2] 34:13 35:22</p> <p>report ^[7] 16:11 40:3 43:20 44:5 49:20 50:1 68:6</p> <p>reportable ^[3] 4:20 30:12,16</p> <p>reporting ^[34] 3:14 4:2,13,18 5:1 6:21,21 8:7,9,17,23,23 10:15 23:4 26:19,25 30:14,23 32:15 33:1 39: 13 44:19 45:11 50:8 53:9,11,12 54:9 60:25 61:7 62:3 66:6 67:2 68: 19</p> <p>reports ^[1] 68:25</p> <p>represents ^[1] 66:20</p> <p>repudiated ^[1] 62:22</p> <p>requested ^[4] 34:23 38:6 53:4,8</p> <p>requesting ^[1] 64:25</p> <p>requests ^[1] 53:22</p> <p>require ^[6] 5:5 19:16 20:19 31:3 47:13 58:23</p> <p>required ^[5] 42:17 46:2,21,24 47:9</p> <p>requirement ^[19] 8:8 10:15 13:17 26:19,25 27:9 39:13,14 44:19 45: 12 53:9,11,13 54:9 55:5 60:25 64: 10,22 65:19</p> <p>requirements ^[25] 4:3,5,13,19 5:2 6:21,22 8:9,17,23,24 23:4 30:14, 23 32:15 33:18 43:11 49:7 50:9 57:8,17 66:7,9 67:2 68:19</p> <p>requires ^[5] 18:21 32:20 46:7,25 68:17</p> <p>requiring ^[1] 41:23</p> <p>reserve ^[1] 65:13</p> <p>resolution ^[1] 30:4</p> <p>resolve ^[5] 32:12 33:10 47:23 48:3 65:21</p> <p>respect ^[4] 52:3,4,5 66:8</p> <p>respond ^[1] 7:25</p> <p>Respondents ^[4] 1:7,22 2:7 31: 15</p> <p>response ^[4] 11:8 22:2,13 68:12</p> <p>rest ^[2] 52:4,12</p> <p>restatement ^[2] 14:1,4</p> <p>restrain ^[7] 7:6 13:20 28:24 37:22 38:11 39:4 64:17</p> <p>restraining ^[5] 3:23 16:7 28:23 31: 22 38:19</p> <p>restraint ^[1] 7:13</p> <p>result ^[1] 45:1</p> <p>results ^[1] 16:14</p> <p>return ^[7] 32:25 42:9,13 44:9 45: 19 46:6,7</p> <p>returned ^[1] 63:3</p> <p>REVENUE ^[9] 1:6 23:7 40:20 43: 12 46:7,9,9 48:12 50:7</p> <p>reverse ^[1] 70:10</p> <p>review ^[32] 3:18 10:24 24:2 28:20 31:9 32:10,21,23 33:2 34:6 35:2,4, 16,18,21 36:1,4 41:22 42:3 43:17, 19 45:13 48:6 52:15 57:22 58:8, 10,11 59:11,13 63:11,12</p> <p>reviewed ^[1] 10:13</p> <p>revocation ^[1] 17:14</p> <p>rid ^[1] 56:25</p> <p>rights ^[1] 58:25</p> <p>rigor ^[1] 20:11</p> <p>rises ^[1] 54:15</p> <p>risk ^[4] 22:10 42:22 45:4 67:23</p> <p>risking ^[2] 5:2 21:17</p> <p>risks ^[1] 69:17</p> <p>ROBERTS ^[32] 3:3 5:7 6:9,11 7:1, 3,21 10:9 13:5 15:18 18:13 21:24 24:4 27:17 30:7 31:11 33:20 35: 14,24 36:10 37:2 41:2 45:8 49:16 52:24 57:1 59:24 63:16,18 66:2 67:8 70:12</p> <p>role ^[1] 18:15</p> <p>route ^[4] 11:24 12:4 29:19 68:14</p> <p>rule ^[4] 10:15 43:1 48:10 64:15</p> <p>rulemaking ^[8] 3:15 10:16,18,23 11:14 12:6,18 30:19</p> <p>Ruling ^[2] 31:8 62:14</p> <p>run ^[1] 45:3</p> <p style="text-align: center;">S</p> <p>sailed ^[2] 23:2,18</p>	<p>same ^[14] 14:6 20:9 21:15 22:20, 21 23:20 29:16 35:7,10 36:12,15 43:6 46:17 54:15</p> <p>sanctions ^[2] 5:3 27:6</p> <p>satisfied ^[1] 29:25</p> <p>saying ^[17] 10:18 12:25 18:19,24, 25 21:1 22:23 28:6 34:3 37:19 43: 15 44:7 46:19 47:17 48:4 66:13 69:18</p> <p>says ^[11] 5:18 8:6 20:7 32:20 38:4 39:8 43:20,20 45:10 46:5 69:2</p> <p>scarlet ^[1] 30:13</p> <p>scope ^[4] 10:2 24:19 31:20 54:15</p> <p>score ^[1] 66:13</p> <p>Second ^[4] 4:16 21:1 32:5 46:18</p> <p>secret ^[1] 56:15</p> <p>section ^[2] 8:14 32:18</p> <p>Sections ^[1] 70:6</p> <p>sector ^[2] 57:14,15</p> <p>Security ^[1] 18:7</p> <p>see ^[8] 12:24,24 15:25 24:11 45:12 46:10 51:12,12</p> <p>seek ^[4] 44:16 52:10 53:23 54:1</p> <p>seeking ^[5] 28:9 54:8,8,21 55:23</p> <p>seeks ^[1] 32:1,14 37:21 38:9 64: 16,21 65:11,14,15,18 66:16</p> <p>seem ^[4] 14:21 17:22 27:2 61:12</p> <p>seems ^[9] 17:21,21 20:7,23 24:15 25:7 28:3 53:5,7</p> <p>send ^[1] 44:10</p> <p>sense ^[6] 9:20 21:16 27:3 42:10 50:21 60:21</p> <p>sentence ^[2] 8:13 13:10</p> <p>separate ^[1] 14:24</p> <p>separately ^[1] 38:22</p> <p>serious ^[1] 30:17</p> <p>SERVICE ^[2] 1:6 46:9</p> <p>SERVICES ^[3] 1:3 3:4,11</p> <p>set ^[3] 5:9,18 16:18</p> <p>setting ^[1] 4:10</p> <p>Seven-Sky ^[1] 16:21</p> <p>several ^[6] 13:6 14:5,5,22 16:1 35: 12</p> <p>shall ^[1] 26:21</p> <p>ship ^[1] 23:2</p> <p>ship's ^[1] 23:17</p> <p>short ^[1] 67:1</p> <p>shouldn't ^[3] 55:4 62:5,7</p> <p>side ^[5] 20:16,16 23:18 47:4 58:15</p> <p>significance ^[2] 7:10 36:11</p> <p>Silberman's ^[1] 16:21</p> <p>similar ^[2] 33:18 66:8</p> <p>simple ^[2] 28:16 53:14</p> <p>simply ^[12] 14:17 16:3 18:5,9 26:1 35:3 42:8 43:16,24 49:4 58:9 59: 16</p> <p>since ^[1] 32:24</p> <p>sincerely ^[2] 46:2,8</p> <p>single ^[5] 52:3,10 59:17,18 68:6</p> <p>situation ^[6] 15:1 20:18 21:16 46: 4 49:19 65:22</p> <p>Sixth ^[1] 70:11</p> <p>slight ^[1] 22:9</p> <p>slowly ^[1] 44:5</p>
---	--	---

Official - Subject to Final Review

<p>Social ^[1] 18:6 sole ^[1] 17:16 solely ^[1] 13:23 Solicitor ^[1] 1:20 solution ^[1] 57:4 somebody ^[2] 46:5 58:24 someday ^[1] 4:12 someone ^[4] 4:12 25:9 50:2,20 Sometimes ^[1] 20:10 somewhat ^[2] 25:8,9 sorry ^[1] 44:5 sort ^[3] 8:12 12:18 18:20 Sotomayor ^[14] 15:19,20 16:4,9, 16 17:1,12,20 18:11 26:5 49:17, 18 50:12 51:11 sources ^[1] 63:9 South ^[7] 5:5 10:25 18:16 20:2 21: 14 25:17 68:16 sovereign ^[1] 22:9 speaks ^[1] 34:16 specific ^[2] 28:12 42:14 Specifically ^[4] 14:12 23:14 62:17, 22 spectrum ^[1] 65:7 spend ^[3] 41:13 50:20 51:15 spending ^[1] 56:13 spent ^[1] 50:17 square ^[2] 58:22 66:23 stand ^[1] 63:14 standard ^[2] 12:21,23 standards ^[2] 63:22 64:9 standing ^[1] 56:22 state ^[7] 10:13 22:9,25 23:3,18 27: 21 42:14 STATES ^[5] 1:1,15 42:8 49:14 67: 16 status ^[1] 17:14 statute ^[16] 15:5 16:21 20:5,6 23: 10,11 26:15 29:3 34:12 38:3 46: 25 58:22 59:4 62:21 63:3 69:21 statutes ^[4] 8:10 15:16 36:6 60:14 statutory ^[6] 26:20 40:10 66:14,24 67:5 68:19 step ^[4] 18:20 37:16 62:19 64:25 steps ^[1] 51:6 Stevens ^[1] 69:24 still ^[5] 5:22 18:22 41:8 55:24 65:4 stop ^[4] 7:15,16 17:3 67:1 stopping ^[2] 22:11 55:7 stops ^[1] 17:23 straightforward ^[2] 27:25 65:23 strategy ^[1] 40:5 strong ^[1] 60:6 strongly ^[2] 36:18 50:10 Subchapter ^[3] 24:12 32:7 60:7 subject ^[11] 13:16 32:9 36:9,21 44: 20 45:20 48:2 60:11 66:11,19 69: 17 subjecting ^[2] 33:17 67:2 subjective ^[2] 15:3 34:18 subjects ^[1] 3:13 submit ^[1] 47:1 submitted ^[2] 70:13,15 subsequently ^[1] 45:17</p>	<p>substantive ^[1] 49:11 substitute ^[1] 40:2 subtle ^[1] 28:7 succeed ^[1] 69:22 successful ^[1] 53:10 sue ^[9] 14:17 18:7 19:17,24 26:3 29:23 42:19 49:23 56:20 suggest ^[1] 9:15 suggesting ^[2] 19:25 46:19 suing ^[1] 33:4 suit ^[55] 3:22 4:22,25 6:1 7:18 8:15, 19 11:3,4 13:8,11,14 14:7,11,15 15:13 16:22 19:4 20:15,23 21:15 27:12 29:10,25 30:21 31:22,25 32: 3 34:10 35:8,9 38:4,9,11,19 39:1, 4,9 42:19 53:15 55:9,10,21,23 56: 1,3,23 58:13 64:21,24 65:5,14,15 66:6,16 suit's ^[2] 19:3 38:7 suits ^[8] 23:15 32:11 33:10,19 35: 2 57:23 66:22 67:3 Sullivan ^[8] 32:24 42:6 45:16 46: 15 48:23 52:2 66:10 68:22 superficially ^[1] 17:12 supply ^[1] 47:13 support ^[1] 61:15 supports ^[2] 10:7 61:12 suppose ^[3] 7:10 54:5 56:7 SUPREME ^[3] 1:1,14 70:2 surely ^[1] 43:9 Sutton's ^[1] 22:3 swaths ^[1] 57:12</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>targeted ^[1] 23:15 tax ^[140] 3:18,20 4:1,5,12,17,22,23 5:1 6:6,7,7,12,16,18,22 8:18 9:1,3, 9,13,16,21,23 13:18,21 14:13,16, 17 16:3,7,14 17:8,9,17 18:5,9,10 19:4,16,19,23 20:19 22:6,16,19 23:3,7,24 24:11,13,17,18,22 26:1, 8,13,17,19 27:2,3,7,7,13,15,15 28: 1,2,3,17 29:8 31:2,5,23 32:2 33: 24 34:4,6,9,19,25 36:11 38:20,24 39:5,17,18,22 40:1,2,4,7,10,12,13, 20 41:7 43:7,16,17,18 44:9,20 46: 6,7 48:19 49:11,11,22,23,24 50:1, 2,18,20 51:7,9,18 52:5,9 53:13 54: 1,13,20 55:1,6,7 56:9 60:8,12 61: 8 63:21 64:5,17 65:10 67:17,23 68:9 69:12 70:7 tax-based ^[1] 20:9 tax-exempt ^[1] 17:14 taxable ^[1] 9:23 taxes ^[34] 3:24 4:14 6:19,24 14:10 16:12 17:23 18:7 19:23 23:1,14 25:6 26:2 32:7 33:9,18 36:8,19 38: 10,12 39:14,17 48:1 49:21 58:12, 16,17,18 64:3,23 65:4,15 66:17 67:3 taxpayer ^[8] 4:24 9:22 13:15 16:2 22:8 49:6,10 51:3 taxpayer's ^[1] 22:8 taxpayers ^[4] 23:19 40:3 69:11,12</p>	<p>technical ^[3] 5:10,15,21 tells ^[6] 10:6 19:22 39:10 41:10,13 67:22 tens ^[1] 68:7 tense ^[1] 9:19 tension ^[1] 48:4 terms ^[4] 22:21 23:1 60:17 63:6 test ^[3] 27:21 28:13 63:24 text ^[19] 13:7 28:21 31:24 33:15 34: 12 36:6 38:3 40:25 52:22 60:5,14 62:21,23 63:1 65:22 66:15,24 67: 6 69:21 theories ^[1] 13:7 There's ^[11] 18:8,22 21:2,4 24:21, 21 34:3 41:16,17 47:22 59:11 therefore ^[6] 24:12,18 44:18,19 60:8,13 they've ^[2] 43:3 69:23 thinking ^[3] 10:11 27:24 53:14 thinks ^[1] 40:4 Third ^[4] 4:21 14:14 31:19 32:17 third-party ^[1] 50:8 Thomas ^[12] 7:23,24 9:2,10,18 10: 8 37:4,5,23 39:16 40:6 41:1 though ^[3] 14:4 28:2 29:24 thoughts ^[2] 22:3,13 threatened ^[1] 7:20 three ^[3] 3:24 29:14 33:6 threshold ^[1] 15:4 throughout ^[1] 35:5 Thunder ^[1] 35:23 timely ^[1] 32:25 today ^[5] 8:6 22:9 57:11,16 63:4 Together ^[1] 32:12 tomorrow ^[1] 22:10 took ^[1] 70:1 top ^[1] 53:21 traditional ^[2] 14:15 29:10 transaction ^[6] 4:20 30:12,17 51: 4,6,7 treated ^[6] 26:16 32:7 33:9 40:13 58:17 66:17 trigger ^[1] 20:20 triggers ^[3] 4:3 28:18 30:13 true ^[5] 13:24 50:6 51:23 53:10 55: 18 truly ^[4] 13:19 21:14 26:13 53:15 try ^[1] 56:9 trying ^[3] 10:24 53:17 62:9 Tuesday ^[1] 1:11 turn ^[1] 27:1 two ^[12] 20:15,24 21:7 31:18 32:12 40:8 44:22 51:25 53:21,22 55:22 60:13 type ^[1] 13:2 types ^[1] 69:22</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S.C ^[1] 5:18 ultimate ^[1] 56:24 unable ^[1] 39:12 unambiguous ^[2] 31:19 32:5 unambiguously ^[1] 33:8 uncertainty ^[1] 47:23</p>	<p>uncollectable ^[1] 66:17 unconstitutional ^[1] 46:10 uncontested ^[1] 23:5 under ^[23] 3:12 4:2,15 5:17 6:19 7: 4 8:15 16:17 30:22 40:25 43:2 45: 24 46:1,1 48:11 49:3 53:19 54:4,9, 12,12,16 56:10 underlies ^[2] 40:17 43:6 underlying ^[4] 10:13 18:6 26:2 45: 5 understand ^[10] 32:4 44:4 45:25 47:5,7,8 49:14 55:4 63:25 69:11 understanding ^[2] 42:20 52:8 understood ^[4] 8:5 18:18 26:14 59:8 undertakes ^[1] 51:5 undone ^[1] 22:19 unemployment ^[1] 18:6 unfair ^[2] 25:8,9 unit ^[2] 59:17,18 UNITED ^[8] 1:1,15 18:3 25:24 34: 22 42:7 49:14 67:15 unlawful ^[10] 5:19 16:3 46:3,20 47: 10,17 54:3 61:1 64:23 68:24 unlike ^[1] 17:13 unsatisfying ^[1] 70:1 until ^[2] 43:25 70:2 unusual ^[1] 29:2 up ^[6] 5:1 27:19 30:8 55:1 62:4 66: 3 upheld ^[2] 26:16 42:12 uses ^[1] 26:21</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valid ^[1] 47:3 vast ^[2] 42:22,23 verb ^[1] 37:8 version ^[1] 12:22 69:25 versus ^[9] 3:5 5:6 11:1 21:12 25: 17 35:6 42:7 46:20 68:16 via ^[1] 23:23 view ^[7] 29:3 45:3 55:23 58:6 59: 19 62:18 64:20 views ^[1] 54:7 vindicating ^[1] 22:8 violate ^[11] 4:13 8:17,20 19:16 20: 19 31:2,4 41:19 42:9 67:17,23 violated ^[5] 7:19 9:8 13:17 44:18 45:2 violating ^[6] 5:1 8:25 9:4 21:18 27: 16 68:18 violation ^[6] 34:4 45:19,24 52:20 60:24 69:16 violations ^[1] 32:19 Virginia ^[1] 1:18 virtually ^[1] 36:8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waived ^[1] 25:21 wanted ^[2] 10:22 24:8 wants ^[3] 3:11 51:3,4 warrant ^[1] 52:21 Washington ^[2] 1:10,21 waterfront ^[1] 23:13</p>
--	---	---	---

Official - Subject to Final Review

way ^[39] 5:16 8:1,15 10:12,21 11:2
 18:21 19:18 21:16 22:21 23:24 25:
 16 29:1,3,20 33:6 38:2,25 40:2 41:
 16,17,25 42:1,4 44:1 47:23 50:25
 53:14 56:22 58:18 59:3 62:14,15
 63:5,12,14 65:21 66:23 68:2
ways ^[1] 20:24
weaker ^[2] 35:20 36:25
weight ^[1] 34:1
whatever ^[2] 36:4 48:4
where's ^[1] 39:21
Whereupon ^[1] 70:14
Whether ^[9] 9:12 12:17 23:19 25:3
 28:22 29:6 34:19 68:3 69:11
whole ^[1] 19:15
whom ^[1] 9:13
will ^[11] 3:3 4:8 13:18 22:25 29:14
 39:11 45:1,5 51:8 65:2 66:11
willful ^[7] 32:19 45:19,24,25 60:24
 69:6,16
willfully ^[3] 33:11 45:11 48:4
willfulness ^[4] 48:11,14,18 49:1
willing ^[1] 64:7
withhold ^[2] 44:15,17
within ^[7] 24:18 27:22 28:4,13 50:
 6 60:9 63:23
without ^[5] 8:18 20:14 25:13 43:
 17 45:13
wonder ^[1] 6:14
wondering ^[2] 18:15 25:3
word ^[4] 8:12 26:21 33:14 37:8
words ^[2] 25:3 61:25
works ^[2] 46:22 65:9
world ^[1] 58:13
worry ^[1] 69:20
worse ^[2] 17:21 23:22
worth ^[1] 25:2
would-be ^[1] 68:4
wrap ^[2] 30:8 66:3
write ^[1] 13:11
wrote ^[2] 42:5 54:6

Y

year ^[4] 23:7 41:18,18 68:9
years ^[5] 32:23 35:12 40:17 42:6
 63:2
yourself ^[1] 45:20