

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE,  
MINORS, Petitioners v. UNITED STATES; and KELLY  
M. O'GILVIE, Petitioner v. UNITED STATES

CASE NOs: 95-966 & 95-977

PLACE: Washington, D.C.

DATE: Wednesday, October 9, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEVIN M. O'GILVIE AND STEPHANIE :

4 L. O'GILVIE, MINORS, :

5 Petitioners :

6 v. : No. 95-966

7 UNITED STATES; :

8 and :

9 KELLY M. O'GILVIE, :

10 Petitioner :

11 v. : No. 95-977

12 UNITED STATES :

13 - - - - - X

14 Washington, D.C.

15 Wednesday, October 9, 1996

16 The above-entitled matter came on for oral  
17 argument before the Supreme Court of the United States at  
18 10;03 a.m.

19 APPEARANCES:

20 STEPHEN R. McALLISTER, ESQ., Lawrence, Kansas; on behalf  
21 of the Petitioners in No. 95-966.

22 LINDA D. KING, ESQ., Wichita, Kansas; on behalf of the  
23 Petitioner in No. 95-977.

1 APPEARANCES:

2 KENT L. JONES, ESQ., Assistant to the Solicitor

3 General, Department of Justice, Washington, D.C.; on

4 behalf of the Respondent.

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1 a longstanding und PROCEEDINGS that there is a  
2 difference between punitive and compensatory d. (10:03 a.m.)  
3 this Court CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-966, Kevin O'Gilvie and Stephanie  
5 O'Gilvie, Minors v. United States, and 95-977, Kelly  
6 O'Gilvie v. The United States. d have said only  
7 compensat Mr. McAllister. ived on account of personal  
8 injuries s ORAL ARGUMENT OF STEPHEN R. McALLISTER. If  
9 said. ar ON BEHALF OF THE PETITIONERS IN NO. 95-966 injuries  
10 should be MR. McALLISTER: Mr. Chief Justice and may it  
11 please the Court: when Congress has wanted to draw a  
12 distinction The minor children of the decedent, in the s it  
13 wrongful death suit underlying this case have raised  
14 before this Court two independent and potentially of the  
15 dispositive legal issues. The first is whether the  
16 punitive damages that the children received in connection  
17 with the death of their mother are excludable from gross  
18 income as any damages received on account of personal  
19 injuries. hat are recovered in connection with a personal  
20 injury sui The statute on its face does not contemplate a  
21 distinction between punitive and compensatory damages. the  
22 The statute says any damages, a word that the United court  
23 States frequently does not include in its quotations of  
24 the statute in its brief in this Court. t of the personal  
25 injuries. Certainly, there was a longstanding -- has been

1 a longstanding understanding in tort law that there is a  
2 difference between punitive and compensatory damages, and  
3 this Court has often stated that Congress is presumed to  
4 have known the state of the common law when it enacts  
5 statutes. substance of it has not changed, but the  
6 Congress easily could have said only extent  
7 compensatory damages received on account of personal  
8 injuries should be excluded, but it did not do so. It  
9 said, any damages received on account of personal injuries  
10 should be excluded. personal injuries, plus any damages  
11 received In fact, when Congress has wanted to draw a  
12 distinction between punitive and compensatory damages it  
13 has expressly done so, for example, in the Federal Tort  
14 Claims Act, in which Congress precluded liability of the  
15 United States for punitive damages arising from the  
16 tortious conduct of its employees and, indeed, the IRS  
17 itself has at times read this statute in precisely the way  
18 we contend it should be read, to exclude any and all  
19 damages that are recovered in connection with a personal  
20 injury suit. language in its decision in Schleier recently  
21 the Court QUESTION: Well, of course, you've now used the  
22 term, in connection with, but the statute says on account  
23 of, and it's my impression the Government's position is  
24 that punitive damages are not on account of the personal  
25 injuries. Age Discrimination and Employment Act did not

1           MR. McALLISTER: That is certainly the damages  
2 Government's contention, Your Honor, and we believe that's  
3 wrong for several reasons. First of all, if you look back  
4 to the language of the statute as originally enacted in  
5 1918, the substance of it has not changed, but the ity and  
6 organization and the order has changed to some extent.  
7           The original provision in 1918 basically  
8 excluded accident or health insurance benefits or Worker's  
9 Comp benefits which the sentence then said, received as  
10 compensation for personal injuries, plus any damages  
11 received on account of personal injuries whether by suit  
12 or agreement, so that the statute itself, when you look at  
13 how it was originally enacted, it was a very odd way that  
14 Congress intended all of those things to be limited to  
15 compensation, to list certain things followed by the  
16 phrase, received as compensation for personal injuries,  
17 and then to go on and say, plus any damages received on  
18 account of personal injuries.           and the traditional rule  
19 is that           Furthermore, when this Court talked about the on  
20 account of language in its decision in Schleier recently  
21 the Court talked about whether the damages were           to be  
22 attributable to an underlying personal injury, or whether  
23 the underlying personal injury affected the amount.           in the  
24           The Court concluded that liquidated damages  
25 under the Age Discrimination and Employment Act did not



1 satisfy either of those conditions, but punitive damages  
2 are different. Punitive damages do satisfy those  
3 conditions in a couple of ways.

4 First of all, as this Court recognized recently  
5 in BMW v. Gore, punitive damages both the availability and  
6 the appropriate amount in most jurisdictions depends on  
7 considerations of the underlying harm, the nature of the  
8 harm, the extent of the harm.  
9 Gore recognizes as much when it talks about the  
10 first factor, for example, the reprehensibility of the  
11 conduct, talks about personal injury is more egregious  
12 than property damage, a physical injury in essence is more  
13 serious than perhaps a dignitary injury, and most  
14 jurisdictions, if not all, recognize those concepts as far  
15 as punitive damages are concerned in determining whether  
16 they're appropriate and then what amount is necessary.  
17 Furthermore, it's the rule in virtually all  
18 jurisdictions, again, if not all, and the traditional rule  
19 is that there can be no award of punitive damages in the  
20 absence of proof of actual harm and generally in the  
21 absence of proof of actual damages, that there needs to be  
22 an actual compensatory award made before punitive damages  
23 are allowed at all, and for those reasons, even within the  
24 language and the affecting the amount  
25 language that this Court endorsed in Schleier, the

1 punitive damages in this case satisfy that test in a way  
2 that the liquidated damages under the Age Discrimination  
3 in Employment Act did not. ~~scope of the original~~ ~~The 1996~~  
4 ~~amendment~~ Furthermore, punitive damages, as we've ~~briefs~~  
5 suggested, do sometimes serve compensatory purposes, so  
6 even if the Court is to view it in that fashion, ~~been~~  
7 historically that was clearly the case. We've cited the  
8 Black's Law Dictionary from the time period when this ~~statute~~  
9 statute was enacted, which clearly contemplates that in  
10 some situations they serve a compensatory purpose. ~~really~~  
11 ~~But even more recently~~, in the 1996 amendment to  
12 this statute Congress recognized that sometimes what the  
13 States call punitive damages may, in fact, serve ~~briefs~~,  
14 compensatory purposes, and that recognition is in the new  
15 section 104(c), in which Congress has said in the new ~~ca~~  
16 104(a)(2) punitive damages are no longer excluded, except,  
17 it says in subsection (c), in a wrongful death suit where  
18 only punitive damages are allowed, and the jurisdiction of  
19 which I'm aware is Alabama. There may be a couple of ~~ext~~  
20 others. ~~now appears~~

21 Congress has said in that circumstance those  
22 punitive damages are excluded, apparently because -- ~~set~~  
23 ~~forth~~ ~~from~~ QUESTION: Where is that set forth? I wish  
24 there were some place where the whole text of the current  
25 code is set forth, including that amendment, and there was

1 an '89 amendment? Is --, so that is not law for  
2 purposes. MR. McALLISTER: There's an '89 amendment, Your  
3 Honor, which altered the scope of the original. The 1996  
4 amendment does not appear in any of the original briefs  
5 because it was passed by Congress in August and signed by  
6 the President in August, after the briefing had been  
7 completed. punitive damages may serve compensatory  
8 purposes. Part of the text is included in the supplemental  
9 briefs. I don't know if 104(c) is actually included in  
10 the supplemental briefs, but that text was all extremely  
11 recent and after the merits briefing was basically  
12 completed in this case. Congress said, even though those are  
13 labeled as The 1989 amendment is discussed in the briefs.  
14 QUESTION: Well, of course, you know, when I  
15 read the United States Code I don't do it piece by piece  
16 and figure out which paragraph was enacted in 1918 and  
17 which was enacted in 1989, or 1996. I read it as a whole,  
18 and it seems to me one has to decide whether punitive  
19 damages are covered or not on the basis of the whole text  
20 as it now appears. strongly endorsed is the view that what  
21 Congress MR. McALLISTER: Well, I think that's correct.  
22 damages as QUESTION: I'd like to see the whole thing set  
23 forth somewhere. was a debate between the House and the  
24 Senate as QUESTION: Mr. McAllister, as far as the most  
25 recent amendment is concerned the effective date is from

1 the time of that enactment, so that is not law for  
2 purposes of this case.  
3 MR. McALLISTER: It's certainly not, Your Honor,  
4 in terms of resolving the statutory interpretation issue  
5 present here. All I'm trying to suggest is that in the  
6 1996 amendment Congress itself is recognizing that  
7 sometimes punitive damages may serve compensatory  
8 purposes.

9 The example it recognized is the Alabama  
10 situation, where in a wrongful death suit all the  
11 plaintiff is allowed to recover, the only thing is  
12 punitive damages and Congress said, even though those are  
13 labeled punitive damages by the State of Alabama, we want  
14 them to be excludable under section 104.

15 QUESTION: And what about the '89 amendment?  
16 Was that also only prospective?

17 MR. McALLISTER: The '89 amendment was  
18 prospective, but it's important, because what the '89  
19 amendment does, it can be read two ways, but what the  
20 lower courts have strongly endorsed is the view that what  
21 Congress understood at the time was that all punitive  
22 damages as of 1989 were excludable under section 104.

23 There was a debate between the House and the  
24 Senate as to how they might narrow the scope of that.  
25 What they ultimately ended up with was a provision that

1 says the exclusion shall not apply in any case not  
2 involving physical injury or physical sickness, and that  
3 narrowed the scope, but it remained the case that punitive  
4 damages received in a physical injury case are excludable  
5 and in fact the House -- That's correct. The point I'm

6 QUESTION: Mr. McAllister, I don't understand  
7 your reference to lower courts. I thought that this pre-  
8 19 -- for pre-1989 and post 1989 to 1996 that all circuits  
9 said that these awards, punitive damages awards, whether  
10 on account of personal injury or on account of something  
11 else, are taxable. Isn't that the law in all the circuits  
12 except the Sixth Circuit? rest of the lower courts that have

13 MR. McALLISTER: I don't believe that's correct,  
14 and certainly most of the cases come after the 1989  
15 amendment, and what I'm suggesting is that the lower  
16 courts have, when they've decided these cases, looked at  
17 that amendment and said, what -- are not taxable, then

18 QUESTION: What circuit, other than the Sixth  
19 Circuit, has ruled in favor of taxpayers on these  
20 challenges?

21 MR. McALLISTER: You're right in that no circuit  
22 other than the Sixth Circuit has ruled in favor of  
23 taxpayers. The tax court itself had at times ruled in  
24 favor of the taxpayers. the case, so that the damages that

25 QUESTION: But the tax court is subject -- has

1 the Skolson rule, so -- then the full amount that the jury  
2 is assessed. MR. McALLISTER: Was reversed by circuits on  
3 further review. QUESTION: That would be a matter of State law.  
4 QUESTION: Yes. That would be generally a  
5 matter of. MR. McALLISTER: That's correct. The point I'm  
6 trying to make is that the 1989 amendment shows what the tax  
7 Congress understood the law to be, and that is certainly  
8 not determinative or conclusive in our view, but that may  
9 well be, or should be accorded some weight and some whole,  
10 consideration here in that what Congress understood the  
11 statute to do is exactly -- in 1989 is exactly what we are  
12 contending it does, and most of the lower courts that have  
13 looked at it have said that it certainly appears that 918,  
14 Congress understood the statute to exclude all punitive  
15 damages up to the point at which it amended it in 1989.  
16 QUESTION: Is -- in line with your view, if  
17 you're correct that these awards are not taxable, then  
18 juries should have been charged, should they not, that  
19 whatever you award in punitive damages will not be subject  
20 to tax? re codified in what was originally one sentence,  
21 following. MR. McALLISTER: They could have been charged  
22 that, Your Honor, and certainly, if punitive damages are  
23 subject to taxation, they probably should also be added on  
24 instructed that that is the case, so that the damages that  
25 they are awarding will be taxed and the plaintiff will

1 actually receive less than the full amount that the jury  
2 is assessing.

3 QUESTION: That would be a matter of State law.

4 MR. McALLISTER: That would be generally a  
5 matter of State law, where you're talking about State tort  
6 actions, how the jury is instructed in terms of those tax  
7 consequences, that's correct.

8 The United States -- and to go back to Justice  
9 Scalia's point about interpreting the statute as a whole,  
10 the United States suggests that the title that goes with  
11 the statute, compensation for injuries or sickness,  
12 suggests a more limited or narrower scope. The problem  
13 with that argument is that title was not present in 1918,  
14 and there's no suggestion that there was any debate by  
15 Congress when that title was added as part of apparently  
16 the codification process that they were in any sense  
17 altering or changing the original scope of the statute.

18 The operative language has remained the same  
19 from 1918 onward. What has happened, though, is the tax  
20 laws were codified in what was originally one sentence,  
21 drawing the distinction between accident or health  
22 insurance benefits and Worker's Comp benefits on the one  
23 hand received as compensation and any damages received on  
24 account of personal injuries. That distinction has been  
25 somewhat obscured by the breaking down of it into three --

1 what is now three separate provisions in the tax code,  
2 (a) (1), (a) (2), and (a) (3).

3 QUESTION: Well, it goes on to (a) (5) at this  
4 point, doesn't it?

5 MR. McALLISTER: It does go on to (a) (5), Your  
6 Honor.

7 QUESTION: What do you make of the textual  
8 argument, or the textual distinction? I'm looking at page  
9 22 of the Government's brief, which quotes some of the  
10 other subsections.

11 (a) (1) provides an exclusion for certain sums as  
12 compensation for personal injuries or sickness. The (3)  
13 refers, again, to certain sums received for personal  
14 injuries and sickness. (4) again uses the for language,  
15 and that suggests that the specific dollar amounts that  
16 they're referring to are those which are attributable to  
17 the sickness or the injury, as distinct from something  
18 else.

19 Your subsection (2) uses the phrase, on account  
20 of, which would suggest, by contrast, a broader meaning.  
21 Which -- we seem to have a choice, I guess, of statutory  
22 interpretation rules. We could either say, well, the  
23 distinction presumably is intended to enact a difference,  
24 or we could say, well, on account of is not entirely clear  
25 and we ought to use the criterion of noscitur a sociis.



1 If we want to know what this one means, which is not  
2 clear, look to what it's companion provisions mean which  
3 are clear. Which of those two criteria should we adopt in  
4 assessing the contrast in the language?

5 MR. McALLISTER: Well, Your Honor, it's  
6 certainly our view that you should look primarily at the  
7 language of (a)(2) itself, which on its face suggests a  
8 broader interpretation -- any damages received on account  
9 of. It would have been extraordinarily easy for Congress  
10 to have said, as compensation, which it did with the rest  
11 of that statute when it first enacted it.

12 So that yes, the companions around that  
13 provision perhaps do suggest a narrower focus, but  
14 certainly in the original provision, and the substantive  
15 language itself has not changed, a broader construction is  
16 suggested.

17 And again, without going back through the  
18 history, when you simply look at these provisions today,  
19 that one sits in the middle of all these other what appear  
20 to be purely compensatory provisions, but our view is, you  
21 cannot fully understand that provision or give full effect  
22 to its language without looking back to the history of it  
23 and following through how it has come through the first  
24 codification, the recodification, and how it ended up  
25 where it is today.

1 QUESTION: So you think the history has more  
2 significance than just the contrast in the language  
3 reading the statute, as Justice Scalia would, as a whole  
4 today? of the provision, where it came from, and how it  
5 got to be MR. McALLISTER: I think both are important in  
6 the sense that the history is certainly relevant, but to  
7 the extent that provision indicates a different scope than  
8 the others, this Court should give effect to that position.  
9 different scope, because --that's basically -- there  
10 QUESTION: Mr. McAllister, what about the ground  
11 rule in interpreting this dense tax code? Everything is  
12 income except, and exceptions are to be narrowly  
13 construed? in fact again, Congress in 1989 essentially  
14 MR. McALLISTER: Your Honor, we recognize that  
15 that principle is there. In our view, the way to deal  
16 with that is that the Court should look at the language  
17 itself, and look at the history, and we believe when you  
18 do that, that the language is no longer so ambiguous, so  
19 that it is not a choice of two interpretations competing,  
20 which we simply have no way to choose between one and the  
21 other. QUESTION: But it's possible, isn't it, that  
22 Congress In fact, the history strongly suggests that one  
23 interpretation is the correct interpretation, the broader  
24 interpretation, but I do recognize the existence of that  
25 default rule as it's been characterized at times. le, Your

1           But we're suggesting that when you look at all  
2 of the surrounding evidence here, the things that Justice  
3 Souter has talked about, the contrast in the language, the  
4 history of the provision, where it came from, and how it  
5 got to be where it is today, that really only one  
6 conclusion makes sense here, or at least is the stronger  
7 conclusion.

8           QUESTION: There's no default, is your position.

9           MR. McALLISTER: That's basically -- there  
10 should not be a default in this instance, because there's  
11 not a situation where you simply cannot tell which is the  
12 better view based on what evidence is available to this  
13 Court, and in fact again, Congress in 1989 essentially  
14 declared its understanding, and we're not suggesting, as  
15 the United States tries to assert in its brief, that that  
16 1989 amendment tells you anything about intent in 1918.  
17 We're simply saying Congress demonstrated that it  
18 understood the statute, the language of it, the meaning in  
19 1989, that all punitive damages received in a personal  
20 injury suit were excluded, and that's --

21           QUESTION: But it's possible, isn't it, that  
22 Congress might in an excess of caution amend the statute,  
23 feeling perhaps the statute, the existing language gives  
24 the result we want, but we want to make absolutely sure?

25           MR. McALLISTER: That's certainly possible, Your

1 Honor, and -- but what the Tenth Circuit clearly found,  
2 and I think most courts that have looked at this, when  
3 they looked at the legislative history, the discussion,  
4 how this amendment came about, and also the House Ways &  
5 Means Committee report, it seems pretty strong, the  
6 inference that Congress thought all of these were  
7 excluded, and it wanted to limit that, and the question  
8 was how much, in exactly what fashion. The 1989 amendment  
9 went part way, the 1996 amendment went the rest of the way  
10 with respect -- or to be extended.

11 QUESTION: It's hard to rely on the Tenth  
12 Circuit in support of your position when they came out  
13 that way.

14 MR. McALLISTER: They came out because they  
15 ultimately decided that the reasons, the justifications  
16 for the competing views here were essentially equal, and  
17 they resorted to what the Court called in that case the  
18 default rule.

19 QUESTION: And if they were essentially equal,  
20 you wouldn't be quarreling with that, would you?

21 MR. McALLISTER: But we do not believe they are  
22 essentially equal, Your Honor.

23 With the Court's permission, I would like to  
24 reserve the remainder of my time for rebuttal.

25 QUESTION: Very well, Mr. McAllister.

1 this Court Ms. King, we'll hear from you. Please proceed.

2 like claim. ORAL ARGUMENT OF LINDA D. KING

3 ON BEHALF OF THE PETITIONER IN NO. 95-977 laid by

4 a review MS. KING: Mr. Chief Justice, and may it please

5 the Court: Federal statute to determine that the claim was

6 not tort- In 1918, Congress created an exception to contract

7 taxation for the traditional tort victim. When asked to

8 extend this same exception to the hybrid statutory victim

9 this Court in Burke and Schleier determined that the analysis

10 exception was not to be extended. A claim is known by

11 the type The enactors in 1918 did not know about the

12 hybrid statutory rights, statutory remedies for age and

13 gender discrimination that would be created in Federal

14 statute some 50 years later. Is it a liquidated damages?

15 Those Congressmen in 1918 wrote the statute for

16 what they understood and what is before the Court today,

17 the common law tort claim. This Court has never before

18 been asked to apply this statute to common law tort of

19 claims. Instead, the recent cases of Burke and Schleier

20 have asked this Court to apply the exclusion to the hybrid

21 Federal statute with legislated remedies. Those remedies

22 are based primarily on lost wages.

23 Because the original statute allows only the

24 exclusion for tort or tort-like claims, and because the

25 hybrid statutes provided for contract-like recoveries,

1 this Court in Burke determined that there was no tort-  
2 like claim. s statute in two separate ways was created.

3 In Burke, the Court tested the type of claim by  
4 a review of the type of damages that could be awarded This  
5 under the Federal statute to determine that the claim was  
6 not tort-like but instead more in the nature of a contract  
7 claim, a contract for wages. bleier, every Court which had

8 found the In Schleier, the Court was once again asked to  
9 name the type of claim, and again resorted to the analysis  
10 of the type of damages to do that. A claim is known by  
11 the type of damages it produces in these hybrid Federal  
12 statutes. that section 104(a)(2), out of its context, out

13 of its ori The matter that is before you today is not -- is  
14 Court was QUESTION: Was Schleier a liquidated damages?

15 Court -- MS. KING: It's my understanding that it was,  
16 Your Honor. al circuit court panels have found this statute

17 to be amb The matter that is before you today is not the  
18 hybrid statute in which you must determine the type of ay  
19 claim. It's the wrongful death of Mrs. O'Gilvie, the  
20 classic and quintessential tort claim, and precisely the  
21 type of tort claim contemplated by the 1918 Congress when  
22 writing the statute. ferent view of the statute, that's a

23 sign that Now, when the statute was divided in 1954 into  
24 the numerous clauses that you've already discussed, go  
25 section 104(a)(2) was cut apart from its first clause,

1 from its context, if you will, and the potential for  
2 reading this statute in two separate ways was created.

3 The entire sentence in section 104(a)(2) has two  
4 separate and distinct meanings that each seem plain. This  
5 is a rare and unusual type of ambiguity, a patent  
6 structural ambiguity, one we seldom encounter in the  
7 English language. Before Schleier, every court which had  
8 found the statute plain had found in favor of the  
9 taxpayer.

10 The test of ambiguity is whether reasonable  
11 persons disagree as to the meaning of the words. It is  
12 apparent that section 104(a)(2), out of its context, out  
13 of its original context, is ambiguous. One third of this  
14 Court was struggling with the issue of whether the  
15 Court -- excuse me, the statute was ambiguous or not.  
16 Seven Federal circuit court panels have found this statute  
17 to be ambiguous, including the Tenth Circuit in O'Gilvie  
18 here, after this Court's decision in Schleier. If we may  
19 presume that justices and judges are reasonable persons,  
20 the test of ambiguity is surely met.

21 QUESTION: But any time there's a dissenting  
22 opinion taking a different view of the statute, that's a  
23 sign that the statute is ambiguous?

24 MS. KING: Mr. Chief Justice, I would not go  
25 that far as to say that.

1 QUESTION: But if three out of nine dissent,  
2 then it's ambiguous?

3 MS. KING: Again, Your Honor, I would not say  
4 that. I am merely --

5 QUESTION: How about four out of nine?

6 (Laughter.)

7 QUESTION: But your position is, it's not  
8 ambiguous.

9 MS. KING: No, my position is that it is,  
10 ambiguous out of context of the original steps.

11 QUESTION: But didn't all those circuits read it  
12 in context? There were arguments presented to all of  
13 them.

14 MS. KING: Each of those circuits determined  
15 that it first was ambiguous, and then read it in a very  
16 tunnel vision fashion, only the language of the current  
17 statute, section 104(a)(2) as written.

18 The two distinct tests that have been found in  
19 the language are, what is the underlying claim, and the  
20 second test is what is the nature of the underlying  
21 damages.

22 QUESTION: You're going to tell us why you win  
23 if it's ambiguous, aren't you?

24 MS. KING: Yes.

25 QUESTION: Okay.



1 (Laughter.)

2 MS. KING: The very nature of a patent  
3 structural ambiguity is that it has two distinct, clear,  
4 and mutually exclusive meanings. The courts have examined  
5 this statute in a tunnel vision manner, and looked either  
6 at one or the other of the interpretations.

7 The type of ambiguity that we have here is  
8 resolved only by context here the original statute. Upon  
9 a finding of ambiguity, the courts are not relieved of the  
10 duty to examine reliable evidence to determine  
11 congressional intent to exclude. The only question here  
12 that must be answered is which of the two tests did the  
13 original statute meet?

14 Proper construction and interpretation of an  
15 ambiguous statute has a mandatory hierarchy of evidence,  
16 and the relative weight of each element primarily is  
17 nondiscretionary. The most reliable evidence that we have  
18 of the intent of the enacting Congress is in the words of  
19 the original statute itself -- there is not a default  
20 rule -- that upon a finding of facial ambiguity that there  
21 is a finding also in favor of the Government.

22 This Court has never applied a default rule  
23 either in *Schleier* or *Burke*. The requirement is a  
24 diligent search of all reliable evidence for the clear  
25 intent to exclude, whether found in the words of the

1 current statute, the words of the original statute, or  
2 other reliable evidence.

3 QUESTION: Well, why would you want a clear  
4 intent to exclude? I mean, because of the basic ground  
5 rule that everything is presumed to be income?

6 MS. KING: Yes, that is correct. The  
7 original --

8 QUESTION: But that works against you, doesn't  
9 it? The main rule for income tax, as I think everyone  
10 agrees, is that unless there's an exemption it's taxable,  
11 and it has always been understood not simply in the  
12 context of 104, but throughout the code, that if there's  
13 an ambiguity in an exemption, it should be read in favor  
14 of the Government, not the taxpayer.

15 MS. KING: My argument is that in the face of an  
16 ambiguity, that you need to look to the intent of Congress  
17 before you decide in favor of the Government, and if there  
18 is clear and reliable evidence -- clear and reliable  
19 evidence -- that there was an intent to exclude, that  
20 should control before a default rule.

21 QUESTION: I thought the conclusion you were  
22 going to come to was, then there is no ambiguity.

23 MS. KING: I'm sorry.

24 (Laughter.)

25 QUESTION: In which case, it seems to me your

1 case would be a lot easier.

2 MS. KING: Well --

3 QUESTION: Aren't you basically saying there's  
4 no ambiguity?

5 MS. KING: Yes. Taken as a whole, if this is a  
6 holistic endeavor and we look at the history of the words  
7 written by Congress, even after divided in 1954, then  
8 there is no ambiguity in the statute, but section  
9 104(a)(2) read out of its context has shown an ambiguity  
10 that each court that's dealt with it has struggled with  
11 mightily.

12 QUESTION: You say the words are ambiguous, but  
13 if you take the history together with the words, then  
14 there's no ambiguity. Is that --

15 MS. KING: I think the words taken out of  
16 context, a short phrase taken out of the context of its  
17 original statute are ambiguous without its context.

18 QUESTION: Well, we don't interpret things out  
19 of context. I mean --

20 (Laughter.)

21 QUESTION: -- when we ask whether it's  
22 ambiguous, we mean whether it's ambiguous in context,  
23 right? Isn't that what we mean?

24 MS. KING: The appellate courts that have looked  
25 at this have given no regard to the original statute.

1 QUESTION: So you say they were wrong.

2 MS. KING: I say they were wrong.

3 QUESTION: Because they were taking it out of  
4 context --

5 MS. KING: Yes.

6 QUESTION: -- right, and ambiguity out of  
7 context doesn't apply, right, doesn't count?

8 MS. KING: That's -- out of context, it doesn't  
9 count. It is plain if you take the entire statute read as  
10 a whole.

11 And finally, the original statute was plain on  
12 its face, in context. The clear distinction between  
13 compensation for personal injury and the amount of any  
14 damages is the clear comparison in the original statute.

15 Congress did not intend an allocation --

16 QUESTION: Thank you, Ms. King.

17 MS. KING: Thank you.

18 QUESTION: Mr. Jones, we'll hear from you.

19 ORAL ARGUMENT OF KENT L. JONES

20 ON BEHALF OF THE RESPONDENT

21 MR. JONES: Mr. Chief Justice, and may it please  
22 the Court:

23 Two terms ago, in Commissioner v. Schleier, this  
24 Court held that an award of damages that is punitive in  
25 nature rather than compensatory does not constitute

1 damages on account of personal injury within the meaning  
2 of section 104(a)(2). That holding applies directly to  
3 this case, and is compelled by the text, structure,  
4 history, and purpose of this statute.

5 The text of the statute provides an exclusion  
6 from income only for damages awarded on account of the  
7 personal injury. It does not, as petitioners contend,  
8 encompass simply any recovery obtained in an action in  
9 connection with a personal injury. Indeed, that precise  
10 contention was rejected by this Court in *Schleier*.

11 In *Schleier*, the Court said that whether the  
12 underlying cause of action is on account of, or rather,  
13 whether the damages are received in connection with an  
14 underlying cause of action that is a tort-type action for  
15 personal injuries is not, in the words of the Court, the  
16 beginning and end of the analysis.

17 Instead, as the Court emphasized in *Schleier*,  
18 each element of the recovery must be on account of the  
19 personal injury for the statutory exclusion to apply.

20 Only damages that compensate for a loss and are  
21 attributable to it are on account of the injury within the  
22 meaning of the statute. As this Court said 40 years ago  
23 in *Commissioner v. Glenshaw Glass*, damages for personal  
24 injury are by definition compensatory only, and do not  
25 include punitive and other ancillary recoveries.

1           This Court's decision in Schleier provides two  
2 applications of the statute in this context. The Court in  
3 Schleier did not doubt that age discrimination effects  
4 personal injuries to the victims of the discrimination,  
5 but the Court pointed out that the two remedies provided  
6 by statute for that discrimination, back wages and  
7 liquidated damages for willful violations of the act, did  
8 not compensate for those personal injuries, were not  
9 attributable to those injuries. They therefore were not  
10 on account of those injuries within the meaning of the  
11 statute.

12           The -- in -- sorry, I've obviously lost my train  
13 of thought.

14           Because the damages are not awarded on account  
15 of the injury, they're not within the scope of the  
16 statutory exclusion from income which, as this Court has  
17 said on many occasions, must be narrowly interpreted and  
18 applied.

19           Now, punitive damages in the decisions of this  
20 Court have never been held to be compensation, and they  
21 are not awarded on account of an injury. Punitive  
22 damages, as this Court has often said, are a civil fine  
23 awarded to punish and to deter reprehensible conduct, they  
24 are not compensation for the injury itself, and I think  
25 it's important to point out that the Kansas cases on which

1 petitioners now rely for the first time in their reply  
2 brief make exactly that same point.

3 In Brewer v. Homestead Production Company, at  
4 200 Kansas, page 96, the Kansas supreme court states, and  
5 I quote, "In this State exemplary damages are not regarded  
6 as compensatory in any degree." That is exactly the  
7 statement that the Court made in Molzof, that this Court  
8 made in Molzof and in Gertz.

9 Now --

10 QUESTION: What if we -- what if this came up  
11 from a State where the supreme court had said something  
12 else about -- something more favorable to the petitioners  
13 about the nature of exemplary damages?

14 MR. JONES: Sometimes, if you will, writing it  
15 in academic fashion, courts look at the fact that these  
16 moneys go to the plaintiff and say, perhaps they serve a  
17 compensatory purpose in that respect. The money goes  
18 there. But no court to my knowledge has held that a jury  
19 may award punitive damages as additional compensation.

20 What courts instruct juries, and what juries do,  
21 is they award punitive damages as deterrence and comp --  
22 and punishment for particular types of egregious  
23 misbehavior. The Kansas supreme court is a classic  
24 example of that, because the Kansas supreme court said,  
25 well, punitive damages are not compensatory in any degree,

1 but a jury may consider the amount of actual damages in  
2 deciding what punitive damages are appropriate to cite  
3 accomplish the State's independent objectives of punishing  
4 and deterring the conduct. ~~ending and end of the analysis.~~

5 As the Fifth Circuit said just last year in ~~the~~  
6 Estate of Moore v. Commissioner, which is not cited in our  
7 brief but which I've mentioned to petitioner's counsel --  
8 it's at 53 F.3d at 716 -- what the Fifth Circuit said in  
9 Estate of Moore is that this fact does not make a punitive  
10 award a compensatory one. ~~an. Isn't that one explanation of~~

11 ~~Schleier~~ It does not, as the court said in that case,  
12 change the fundamental truth that punitive damages are  
13 awarded only on account of and in proportion to the ~~of the~~  
14 defendant's wrongful conduct. Thus, that court and all  
15 but one of the courts of appeals have concluded that ~~what~~  
16 punitive damages being awarded on account of the  
17 reprehensible conduct and not as compensation to the ~~that~~  
18 injuries do not come within the statutory exclusion.

19 ~~discrimin~~ The one court that reached a different ~~ration~~  
20 conclusion, the Horton case in the Sixth Circuit, relied  
21 solely on a rationale that this Court flatly rejected in  
22 Schleier. What the Court said in Horton is that any ~~age~~  
23 recovery obtained in an action based upon a personal ~~ted by~~  
24 injury is exempt from tax for that reason alone. In fact,  
25 in Horton the Court said, that is the beginning and end of



1 the analysis.

2 In Schleier, although this Court didn't cite  
3 Horton, the Court referred to that same contention and  
4 said, that is not the beginning and end of the analysis.

5 QUESTION: In Schleier we also said that whether  
6 one treats respondents attaining the age of 60, or his  
7 being laid off on account of his age, as the proximate  
8 cause of respondent's loss of income, neither the birthday  
9 nor the discharge can fairly be described as a personal  
10 injury or sickness. I mean, isn't that one explanation of  
11 Schleier that doesn't apply here?

12 MR. JONES: It is a -- it is the -- it is the  
13 explanation of why those damages aren't on account of the  
14 personal injury, but the Court said --

15 QUESTION: There was no personal injury is what  
16 we were saying.

17 MR. JONES: No, I believe, Justice Scalia, that  
18 what the Court acknowledged in Schleier was that age  
19 discrimination, the but-for, but for age discrimination  
20 these recoveries would not have been obtained, but the  
21 Court pointed out that these recoveries were not on  
22 account of that personal injury that stems from the age  
23 discrimination. The personal injury is not compensated by  
24 back wages and by liquidated or punitive damages under the  
25 ADEA.

1           QUESTION: That sentence suggests to me that we  
2 thought that the gravamen of the complaint was not  
3 personal injury or sickness, and that's a totally  
4 different point from whether it was on account of or not.

5           MR. JONES: Well, but that's the point. The  
6 question in these cases is not what is the gravamen in the  
7 complaint. The question is whether the recovery is on  
8 account of the personal injury.

9           QUESTION: You're -- but it has to be on account  
10 of personal injury or sickness, but you're laying Schleier  
11 before us as though what it proves is that there was no on  
12 account of there, which is what this case involves.

13          MR. JONES: That there was not --

14          QUESTION: But really what I think it proves is  
15 that there was no physical injury or sickness there.

16          MR. JONES: Actually, I -- Justice Scalia, we --  
17 only by reference to the opinion can this question be  
18 answered, but my recollection of the opinion is that the  
19 Court acknowledged in Schleier that age discrimination  
20 effects personal injuries.

21                 The Court also acknowledged in Schleier, twice  
22 in a footnote and once in the text, that if the  
23 compensation obtained under the act was on account of  
24 those injuries, it would be within the statutory  
25 exclusion, but what the Court quite clearly held was that

1 an award that is punitive in nature rather than  
2 compensatory cannot be said to be on account of the  
3 injuries, which is what five of the circuits have  
4 concluded when the same issue has been presented in the  
5 context of this case.

6 The text of the statute in our view, and I  
7 believe in the Court's view in *Schleier*, compelled that  
8 conclusion. The title and structure of the act reflect  
9 the same understanding. The title of section 104 is,  
10 Compensation for Injuries and Sickness. Each of the  
11 subsections of the statute relate solely to compensation  
12 for different types of injuries. None of them provide an  
13 exemption from tax for any recovery that's not  
14 compensatory.

15 The history of the act is fairly clear on this.  
16 Each -- several of the courts of appeals have described in  
17 detail the fact that this statute is derived directly from  
18 the 1918 opinion of the Attorney General holding that  
19 recoveries for personal injuries are akin to a return of  
20 capital. They merely make the taxpayer whole for a  
21 personal loss, and would not represent income as that term  
22 was then understood.

23 As this Court said 40 years after that in  
24 *Glenshaw Glass*, that underlying rationale supports  
25 exclusion of compensatory awards, but it does not support

1 exclusion of punitive damages. *other factually nor legally*  
2 *a fair reading* The text, the structure, the history, the *fair*  
3 purpose of the statute all support this conclusion. It's  
4 also compelled at the -- *and this provision to avoid taking*  
5 *a position* QUESTION: Mr. Jones, I think you're coming to  
6 your -- before you leave, I'd like you to comment on the  
7 1989 amendment. Now, I understand that of course it  
8 doesn't govern this case, because it happened later, but  
9 let's assume that if that had been in the statute from the  
10 beginning, would you not think that the better reading of  
11 the statute would have been that punitive damages were  
12 excludable? *QUESTION: Let me make it*

13 MR. JONES: That's a difficult hypothetical, but  
14 if it had been in the statute from the beginning with the  
15 history that it had, my answer would be that it does not  
16 affect the outcome in this case. *it would be a little*  
17 *bit harder* I mean, we briefed rather clearly, I thought, on  
18 this subject. The 1989 amendment quite clearly was *legally*  
19 designed to answer the question it addresses, and was  
20 quite clearly designed not to answer any other question.  
21 That is to say -- *cannot use a negative inference out of the*  
22 *1989 amend* QUESTION: But is it not a fair reading of it,  
23 as your opponent argues, to suggest that the Congress that  
24 enacted that amendment must have assumed that punitive --  
25 this sort of punitive damages were excludable?

1 MR. JONES: It is neither factually nor legally  
2 a fair reading of the statute. It's not factually a fair  
3 reading because the legislative history shows that  
4 Congress carefully crafted this provision to avoid taking  
5 a position on whether punitive damages were excluded for  
6 physical injury cases.

7 They wanted to solve this question about  
8 punitive damages in nonphysical injury cases. They had an  
9 agreement, they had a majority to accomplish that. They  
10 did not have a majority, or an agreement to accomplish the  
11 resolution of the entire --

12 QUESTION: Let me make -- that it is.

13 QUESTION: What the -- Justice Blackmun described it

14 in Burke QUESTION: -- the case a little harder for you,  
15 and then -- supposing some of us felt that we shouldn't  
16 look at legislative history. Then it would be a little  
17 bit harder to explain, wouldn't it? --

18 MR. JONES: No. That's my legal point. Legally  
19 it would still be irrelevant, because it is quite clear  
20 that exclusions from income are not to be obtained by the  
21 inference. You cannot use a negative inference out of the  
22 1989 amendment to create -- to do what frankly what this  
23 Court said in its footnote in Burke, that this amendment  
24 allows the recovery of punitive damages in physical injury  
25 cases.

1 QUESTION: This isn't a negative inference.  
2 This is simply application of the usual rule that you  
3 interpret every word of a statute as having some effect.  
4 Those words except for, you know -- except for punitive  
5 damages in these other areas would have been totally  
6 unnecessary.

7 MR. JONES: But that's not the way it's written,  
8 Justice Scalia. What the 1989 --

9 QUESTION: Where is the text? I don't have the  
10 text right in front of me. Is it in your brief at some  
11 point?

12 MR. JONES: Yes, I'm sure that it is.

13 QUESTION: The way Justice Blackmun described it  
14 in Burke was that the enactment allowed exclusion of  
15 punitive damages only in cases involving physical injury  
16 or physical sickness.

17 MR. JONES: What -- at page 30 of our brief,  
18 Justice Scalia --

19 QUESTION: Okay.

20 MR. JONES: -- we quote the provisions from the  
21 1989 act.

22 QUESTION: Thank you.

23 MR. JONES: And what it says is --

24 QUESTION: Whereabouts on page 30?

25 MR. JONES: In the middle of the full paragraph.

1 It says, the House bill was modified to provide only that  
2 the section 104(a)(2) exclusion shall not apply to any  
3 punitive damages received in connection with a case not  
4 involving physical injury.

5 To take that to mean the positive you have to  
6 infer that therefore any punitive damages awarded in a  
7 case involving punitive -- involving physical injuries is  
8 to be excluded. That's the kind of exclusion by  
9 implication that as a matter of statutory construction  
10 this Court would not --

11 QUESTION: But my point is, unless that is what  
12 Congress -- I don't care what Congress had in mind unless  
13 that's what the text --

14 (Laughter.)

15 QUESTION: -- of the statute had in mind. The  
16 language with a case not involving physical injury or  
17 physical sickness could have simply been left out. In  
18 order to give that phrase any meaning, you must assume  
19 that where it is a case involving physical injury or  
20 physical sickness, punitive damages are included within  
21 the exemption.

22 MR. JONES: The way that the provision had  
23 read -- I'm speaking from memory now. This isn't in here,  
24 although it's described in here.

25 The way the provision read before it was amended

1 in conference would have provided that amounts atrib --  
2 punitive damages received in connection with a claim  
3 involved in puni -- physical injury are excluded. In  
4 other words, it would have said exactly what you're saying  
5 it should be inferred this --re must be an express  
6 exclusion. QUESTION: So you're using legislative history  
7 again.ives is not unimaginable, it's just not consistent  
8 with the MR. JONES: Well --would approach these kinds of  
9 questions QUESTION: I thought we were just going to look  
10 at the text. QUESTION: Mr. Jones, you quoted -- and maybe  
11 it's on MR. JONES: Well, I --ed I think someone who  
12 expressly QUESTION: Looking at the text, there is no reat  
13 other explanation for the whole phrase, in connection with  
14 a case not involving physical injury or physical sickness.  
15 You may as well have dropped it out entirely unless you  
16 assume that in those cases it is within the exemption.  
17 history? QUESTION: What you're saying, I take it,  
18 Mr. Jones, is that Congress wished to deal with this  
19 particular category --elies on is the legislative history  
20 in detail MR. JONES: Yes. article, and he has a very  
21 detailed QUESTION: -- and leave what wasn't covered and  
22 there to the preexisting law. mites. If that issue were  
23 relevant MR. JONES: Absolutely, and I think, Justice the  
24 Scalia, with all respect, that that's exactly what the  
25 statute indicates, and the only point I'm making -- well,



1 there's two points. One is, none of this matters to the  
2 resolution of this case, but the other point is, this  
3 Court has often said, and I think it's an important  
4 holding, that exclusions from income are nonimplied.

5 That is to say, there must be an express  
6 exclusion, and to create an inference out of these two  
7 negatives is not unimaginable, it's just not consistent  
8 with the way that the Court would approach these kinds of  
9 questions.

10 QUESTION: Mr. Jones, you quoted -- and maybe  
11 it's on the same page. You quoted I think someone who  
12 expressly drew the conclusion that Congress meant to treat  
13 only this subject and to leave --

14 MR. JONES: Yes.

15 QUESTION: -- all other application -- was that  
16 in a law journal article, or was that in the legislative  
17 history?

18 MR. JONES: Well, what we quoted was his  
19 article, but what he relies on is the legislative history  
20 in detail. I've read the article, and he has a very  
21 detailed explanation of the various drafts of the bill and  
22 the statements within the committee. If that issue were  
23 relevant to the disposition of the case, I would refer the  
24 Court to that more detailed discussion on that subject.

25 I also need to correct what I believe is a

1 fundamental misstatement of counsel on this issue. Having  
2 heard his argument, I would get the impression that most  
3 courts had interpreted the '89 amendment to help their  
4 case.

5 In fact, all but one of the courts of appeals  
6 have said about this 1989 amendment almost exactly what  
7 I've just said to the Court, that it doesn't address this  
8 issue, it addresses a different issue, it consciously  
9 addressed a narrow issue, and consciously left this other  
10 issue untouched, just as Congress did in the '96  
11 amendment, where they prospectively authoritatively  
12 determined punitive damages are not within the statutory  
13 exclusion, which really brings me to my last point.

14 In our view, and in the view of the tax court in  
15 the Bagley case, this Court's opinion in Schleier resolved  
16 this issue. It says that damages that are punitive in  
17 nature and not compensatory are not within the statutory  
18 exclusion precisely because they're not awarded on account  
19 of the personal injury.

20 That is exactly what the Treasury said in its  
21 1984 ruling on this subject. It said that the punitive  
22 damages are not on account of the injury, they're not  
23 compensation for the injury, they're not within the  
24 statutory exclusion.

25 QUESTION: Mr. Jones, were you going to address

1 the statute of limitations problem in this case?

2 MR. JONES: I -- that will be my next point. I  
3 think I have time.

4 The -- Schleier being only 18 months old, I  
5 mean, it seems obvious to point out that the principles of  
6 stare decisis are very strong in tax cases, and they  
7 should be especially strong in this context, where  
8 Congress has prospectively reached the same conclusion in  
9 amending the statute for all tax years this day forward.

10 QUESTION: I assume you think we ought to  
11 disavow the footnote in Burke.

12 MR. JONES: I think the footnote in Burke was  
13 dicta, and I think it's honest to say that the Court  
14 wasn't briefed on that issue, and other courts have said  
15 that they believe that that statement was dicta.

16 Clearly -- and the 1989 amendment has not yet  
17 actually been before the Court, although this is the third  
18 section --

19 QUESTION: I know, but it really would be ironic  
20 if we were to say the law was pretty clear up to '89, and  
21 that's all involved now, and it's clear now after '96, but  
22 in this interval, if you read the statute on its face  
23 during that period, someone might say, well, there's a  
24 different result in here, and that's why -- one of the  
25 things that concerns me.

1 MR. JONES: I think that's why the '96 amendment  
2 was --

3 QUESTION: That takes care of everything --

4 MR. JONES: Prospectively.

5 QUESTION: Right.

6 MR. JONES: I mean, it removes the shadow  
7 that --

8 QUESTION: Can we decide this case without the  
9 effect of the '89 amendment, but around the corner there  
10 may be a case that arose in 1991 that squarely presents  
11 the question whether the footnote in Burke was right or  
12 not.

13 MR. JONES: I would hope, and I'm sure the Court  
14 would hope that that case doesn't come around the corner.

15 (Laughter.)

16 QUESTION: You don't think any punitive damages  
17 were awarded during those years? I doubt it.

18 MR. JONES: But in all --

19 QUESTION: It would have been in circuits --  
20 there was only one outlying circuit --

21 MR. JONES: That's correct.

22 QUESTION: -- so the circuits have --

23 MR. JONES: The circuits have not had any  
24 difficulty with this issue about the '89 amendment.

25 On the statute of limitations, petitioners claim

1 that the statute of limitations for suits to recover an  
2 erroneous refund expired before this suit was brought by  
3 the Government. That contention is wrong for two reasons.  
4 First, petitioners don't dispute that they did not raise  
5 this issue in the district court, and when they raised it  
6 in the court of appeals, they did so solely on the theory  
7 that a failure to comply with the statute of limitations  
8 would deprive the court of subject matter jurisdiction.

9 Now, as we state in our brief, and as argument  
10 petitioners do not address at all, this is an ordinary  
11 type of statute of limitations that limits only the  
12 recovery on the claim. It does not limit the jurisdiction  
13 of the court. Government, right?

14 Thus, even if the statute of limitations had not  
15 been complied with, this Court would have jurisdiction,  
16 the lower courts would have jurisdiction, and such a  
17 holding would therefore have no remedial significance.

18 challenged They can't raise at this point a suggestion that  
19 the failure to comply with the statute was an affirmative  
20 defense, because they waived the issue by not raising it  
21 in the district court. And everybody agrees -- well, that  
22 this is no QUESTION: But they answered that you in turn  
23 waived because you didn't mention that in your brief in  
24 opposition. And this is jurisdictional.

25 MR. JONES: And my point on that issue is that

1 the Court, because this relates only to subject matter  
2 jurisdiction, the Court has to decide, it seems to me,  
3 first whether this claim relates to subject matter  
4 jurisdiction, because if it just decided the statute of  
5 limitations issue as an unanchored legal principle, it  
6 would have no remedial significance in this case and the  
7 Court rarely, to my knowledge has never decided an issue  
8 that doesn't have remedial significance.

9 QUESTION: Well, I thought that their argument  
10 was simply, if we waived, then your failing to bring up --  
11 to challenge the Tenth Circuit ruling -- the Tenth Circuit  
12 ruling was in favor of -- the Tenth Circuit ruling was in  
13 favor of the Government, right?

14 MR. JONES: On the merits.

15 QUESTION: Yes.

16 MR. JONES: On the merits of the statute.

17 QUESTION: Right. Right, and then they  
18 challenged that here, and you didn't object to it.

19 MR. JONES: Only on the merits. We didn't point  
20 out, as we --

21 QUESTION: And everybody agrees -- well, that  
22 this is not a statute of limitations that operates against  
23 the taxpayer, or no question of sovereign immunity, so --  
24 no one has said this is jurisdictional.

25 MR. JONES: Oh, well, that's their -- that's the

1 only basis on which they have raised it, even to this  
2 point, and it's the only basis on which the Court could  
3 address it.

4 I -- it's, just to repeat myself, but I think  
5 it's the reason why even if under -- the Court might say,  
6 well, you -- the Government didn't raise this point. The  
7 point that we didn't raise is that this statute doesn't  
8 relate to subject matter jurisdiction.

9 Well, I suppose that's a jurisdictional point,  
10 and I suppose the Court has to decide whether it relates  
11 to subject matter jurisdiction before it decides --

12 QUESTION: Well, if we can just get to the  
13 merits --

14 MR. JONES: Yes.

15 QUESTION: -- you may be right that they're  
16 waived.

17 One question that I had is on the question of  
18 the date of payment. Is it the receipt, or -- there's a  
19 section of the code, 6602, that talks about interest due  
20 to the Government when the Government overpays the  
21 taxpayer then gets back the overpayment with the interest.

22 MR. JONES: Yes.

23 QUESTION: What is the date from which the  
24 interest runs? It says that the interest is due -- what  
25 is it, what are the words? I have the statute here. The

1 interest -- shall bear interest from the date of the  
2 payment of the refund. What is the date of the payment  
3 for purposes of the interest provision?

4 MR. JONES: I don't have the text of that in  
5 front of me, but as you've described it, I'm not -- I  
6 don't hear any words that would lead me to think that it  
7 would be different from the date of the payment, the  
8 making of the refund in this context, because what the  
9 Court held in United States v. Wurtz is that the date of  
10 the making of the refund is the date on which the refund  
11 was paid.

12 QUESTION: Well, it really -- it didn't make any  
13 difference in Wurtz. The key thing was that they rejected  
14 the one date that would have made the claim too late.

15 MR. JONES: Well, let me see if I can put this  
16 point in perspective, just to state it from the beginning.  
17 Section --

18 QUESTION: The reason that I ask the question  
19 is, if the Government's calculation of interest has to  
20 depend on the date of receipt, the Government won't know  
21 that. I mean, it knows when it mails the check, but it  
22 doesn't know -- so when it reclaims the overpayment and  
23 sends the interest bill at the same time, how will it know  
24 the starting date for the interest, because it doesn't  
25 know the date of receipt?



1 MR. JONES: Justice Ginsburg, you've triggered a  
2 recollection that is only vague for me. I believe that  
3 there may be a regulation, or even an additional statutory  
4 provision that addresses the precise point you're making  
5 under that interest statute, and I do not remember exactly  
6 what it says, so I'm afraid I can't be of too much help to  
7 you on that, other than to say that I do believe that  
8 there's some specific substantive provision of law that  
9 has been adopted to address that point.

10 QUESTION: Is there, then, if you don't -- is  
11 there any reason -- what I thought of doing to answer this  
12 is to look up how the law works in the area of contracts  
13 and how it works in the area of money had and received,  
14 say an insurance company that makes an erroneous refund.  
15 How does the statute of limitations work there?

16 My guess, from recollecting my first year of law  
17 of contracts is that the contract is good when it's -- the  
18 acceptance is mailed --

19 MR. JONES: Well --

20 QUESTION: -- and therefore the statute of  
21 limitations would run from that time, and I bet it's the  
22 same with money had and received, that it's made --

23 MR. JONES: Well, a contract may be made by  
24 putting it in the mail as a matter of common law rule.

25 QUESTION: No, but bills --

1 MR. JONES: A refund --

2 QUESTION: Notes under NI -- normal law in  
3 making is the date on the check.

4 MR. JONES: And that may also be true --

5 QUESTION: Yes.

6 MR. JONES: -- but what's relevant here is that  
7 what has to be made is a refund, and what the Court said  
8 in Wurtz is that a refund is the actual repayment. It's  
9 not a contract, it's not a check --

10 QUESTION: But it said that in rejecting an  
11 argument that you should look at the date when the refund  
12 was authorized, which was clearly wrong. It really didn't  
13 focus on this distinction.

14 MR. JONES: Oh, I don't think it focused on it,  
15 but I think in --

16 QUESTION: It did use the words, date of  
17 payment.

18 MR. JONES: And every -- and I should point out  
19 every court that has addressed this issue has concluded --

20 QUESTION: Well, refund at least requires  
21 delivery. I mean, if the Government simply draws a check  
22 and keeps it, surely nothing is started.

23 MR. JONES: Oh, of course not, and as this Court  
24 did say in Wurtz, and I think it answers this question if  
25 the other part that I've quoted doesn't, is that a

1 payment, which the Court said is what a refund is, a  
2 payment isn't made even when the check is mailed and --  
3 signed and mailed --

4 QUESTION: Why would we want one rule for --

5 MR. JONES: -- because the payment can be  
6 stopped.

7 QUESTION: Why would we want one rule when an  
8 insurance company makes a refund, or any private person,  
9 and the Government have a different rule when it's totally  
10 silent on the matter? Why wouldn't a refund for the law  
11 be good on mailing or not good on mailing for everybody  
12 alike?

13 MR. JONES: Well, one -- one obvious difference  
14 is that -- is this Court's law in addition to Wurtz. I  
15 think Wurtz answers this question, but even if one wanted  
16 to look beyond Wurtz --

17 QUESTION: Well, isn't Wurtz a little bit like  
18 Burke in that respect? All Wurtz has to do is to say that  
19 the time hasn't run, period. It had to reject one  
20 reading. Whatever it said about -- there were a number of  
21 dates you could pick. Only one was out of the ball park.

22 MR. JONES: I think the difference is that in  
23 Wurtz we're talking about the ratio decidendi of the  
24 Court, and in Burke we were talking about a footnote that  
25 related to a statute that wasn't before the Court and

1 wasn't involved.

2 The ratio decidendi of Burke -- of Wurtz was  
3 that a refund is an actual repayment. it is not simply  
4 putting the check in the mail, because the check can be  
5 cancelled and the payment stopped, as the Court said.

6 Now, there's one other reason --

7 QUESTION: Well then, if that's -- if that  
8 really is the criterion, then it's the date of negotiating  
9 the check.

10 MR. JONES: Well, I think that might be the  
11 most --

12 QUESTION: You can stop payment while it's in  
13 the recipient's hand.

14 MR. JONES: That might be the most faithful  
15 application of the statute, and frankly I --

16 QUESTION: But then you said it would be the  
17 same thing for the interest, and so the interest, that  
18 would be even more uncertain, the date the check is  
19 cashed.

20 MR. JONES: I want to make it clear, Justice  
21 Ginsburg, that I don't believe I have a view on the  
22 interest issue at this point. I'm just not in a position  
23 to give you an answer on that.

24 QUESTION: But the Government is not going to  
25 know when the statute of limitations runs, if in fact it

1 isn't the time it mailed, but the time it's received by  
2 somebody.

3 MR. JONES: The Court pointed out in Wurtz that  
4 it is implausible to think that Congress started the  
5 statute of limitations running on a date before the cause  
6 of action accrued. The cause of action here accrues only  
7 when the payment is made. It does not accrue simply by  
8 putting a check in the mail. We can't sue someone for an  
9 erroneous refund because we sent them a check. We can sue  
10 them because they received money that we want back.

11 QUESTION: Of course, if you use what you say  
12 may be the most faithful position, which is at the time  
13 the payment is actually made by the Government, the  
14 Government would know that.

15 MR. JONES: Yes, they would, and when -- and  
16 there would be records on that.

17 QUESTION: And you don't exclude that as a  
18 possibility.

19 MR. JONES: As I said, I think that's the most  
20 faithful reading of the statute. It's a reading that some  
21 courts have adopted. There are two district court  
22 opinions that have stopped short and said it's the date of  
23 receipt, but under any interpretation that any court has  
24 ever expressed, the Government wins in this case.

25 QUESTION: But the Government doesn't win if

1 it's the date of mailing.

2 MR. JONES: That would be the only circumstance  
3 in which the Government would not win, and there's no  
4 authority to support that proposition.

5 QUESTION: And in any event you say this was  
6 waived.

7 MR. JONES: In any event, we believe it was  
8 quite clearly waived.

9 If there are no further questions, I'm through.  
10 Thank you.

11 QUESTION: Thank you, Mr. Jones.

12 Mr. McAllister, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

14 ON BEHALF OF THE PETITIONERS IN NO. 95-966

15 QUESTION: Do you agree that if we don't hold  
16 the statute jurisdictional that you have waived it?

17 MR. McALLISTER: No, I don't, Your Honor. I  
18 believe that we raised the issue in the Tenth Circuit.  
19 The Tenth Circuit addressed it on the merits, and under  
20 this Court's rules the Government had an obligation to  
21 object to any procedural problem in its response to our  
22 petition for writ of certiorari.

23 It did not do so, so I believe in effect it has  
24 waived any objection, and this Court now, under its  
25 precedents, is entitled to reach that issue on the merits,

1 and I do not believe it makes a difference whether it's  
2 treated as subject matter jurisdiction or not.

3 QUESTION: You did admit that the refund was  
4 made on July 9 in the answer to the complaint.

5 MR. McALLISTER: What the stipulation says is  
6 the amounts were refunded. They do not -- and basically  
7 what that means is --

8 QUESTION: Well, but your answer to the  
9 complaint is not inconsistent with that stip. In the  
10 answer to the complaint you admitted that it was July 9.

11 MR. McALLISTER: The amount was refunded on  
12 July 9. What that meant was that was the date on which  
13 the check was received, but it didn't say that the refund  
14 was made, and in our view making should refer to the last  
15 act basically the Government needs to perform to complete  
16 the process, which was after it's issued the check, put it  
17 in the mail to the taxpayer.

18 At that point, the Government has made its  
19 determination, the money is on its way, and at that point,  
20 that is really the last point at which the Government can  
21 know with certainty its window of opportunity has begun to  
22 run. After that --

23 QUESTION: Well, you wouldn't make that argument  
24 if you never received the check, would you?

25 MR. McALLISTER: No. We would certainly suggest

1 that if we had not received the check, the Government --

2 QUESTION: The Government wouldn't be suing to  
3 get it back, either --

4 MR. McALLISTER: That's right. There would be  
5 no case.

6 QUESTION: -- if you never received it.

7 (Laughter.)

8 QUESTION: But it might be saying --

9 QUESTION: Sort of a nonexistent problem.

10 QUESTION: It might be saying that it had made  
11 the refund.

12 MR. McALLISTER: It might. It might.

13 QUESTION: Do you know how it works with a  
14 private company?

15 MR. McALLISTER: With a private company, I do  
16 not, Your Honor. I do know the mailbox rule for contract  
17 law.

18 QUESTION: So that might be the right rule, but  
19 nobody's -- we haven't looked it up yet.

20 MR. McALLISTER: Right. We did talk about the  
21 mailbox rule in contract law in our reply brief.

22 One point I'd like to make --

23 QUESTION: Was it just oversight that you didn't  
24 bring this up in the first instance?

25 MR. McALLISTER: In the first instance, yes,



1 Your Honor.

2 The 1989 amendment, if I could go back to that  
3 for a moment, this Court in Burke in a footnote did  
4 suggest that it has the reading, and certainly the  
5 Congress understood what we claim Congress understood in  
6 section -- or in 1989 about --

7 QUESTION: All of these tax years were all  
8 before 1989 though, weren't they?

9 MR. McALLISTER: Right.

10 QUESTION: So in fact the way the law read at  
11 the time that's relevant here did not contain the 1989  
12 amendment.

13 MR. McALLISTER: Correct.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 McAllister.

16 MR. McALLISTER: Thank you.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

18 (Whereupon, at 11:03 a.m., the case in the  
19 above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS, Petitioners v. UNITED STATES; and KELLY M. O'GILVIE, Petitioner v. UNITED STATES CASE NOS. 95-966 & 95-977

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)