IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

STATE OF TEXAS, et al, Plaintiffs,	(	CAUSE NO. 4:18-CV-167-O
vs.	(	
UNITED STATES OF AMERICA, et al, Defendants.	(	FORT WORTH, TEXAS SEPTEMBER 5, 2018 9:30 A.M.

HEARING ON MOTION FOR PRLIMINARY INJUNECTION

BEFORE THE HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE

SHAWN M. McROBERTS, RMR, CRR
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THE COURT: Please be seated.

Okay. Let's get started. Let's start with who's here for the State Plaintiffs?

MR. McCARTY: Darren McCarty for the State of Texas.

THE COURT: Thank you, Mr. McCarty.

MR. TSEYTLIN: Misha Tseytlin for the State of Wisconsin.

MR. HENNEKE: Good morning, Your Honor. Robert Henneke for the Individual Plaintiffs.

THE COURT: For the individual Plaintiffs. Okay. Thank you Mr. Henneke.

Anyone else here for the Plaintiffs? Nobody else?

Okay. Then who is here for the federal government?

MR. SHUMATE: Good morning, Your Honor. Brett Shumate from the Department of Justice.

THE COURT: Thank you.

MR. MAULER: Good morning, Your Honor. Dan Mauler on behalf of the Department of Justice.

THE COURT: Okay. Very good.

Now, here is here for the Intervenor Defendants?

MR. ELIAS: Good morning, Your Honor. Nimrod Elias far the State of California.

MS. PALMA: Good morning, Your Honor. Neli Palma on behalf of the State of California and the Defendant States.

THE COURT: Great. Thank you.

Anyone else who is here that needs to be identified for the record?

MR. KANTOR: Henry Kantor FROM the State of Oregon Department of Justice, Your Honor.

THE COURT: Thank you for being here as well.

Yes?

MS. NANNERY: Valerie Nannery for Intervenor Defendant District of Columbia.

THE COURT: Very good. Thank you for being here.

MR. VOGEL: Stephen Vogel on behalf of Intervenor Defendant Commonwealth of Massachusetts.

THE COURT: Very good. Thank you for being here as well.

Anyone else?

Okay. So why don't we get started. And it's the Plaintiffs' motion, and so I will turn it over to whichever Plaintiff wants to lead off.

MR. McCARTY: Thank you, Your Honor. Darren McCarty for Texas and the other Plaintiff States.

First, a little bit of housekeeping. I'm going to present argument on all of the issues saving severability, and severability is going to be addressed by my colleague from Wisconsin Mr. Tseytlin, and then Mr. Henneke will address Individual Plaintiffs.

THE COURT: Very good. Thank you.

MR. McCARTY: Thank you.

The Plaintiff States brought this case to restore choice to American health insurance markets; not only for the states but also for their citizens.

When Congress passed the Affordable Care Act in 2010, it pushed the limits of its unconstitutional authority. In the *National Federation of Independent Business versus Sebelius*, the Supreme Court only upheld the ACA because of the financial penalty that accompanied the individual mandate. But in 2017 Congress itself severed that very thin thread that held together the ACA for the last several years by doing away with the individual penalty.

With the ACA, Congress fundamentally shifted the regulation of America's healthcare markets from the states who had traditionally regulated these markets to the federal government. When it implemented its one-size-fits-all federal solution, it took away decades of state regulation, state statutes, and state policy.

The ACA touched almost every aspect of American healthcare. It did so to achieve a form of universal coverage. And I say a form of coverage because it was the federal government, not the states and certainly not the citizens, that decided what was essential for Americans in their own healthcare choices.

The core of the ACA is the individual mandate, guaranteed

issue, and community rating--individual mandate requiring that individuals have insurance, guaranteed issue requiring that those insuring participants in the marketplace had to issue policies to those who asked, and finally, community rating that essentially barred the insurance companies from rating actuarial risk on individual applicants.

Prior to the ACA, the states adopted a number of different approaches to health insurance regulation. In fact, Massachusetts had something very akin to the ACA in place, while Texas, Wisconsin, Nebraska, and other Plaintiff States took a different approach. One prong of that approach in all three of those states was to institute a high-risk insurance pool that was administered for the states for those who otherwise found it difficult to find insurance.

Without the ACA's continued preemption of state law, the states will once again be free to implement their own policies, their own regulations, more accountable to their own citizens. And this is not true just for the Plaintiff States but for all the states, the Intervening States and the non-participant states.

But the outcome of this case is essentially dictated by the Supreme Court's decision in *NFIB versus Sebelius*. In that case the Supreme Court analyzed in detail the same core provision that's at issue here. And what did the Supreme Court hold?

First, it held that Congress did not have the power to enforce the individual mandate under either its Commerce Clause authority or its necessary and proper clause authorities. Chief Justice Roberts, in fact, conceded that the most straight forward reading of the individual mandate was, in his words, "a command to individuals to purchase insurance." And those words are important. That same command still exists today untouched by any Congressional action.

But as everyone knows, Chief Justice Roberts' decision didn't stop there. Instead he adopted savings construction under the doctrine of constitutional avoidance to marry the individual mandate together with the underlying financial penalty, and then found it to be constitutional under Congress' taxing authorities. And his reasoning concerning that financial penalty is important to this case today, and it was that the penalty had the essential feature of any tax that it raise at least some revenue.

When Congress took away that penalty, it took away anything connected to the individual mandate that could be construed as raising tax revenue for the federal government. But notably, what Congress did not do is repeal the individual mandate. It's in force as law.

And if there's any question about what Congress meant to do, it goes back to the 2010 passage of the ACA. When it passed the ACA, numerous individuals were exempted from the

tax penalty, but yet they were required to have health insurance. In fact, Medicaid recipients who would not be subject to the penalty still satisfied the ACA and were required to satisfy the ACA by acquiring Medicaid.

The ultimate question before this Court today is whether the Supreme Court meant what it said in *NIFB*. If it did, the individual mandate cannot stand. Plaintiff States' position is that once the individual mandate falls the entire ACA falls, at least guaranteed issue in community rating provisions, as both the Obama Department of Justice and the Trump Department of Justice, who's represented here today, have conceded. I'll reserve the balance of that argument for my colleague Mr. Tseytlin.

The first question for this Court is whether following the constitutional analysis of individual mandate is whether the states are irreparably harmed. Unquestioningly they are.

The coercive power of the individual mandate is a compulsion for more individuals to access state healthcare roles, whether they be state employee dependents or whether they're recipients of public health programs such as Medicaid. Unlike Plaintiffs argue, the individual mandate does not have to apply directly to the states for it to produce injury in the states. The coercive effect upon individuals that then turn and access state healthcare programs is enough. And the Supreme Court made that clear in *Bennett v. Spear* at 520 U.S.

at 169.

Further, the individual mandate and other ACA-imposed requirements directly conflict with states' prior health insurance regulations. The states had extensive regulatory mechanisms in place. And notably, unlike Massachusetts, Texas' regulatory scheme and Wisconsin's regulatory scheme did not have an individual mandate, so the individual mandate itself conflicts with state sovereignty.

Related to the access of public health roles, the Fifth Circuit has recognized that unrecoverable funds constitute irreparable harm. That's in *Paulsson*, 529 F.3d at 312, and Justice Scalia recognized the same in *Thunder Basin*, 510 U.S. 320 [sic].

Likewise, when a state is prevented from implementing its own laws and policies, it's irreparably harmed as confirmed by both the Supreme Court and various circuits. The Supreme Court in *Maryland v. King*, 567 U.S. at 1301, and the Fifth Circuit addressed the issue directly in the context of preempting state law in *Texas Office of Public Utilities Council versus FCC* at 183 F.3d 393.

The ACA will continue to cause these harms as long as it operates, making it appropriate for this Court to issue an injunction.

And I'll stop here for a moment to address the contention that the Intervening States have raised that this is somehow a

mandatory injunction. Certainly it is not. This -- any injunction issued by this Court would simply restrain the effect or the operation of the ACA, actually freeing states and citizens to make different choices in healthcare. It mandates that no one do anything.

The case that they primarily rely upon, the *Tate* case was a case where the applicant requested that the corporation under injunction increase the amount that it paid to him. In other words, it was a request for an affirmative action. That's not the case here.

So the Plaintiff States seek two alternative forms of relief. First, because the ACA should fall in its entirety, we request the national injunction. And the reason it must be a national injunction as opposed to just a Plaintiff State injunction, whatever the benefits that accrue to the states through the ACA would obviously not accrue to the Plaintiff States, yet the Plaintiff States would continue to subsidize other states' access to the ACA.

However, if this Court finds only that the individual mandate, guaranteed issue, and community rating provision should fall, then the Court could limit its injunction to only the 20 Plaintiff States, thus freeing those Plaintiff States to institute their own insurance regulations. Balancing the equities of either of these two approaches favors the Plaintiff States.

Although the Plaintiff States have made it clear that on balance the ACA is detrimental to the public interest, and many states have submitted declarations describing in some detail the deterioration of their health insurance markets since the passage of the ACA, the merits of the ACA are really not on trial here; only its constitutionality. But given the direct harms to the Plaintiff States, if this Court finds it likely that the Plaintiff States will prevail, it seems unquestionable that an injunction should issue.

The Intervening States make much of the public harm that they allege would result from an injunction against the ACA, but any harm to the Intervening States is at best minimal and likely non-existent.

First, if this Court issues an injunction as to only the 20 Plaintiff States, certainly the Intervening States and non-participating states won't be affected at all. In fact, there's no harm to balance.

If the Court enjoins the ACA nationally as to the entirety of the ACA, it frees Plaintiff States, Intervening Defendant States, and non-participating states to institute their own policy. It also frees Congress to act as Congress so chooses in a constitutional manner.

And that's not a speculative suggestion. States are already doing it in response to the cancellation of the individual penalty. At least two states, New Jersey and

Vermont, have now passed their own versions of an individual mandate that will be accompanied by a financial penalty. And I'll give you those citations. The first is New Jersey Statutes Annotated, § 54A11-3, and the second is 32 Vermont Statutes Annotated § 10452.

The Plaintiff States case here is straight forward. It honors both the Supreme Court's and Congress' own express words. Turning to the contention of the Intervening States, they've stretched Congress' actions and inactions into implication after implication and it produces strained reading of a number of different cases.

Concerning the constitutionality of the individual mandate, the Intervenors suggest that the, quote unquote, essential feature of a tax, in Chief Justice Roberts' words, that it raise at least some revenue is, according to the Intervening States, one, not essential; or two, that the reduction of the penalty to zero doesn't violate this feature.

As to whether raising at least some revenue is a necessary element of a tax, Chief Justice Roberts' words in *NIFB* were clear. "This process yields the essential feature of any tax: It produces at least some revenue for the Government." Essential means necessary under any plain reading.

Their second argument that there doesn't have to be any tax revenue to have a tax not only directly conflicts with

what I just read, but also derives from a distinguishing case, and that case is *U.S. v. Ardoin*, which was a Fifth Circuit case from 1994, and in that case the ATF refused to collect a tax on automatic weapons. Those weapons were banned for sale. The statutory tax remained on the books; the ATF just wouldn't accept it.

The criminal appellant argued that because the ATF was not accepting the tax, that it was an implicit repeal of the tax, but the Fifth Circuit disposed of that argument quite quickly noting that certainly the ATF agency actions cannot repeal the statutory tax passed by Congress. Once again, *NFIB* controls.

Intervenors also suggest that the penalty would raise revenue ad infinitum because taxpayers who incur the penalty in 2018 and earlier will continue to pay that penalty in 2019 and the foreseeable and maybe unforeseeable future, but there is no legal authority to support the idea that collection of a prior tax is a continuation of the tax itself. Congress ended the tax. It didn't suspend it. The fact is that not a single cent of new tax revenue will be raised by the penalty post 2018. There is no more tax providing constitutional cover for the individual mandate.

Next, the Intervening States make the extraordinary suggestion that this Court should order the penalty reinstated. Congress' intention in 2017 was

unmistakable--that it eliminated the penalty underlying the individual mandate, and when it did so it spoke as a unified body. The numerous statements that the Intervening Defendants point to individual politicians not to be exalted above the words of Congress, and if there was any doubt about that, the travel ban decision from the Supreme Court in *Trump v. Hawaii* should have laid that to rest.

Frost and all the other cases cited by the intervenors for this proposition address subsequent legislation that was in itself unconstitutional. They added unconstitutional exemptions onto an earlier constitutional statute. *Frost* made its own holding in that case clear, and I quote, "But the proviso here in question was not in the original section. It was added by way of amendment many years after the section was enacted. If valid, its practical effect would be to repeal by implication the requirement of the existing statute." And it went on to emphasize.

"But since the amendment is void for unconstitutionality, it could not be given an effect, because an existing statute cannot be recalled or restricted by anything short of a constitutional enactment."

Of course that's exactly what happened here. The citation for that quote is 278 U.S. at 526.

The Intervenors' argument that the individual mandate does not impact the Plaintiff States ignores, as I mentioned

earlier, the access of state employee health roles and state public benefit plans because of the individual mandate itself. The Intervening States' argument concerning balancing the equities centers on two points--first, essentially that the ACA is good policy. But as I said earlier, the policies embodied within the ACA and the merits and demerits of these policies are not on trial here. The question is whether the individual mandate remains constitutional and, thus, what is severable from the individual mandate.

Second, the Intervening States complain that they will lose federal subsidies. Setting aside whether there is a net positive or negative to the states in subsidies, which the two sides disagree about, logic dictates that if one state is receiving a net positive in subsidies, that's caused by an outflow of funds from other states.

The Intervening States did not even attempt to address the Plaintiff States' loss of their sovereign authority over the insurance markets. As the Supreme Court said, this is not only to the states' benefit, but also to citizens having the interest in the diffusion of legislative power. And interestingly enough, the Supreme Court said that in *NIFB* at 567 U.S. at 536.

In summary, Plaintiff States' position is simple. By eliminating the penalty for failure to maintain health insurance, Congress eliminated the only constitutional basis

on which the individual mandate was upheld in *NIFB versus Sebelius*. The continued existence of the individual mandate causes irreparable harm to the states.

Finally, an injunction will either leave the Intervening States untouched or free to implement any health insurance policy they choose, just as it will for the Plaintiff States.

Thank you, Your Honor. With your permission I'll turn it over to my colleague.

THE COURT: Thank you.

MR. TSEYTLIN: Thank you, Your Honor.

The remainder of the ACA is inseverable from the individual mandate and, as a result, this Court should enjoin the ACA's operation nationwide.

Now, I would like to break my presentation on severability down in two portions. First I would like to argue, consistent with the concession of Obama Administration, and now the Trump Administration, that community rating and guaranteed issue are inseverable from the individual mandate. And then second I would like to argue, consistent with the position of the only four justices in *NIFB* that opined upon the severability of the individual mandate, that the entire ACA is inseverable from guaranteed issue, community rating, and the individual mandate and, therefore, the entire ACA should fall.

Now, before getting into this discussion, I think it's

important to frame the discussion around what the U.S. Supreme Court has said are the standards for a severability analysis. The Supreme Court has articulated two inquiries that must be conducted--first, whether the other provisions that are not themselves constitutional can operate in the manner envisioned by Congress without the unconstitutional provision; and second, whether Congress would have enacted those provisions without the unconstitutional provision. Now, in either case, the inquiry here is of legislative intent. So in a situation where we have legislative text speaking to that legislative intent, that provides the controlling answer to any question.

Now, moving to guaranteed issue and community rating, the statutory text already answers the question of severability, which is that community rating and guarantee issue are not severable from the individual mandate; and again, as was conceded by the Obama Administration's DOJ and now the Trump Administration. Now, the statutory text I'm referring to is 42 U.S.C. § 18091 (2)(I). And I will refer to this in my presentation as subsection (2)(I).

Now, subsection (2)(I) provides that the requirement, which is the individual mandate, is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and community rated can be sold. And the word key word there is essential.

The United States Supreme Court has, in fact, told the

world what that phrase means. In *King v. Burwell* the Supreme Court said specifically that this finding, this very finding was included by Congress that guaranteed issue and community rating would not work without the individual mandate. The would not work phraseology is the U.S. Supreme Court's phraseology.

That maps directly on to the severability analysis. Would Congress have enacted community rating and guaranteed issue without the individual mandate? Of course not. Congress would not enact provisions that, in the Supreme Court's words, Congress believed would not work. Do those provisions function in the manner Congress envisioned? Of course not. Congress did not envision provisions that, quote, would not work.

And, in fact, the Congress in that finding told us why those provisions, community rating and guaranteed issue, would not work without the individual mandate. That's because if folks know that they as a matter of right can purchase health insurance that is not related at all to their risk, but is rated only on a community basis, whenever they need it they, as a logical economic matter, would wait until they got sick, the risk went up, and they would buy insurance for the same amount of money. Congress in that finding explained that as a result of that basic economic fact, community rating and guaranteed issue do not work without the individual mandate.

And that's, of course, why both the Obama Administration and the Trump Administration conceded that guaranteed issue and community rating must fall if the individual mandate falls.

Now the Plaintiff States -- I mean the Intervenor States led by California make two categories of arguments against the statutory text. Both those arguments fail.

The first argument is that this Court should ignore the statutory text, Congress' finding that the individual mandate is essential to community rating and guaranteed issue, because in Intervenor States' submission Congress was wrong, that guaranteed issue and community rating work just fine with the individual mandate.

Putting aside the highly contested and, I think, irrational nature of that suggestion, it is completely irrelevant to the severability analysis. The severability analysis looks only at what Congress believed, and Congress already told us what it believed in subsection (2)(I), and there is not doubt as to what subsection (2)(I) means because the United States Supreme Court in the *King* case told us what it means, which is that community rating and guaranteed issue, in Congress' judgment, would not work without the individual mandate.

Now, the second argument that California and the other Intervenor States make is that this Court should ignore subsection (2)(I) because it was enacted by the Congress that

adopted the initial ACA and the individual mandate itself it was not adopted by the 2017 Congress. With all due respect, that's not how statutory interpretation works. Subsection (2)(I) was adopted by both houses of Congress and was signed by the President. It is the law of land of the United States. It establishes conclusively Congress' ongoing intent for all purposes, including severability. If Congress wants to change its objective intent, it can only do it in one way, which would be by repealing subsection (2)(I).

Now, I think what I've said there is enough to establish why community rating and guaranteed issue are inseverable as a matter of statutory text, but we would urge this Court to go further than that, and we draw arguments for going further, which is striking down the entire ACA, from the learned opinion written by the four justices who opined upon the severability of the rest of the ACA from the individual mandate in *NIFB*. That's the late Justice Scalia, the recently retired Justice Kennedy, Justice Thomas, and Justice Alito.

We went into a good amount of detail in our briefing explaining those justices' reasoning. And with respect, the U.S. DOJ's responses and California's responses on those detailed arguments were rather summary. But I think it is still important to walk through the reasoning of why each of the major provisions of the ACA necessarily, in the words of the U.S. Supreme Court severability doctrine, requires the

functioning together with the individual mandate, community rating, and guaranteed issue.

First, the insurance regulations. These are the regulations that tell insurance companies the features of insurance products that must be sold. Now, these insurance regulations were not enacted in a vacuum. They were attempting to tell people what are the kinds of insurance products you need to buy in order to satisfy the individual mandate, and they were telling insurance companies what are the kinds of products that you need to sell under the community rating and guaranteed issue provision. And these provisions, these insurance provisions were also tied to the community rating and guaranteed issue and the individual mandate by the statutory text, by subsection (2)(I) in particular. Let me repeat again the critical sentence in subsection (2)(I), which is that the requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and community rated are sold. The improved products that Congress is talking there in subsection (2)(I) are the ones improved, in Congress' judgment, by these regulations. You'll see these are tied together.

Next, moving on to the subsidies. These are the subsidies that Congress provided to those from between 100 and 400 percent to buy insurance products. Congress was providing

subsidies for a particular kind of product, which is the community rated product that satisfies the insurance regulations. There is absolutely no indication that Congress intended to provide subsidies for risk-rated products that didn't satisfy the insurance regulations.

And then, of course, the subsidies are quite generous and they required a substantial amount of taxes to be raised, and the ACA is full of tax increases. Once the subsidies are, by hypothesis, validated, it makes every sense in the world to invalidate the taxes because the taxes are funding the subsidies.

Next, the insurance exchanges. The exchanges are marketplaces where Congress wanted to provide for insurance to be sold and for individuals to buy that insurance to satisfy the individual mandate. Now, of course, they were not setting up these insurance marketplaces to sell any products whatsoever. They wanted to have community rated products sold on those marketplaces. There's absolutely no reason to believe that Congress was setting up the marketplaces to permit the selling of risk rated products.

The employer mandate, which penalizes employers for not providing their employees with sufficient health insurance, in Congress' judgment. The employer mandate is triggered by an employee purchasing a community rated product with subsidies on the insurance exchanges. Of course, if the insurance

exchanges are invalidated, community rating is invalidated, the regulations are invalidated, there is nothing that would even trigger the employer mandate, so that also must fall.

The ACA also cuts substantial funds from DSH hospitals. These are hospitals that provide free care for those who are low income and don't have insurance. The reason that the ACA cut so much funding from those is that Congress supposed that because the individual mandate would force so many people on insurance, there would be a lot less uncompensated care provided by these DSH hospitals and, as a result, there would be a lot less need for substantial federal payouts. Once the individual mandate is invalidated, the hospitals would suffer an unjustified loss if those cuts in DSH hospital reimbursements were eliminated.

Then the Medicaid expansion. What the four justices in the -- that talked about severability in *NIFB* said is that Congress designed the Medicaid expansion to, quote, offset the ACA's costs to the insurance industry, and those costs are from community rating and the regulations. Once community rating and the regulations are, by hypothesis, invalidated, that balance completely falls apart.

And finally, there is in the ACA a significant grab bag of other provisions that are not really tied to this core that I talked about. I will concede that the case for severing those grab bag provisions that are not tied to the core is

somewhat weaker than the provisions that I've talked about here. But we would, nevertheless, urge Your Honor to follow the reasoning of the *NIFB* four justices and hold that once the ACA is nothing but a hollow shell because its core has been invalidated, all other provisions should fall.

So in conclusion, the States respectfully ask this Court to follow the four justices in *NFIB* and invalidate the ACA in whole. But, at minimum and in the alternative, this Court should accept the concession of the Department of Justice and invalidate the community rating, guaranteed issue, and individual mandate provisions, and limit that injunction in that circumstance to the 20 states.

Thank you, Your Honor.

THE COURT: Thank you.

MR. HENNEKE: Good morning again, Your Honor. My name is Robert Henneke with the Texas Public Policy Foundation. It's nice so see you again.

THE COURT: Nice to see you.

MR. HENNEKE: Thank you, Judge.

In this instance I am here today on behalf of the two Individual Plaintiffs in the lawsuit Neill Hurley and John Nantz.

First of all, just for the record, Judge, we join in the arguments that were made by the Texas and Wisconsin led states, and also stand on the briefing here in this case.

Just briefly, to frame an additional perspective for Your Honor, you know, where we stand on behalf of my clients are two individuals who themselves were personally subject to the individual mandate, the individual mandate which is, quote, read as a command by insurance according to the Supreme Court *NIFB* at 567 U.S. at 574.

And the injury, first of all, there is the ongoing mandate on them to comply with the federal law that's unconstitutional. It's unconstitutional for the reasoning which with Texas and Wisconsin have laid out. And yet that mandate, that requirement exists on them even as it continues today. The federal law tells my clients to buy these types of health insurance products, and they have an obligation to follow the law. And it's an untenable position, that taken of the Intervenor States, that simply alternate or, I guess, offer two alternatives--one which is don't follow the law; and two, by consequence of that, to seem that its an adequate alternative for my clients, Mr. Hurley who's a father of two, is married, provides health insurance for his family as he's a self-employed businessman, to seemingly have the alternative option that's offered by the California states of don't have insurance. Neither of those are tenable positions. The law tells Mr. Hurley and Mr. Nantz that they are required to purchase this type of health insurance, and they continue to comply with that obligation even while that requirement is now

unconstitutional.

And the effect of that, Your Honor, is that it continues to cause them irreparable injury. It causes them an injury not just in having to comply with an unconstitutional regulation for which they will never be able to recover their costs, but it also affects and harms them in the quality, access, and cost of the product that they are forcibly required to acquire.

As documented in the undisputed facts in this case that are submitted for the Court, my clients at the same time they are paying in some cases double what they paid before in the same instances where they have had double digit increases in their premiums, they have lost their healthcare provider because the plans that they're mandated to purchase don't cover the doctors that they had previously seen, they're limited in how many times, how often they can see those doctors, and they're paying more for those with healthcare providers that they would not otherwise choose.

And in forcing them to purchase these plans is diverting -- forcing them to divert resources away from their families -- I'm sorry. Away from their businesses to -- despite whether in their judgment that would be the best choice of what they would make and what type of product that they would pursue on the market.

They all testified that in the absence of the Affordable

Care Act, each of them would purchase a health insurance plan that's different than the Affordable Care Act compliant plan that they are required to purchase.

And so the need for the preliminary injunction is this ongoing injury which is irreparable that causes them this financial and other harm, other harm that I would say is not quantifiable in dollars and cents. I mean, what is the value of your children's pediatrician? What is the value of your own primary care doctor? What is the cost to you, as the Hurley family has had where they have to choose one or the other because there's not a plan that they can afford that covers both, and having to go for another doctor that's not familiar to them that they would not be voluntarily willing to choose but for that's what's offered?

You know, the Department of Justice and the current administration agree that we've adequately alleged injury.

And for the remainder of my time with respect to Your Honor for the matters here today, we'll stand on our briefing and request that you grant the preliminary injunction that we've requested in this case in total.

Thank you, sir.

THE COURT: Thank you.

MR. SHUMATE: Good morning, Your Honor.

THE COURT: Good morning. Thank you for being here.

MR. SHUMATE: May it please the Court. Brett

Shumate for the United States.

The United States has concluded that the Affordable Care Act's individual mandate will be unconstitutional beginning in 2019. We also agree with the prior administration's legal position in *NIFB* that the individual mandate, if it's declared unconstitutional, cannot be severed from the guaranteed issue and the community rating provisions of the ACA.

To be clear, the current administration supports protections for people with pre-existing health conditions, and the current administration has only supported legislation that would provide protections to people with pre-existing medical conditions. However, as the previous administration recognized, guaranteed issue and community rating are parts of a three-legged stool that cannot function as Congress intended without the individual mandate, which will be unconstitutional starting next year.

Section 5000A(a) of the statute requires most Americans to buy health insurance, but five justices concluded in *NFIB versus Sebelius* that a requirement to purchase health insurance is unconstitutional because Congress does not have the power to require individuals to engage in commerce.

Nevertheless, the Supreme Court adopted a saving construction of the statute. The Court said that the mandate could fairly be construed as a tax because it had the essential feature of a tax, namely it raised revenue for the

United States. By adopting that saving construction, the Court upheld the requirement to purchase health insurance under Congress' taxing authority.

But next year the individual mandate will no longer have the essential feature of a tax because it will no longer raise revenue for the United States. In the Tax Cut and Jobs Act of 2017, congress reduced the tax penalty associated with the mandate in § 5000A(c) to zero, but it left untouched the requirement to purchase health insurance in § 5000A(a). As a result, the Supreme Court's saving construction is no longer available, and the requirement to purchase health insurance must be declared unconstitutional under the holding in *NIFB* that Congress does not have the power to require individuals to engage in commerce.

On the question of severability, Your Honor, I want to emphasize our position is consistent with the prior administration's position in *NIFB*--that if the mandate is unconstitutional, the guaranteed issue and community rating provisions also must fall with it. And the text of the ACA makes that clear. It says that the individual mandate is essential to the provision of health insurance products that are guaranteed issue and do not exclude coverage for pre-existing conditions.

The Supreme Court essentially agreed in *King versus Burwell* that these three reforms are closely intertwined--that

the guaranteed issue and community rating provisions would not work without the coverage requirement.

Finally, Your Honor, I just want to emphasize that the Government does oppose the entry of a preliminary injunction that could potentially cause chaos in the health insurance markets. We're about to embark on open enrollment season at the end of this year, and any injunction at this stage of the year could throw the health insurance markets into chaos. And we don't want to be in a situation where there is confusion about what health insurance products are available, and we certainly don't want to be in a position where individuals lose their health insurance going into next year.

So what we would ask the Court to do is, first of all, deny the preliminary injunction; but if it is inclined to enter some sort of relief, to defer any ruling until after the close of the open enrollment period which is in mid December, and that would ensure that there is no disruption to the open enrollment period.

And also if the Court is inclined to grant any type of relief, to limit it to a declaratory ruling on Count 1 of the complaint that the individual mandate will be unconstitutional starting in 2019, and defer any question of the remedy or scope of any injunction to allow further briefing into next year on the question of what the remedy should be like. And the reason we ask for that is there is a long cycle and

multi-year process that takes place before health insurance products are available on the market. The first step is for HHS to adopt regulations. Insurers then have to respond to that by proposing health insurance products that go to the state regulators that have to approve them for sale on the individual markets. That process takes time, and the government doesn't want to be in a position where there is extraordinary disruption to that process at the close of this year.

So we would ask the Court to either deny the preliminary injunction or allow supplemental briefing on the scope of any injunction.

Thank you, Your Honor.

THE COURT: Thank you.

So are you taking the lead? I'll defer to you-all on who is presenting and what order.

MR. ELIAS: Thank you so much, Your Honor.

Once again, I'm Deputy Attorney General Nimrod Elias representing the State of California and arguing on behalf of the Intervenor States.

THE COURT: Thank you.

MR. ELIAS: I would like to begin by expressing my appreciation to the Court and to counsel for graciously agreeing to move the hearing date so that I could participate.

With the Court's permission, Ms. Palma and I intend to

divide our argument as follows: I will speak about the continuing constitutionality of the minimum coverage provision and address the issue of severability. Ms. Palma will address the preliminary injunction factors of harm, the equities and the public interest, and Ms. Palma will also explain why the Plaintiffs lack Article III standing which is closely related to the question of irreparable harm.

Your Honor, the Plaintiffs in this case ask this Court to strike down the entire Affordable Care Act, including Medicaid and Medicare reforms, federal subsidies for purchasing health insurance, and consumer protections for Americans with pre-existing health conditions based on the premise that a zero dollar tax is no longer a tax. The federal Government agrees that this Court should invalidate the minimum coverage requirement and strip 133 million Americans with pre-existing health conditions of their right to affordable healthcare guaranteed by the ACA.

Before addressing the legal merits, there are two overarching points that I would like to raise.

First, there is an enormous imbalance in the harm here. Congress' decision to reduce the shared responsibility payment to zero harms no one. Beginning next year, if the Individual Plaintiffs do not wish to purchase insurance or they wish to purchase insurance that does not comply with the ACA's requirements, they are free to do so without any consequence

at all. And the Plaintiff States cannot possibly be harmed by the reduction of a tax that never applied to them in the first place.

The harm from striking down the ACA, however, would be devastating. The ACA has enabled more than 20 million Americans to gain healthcare coverage. Nearly 12 American Americans have gained health coverage through the ACA's Medicaid expansion, and another nearly nine million Americans utilize the ACA-funded tax credits to purchase health insurance.

Because of the ACA, millions of young Americans can stay on their adults' -- on their parents' health plans until age 26. And because of the ACA's consumer protections, 133 million Americans with pre-existing health conditions cannot be denied insurance or charged exorbitant for that insurance because they have cancer, heart disease, or diabetes. In fact, the ACA is so interwoven into our healthcare system that striking it down will damage programs that predate it, such as Medicare.

To give just one example, the ACA replaced the payment system from Medicare Advantage. Striking down the ACA could, therefore, cause 19 million Americans with Medicare Advantage to lose their plans. Neither in their papers nor in their presentation today do Plaintiffs ever seriously address the catastrophic harms that would be caused by the outcome that

they seek.

Second, the result that the Plaintiffs seek is an end-run around the legislative process. Plaintiffs are seeking an outcome that Congress, the elected representatives of the people, rejected 70 times through the political process. Plaintiffs are trying to obtain judicial invalidation of a statutory scheme that Congress deliberately, intentionally, and repeatedly chose to leave in tact. Even worse, when the Plaintiffs and the Federal Defendants asked this Court to strike down protections for Americans with pre-existing health conditions, they are asking this Court to do exactly what Congress said it was not doing when it amended § 5000A last year. Binding precedent squarely forecloses imposing a remedy that is precisely the opposite of what Congress intended.

There are four arguments that I will make regarding why Plaintiffs are unlikely to prevail on the merits.

First, the ACA's minimum coverage provision remains a constitutionally valid exercise of Congress' taxing power.

Second, in the alternative, the minimum coverage provision may now be sustained under Congress' Commerce Clause authority.

Third, the proper remedy under long-standing Supreme Court precedent, if the Court does not accept those arguments, is to strike the recent unconstitutional amendment and revert back to the prior version of § 5000A, which was fully

constitutional according to Supreme Court in *NIFB*.

And fourth, even if the minimum coverage provision becomes unconstitutional next year, the rest of the ACA must be severed under well-established Supreme Court precedent.

The Plaintiffs' and Federal Defendants' assertion that the minimum coverage requirement would become unconstitutional next year rests on the sole premise that to be constitutional a tax must raise revenue at all times. And it is true that in *NIFB* the Court said that the shared responsibility payment yields the essential feature of any tax; it produces at least some revenue for the Government. But the Court did not hold that the shared responsibility payment had to raise revenue every year in its existence. In fact, *NIFB* upheld this tax years before generating a cent of revenue for the federal government. The Court simply presumed that it would eventually raise revenue, and moved on to examine its other tax-like features, all of which remain present today.

So *NIFB* does not address the actual question before the Court--must a tax that has already generated considerable revenue for the federal government, must that tax continue generating revenue in every single year to remain constitutionally valid? Plaintiffs have cited no authority answering that question.

The Fifth Circuit, however, answered this question in *U.S. v. Ardoin*. In *Ardoin* it held that a federal statute that

had not raised revenue in nearly eight years because it taxed a product, machine guns, that had become illegal, quote, "can be upheld on the preserved but unused power to tax," end quote. As long as the taxing power still exists, even if it is not exercised, it remains within Congress' taxing authority.

That is the situation here, Your Honor. Congress did not repeal any part of the ACA, including the shared responsibility payment. In fact, it could not do so through the budget reconciliation procedures that it used. It simply reduced the amount of the penalty, and it can raise it again at any time.

Congress also routinely suspends or delays the imposition of taxes, as it did in the ACA itself with the medical device and Cadillac taxes, and that has not rendered such taxes unconstitutional. But as *Ardoin* demonstrates, there is no constitutional requirement that a tax must raise revenue every year of its existence to remain constitutionally valid.

Moreover, even if the Plaintiffs are correct on this point, their claims would still not be ripe because it would be years before this tax will cease generating revenue for the federal government. At a minimum, there will be considerable revenue in 2019 that will come in from the 2018 tax payments that individuals will make. But as we submitted in our briefs, Your Honor, approximately one fourth of taxpayers pay

their taxes late, and it is highly likely, if not a near certainty, that revenue will continue to be produced into 2020 and beyond, so at a minimum their claims are not ripe.

And it is our position, Your Honor, that produced revenue, as the Supreme Court stated *NIFB*, means when does the Treasury receive that money. It is not when the tax is assessed. And I don't believe any colleague have cited any case that says produced revenue means when a tax is assessed.

In the alternative, however, Your Honor, if the minimum coverage provision is not a constitutional tax, it may now be sustained under the Commerce Clause because a tax of zero dollars does not compel anyone to purchase insurance. In *NIFB* the minimum coverage provision exceeded Congress' Commerce Clause authority because it compels individuals to become active in commerce by purchasing a product, but with a tax of zero dollars there is no compulsion.

Compel is defined in *Black's Law Dictionary* as to cause to bring about by force, threats, or overwhelming pressure. A tax of zero dollars does none of these things. It imposes no force, no threat, and no pressure. Therefore, the constitutional problem, the compelling the purchase of insurance--and compel is the word that Chief Justice Roberts used--is no longer present absent any consequence for failing to do so. So § 5000A may now be sustained under the commerce clause powers if it is no longer a constitutional tax.

If, however, zeroing out the shared responsibility payment makes the minimum coverage provision unconstitutional under both of these authorities, the remedy is to strike the recent amendment and reinstate the prior tax amount. Under long-standing principles of statutory construction, when a legislature amends an existing statute in a way that would render that statute or part of that statute unconstitutional, the amendment itself is void and the statute continues to operate as it did before the invalid amendment. That is the *Frost* case, as my colleague has discussed, and it squarely addresses the highly unusual situation presented here.

In *Frost*, the Supreme Court ruled that an amendment to an Oklahoma licensing statute passed ten years after that statute was enacted violated the Constitution's equal protection laws. The Court emphasized that, quote, "The statute before the amendment was entirely valid and then a different legislature passed the unconstitutional amendment to the pre-existing statute." And in that unusual situation, the amendment, quote, "is a nullity and, therefore, powerless to work any change in the existing statute. That existing statute must stand as the only valid expression of legislative intent," end quote.

That is precisely the situation here. In 2010 Congress enacted § 5000A, which the Supreme Court declared fully constitutional in *NIFB*. In 2017 Congress amended one

subdivision of § 5000A to reduce the shared responsibility payment to zero. That amendment to a pre-existing statutory provision, according to the Plaintiffs and the Federal Defendants, transforms that provision from constitutional to unconstitutional. If they are right--and we disagree with that premise-but if they are right, *Frost* is on all fours and requires striking just the amendment and reverting back to the prior fully constitutional version of 5000A.

Now, my colleagues claim that *Frost* is distinguishable because Congress can always repeal its taxes. But a legislature can also change its licensing requirements. In *Frost*, the legislature simply removed a licensing requirement, removed the public necessity requirement for obtaining a license. That in and of itself is also fine, just like repealing a tax is fine. The problem arises when you graft that amendment onto a pre-existing statutory scheme. The confluence of the two statutes, both in *Frost* and, according to them, in this case is what creates the constitutional violation. And so, therefore, *Frost* is directly on point and would require that remedy if the Court strikes down the minimum coverage provision.

If the Court, nevertheless, concludes that the minimum coverage requirement is unconstitutional under both the taxing and Commerce Clause powers, and it declines to apply *Frost*, this Court should sever it from the rest of the ACA, as the

Supreme Court has done in nearly every case over the past half century.

The Plaintiffs ask this Court to strike down the entire Affordable Care Act, but they have not come close to meeting their very heavy burden of demonstrating that hundreds of perfectly lawful provisions must be wiped off the books because a single provision is unconstitutional. Binding precedent requires rejecting such a far-reaching, unprecedented, and fundamentally undemocratic result.

We know that Congress intended to keep the rest of the ACA in place when that is exactly what it did, when it amended § 5000A last year and deliberately left the rest of the ACA untouched.

The Supreme Court has repeatedly stated that when reviewing the constitutionality of a legislative act, a federal court should act cautiously because a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. It is a settled premise that severability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint.

In *Booker*, the Supreme Court emphasized that a court must refrain from invalidating more of the statute than is necessary. In the following year in *Ayotte*, it reiterated that when confronting a constitutional flaw in a statute, the Court severed its problematic portions while leaving the

remainder in tact.

As the Supreme Court asserted point blank in *Regan*, their presumption is in favor of severability. It is also why the Eleventh Circuit, the only court of appeals to reach this question, severed the entirety of the ACA when it struck down the individual mandate. And it, in fact, rejected the concession made by the Obama Administration that community rating and guaranteed issue are not severable.

Critically here, no party disputes that the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature. The Court said that in *Ayotte* and reiterated in *NIFB* itself.

I would briefly note that my colleague emphasizes the word manner, which comes from the *Alaska Airlines* case, and I would make two brief points about that, Your Honor.

First, that's the only Supreme Court case to use that word, and I don't believe it up-ended the settled law when it comes to severability; and second, in *Alaska Airlines* the Court reiterated after using that word that a court must sever the unconstitutional provision from the rest of the statute unless it is evident that the legislature would not have enacted those provisions which are within its power independently of that which is not.

So all of these precedents boil down to the simple

question posed in *Ayotte*: Would the legislature would have preferred what is left of its statute to no statute at all. And normally this is a hypothetical and a counterfactual question which is necessitated only because the Court itself strikes down a provision in a statute. But here it was Congress itself that reduced the shared responsibility payment without touching any other part of the ACA.

So unlike every other severability case, Your Honor, here we know exactly what Congress intended based on what Congress actually did. The 2017 Congress that amended § 5000A(c) deliberately left the rest of the ACA in tact because it did not want to strip tens of millions of Americans of their newly gained health coverage, revoke the ACA's federal subsidies that millions have come to rely upon, or reverse the ACA's critical consumer protections for 133 million Americans with pre-existing medical conditions.

And critically, Your Honor, in December of 2017 Congress knew that the insurance markets would remain stable even without a shared responsibility payment, and that is because the Congressional Budget Office told them so the prior month at their request. CBO confirmed that even without a penalty, quote, "non-group insurance markets would continue to be stable in almost all areas of the country throughout the coming decade," end quote. With this assessment in hand, Congress in 2017 made the policy judgment to zero out the

shared responsibility payment and change nothing else in the ACA.

Just a few examples of the legislative history make these Congressional intentions crystal clear. Senate Orrin Hatch, Republican of Utah, asserted the following in Congress when considering this amendment to §5000A: "Let us be clear. Repealing the tax does not take anyone's health insurance away. No one would lose access to coverage or subsidies that help them pay for coverage unless they choose not to enroll in health coverage once the penalty for doing so is no longer in effect. No one would be kicked off of Medicare. No one would lose insurance they are currently getting from insurance carriers. Nothing, nothing in the modified mark impacts Obamacare policies like coverage for pre-existing conditions or restrictions against lifetime limits on coverage."

Senator Tim Scott, Republican of South Carolina, echoed that sentiment from the Senate floor saying, "Anyone who doesn't understand and appreciate that the individual mandate and its effects in our bill take nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage, it does not have a single letter in there about pre-existing conditions or any actual health feature."

And finally, Senator Lamar Alexander, Republican of Tennessee and Chair of the Senate Health Education Labor and Pensions Committee states on that committee's website right

now, "The Justice Department argument in the Texas case is as far-fetched as any I've ever heard. Congress specifically repealed the individual mandate penalty, but I didn't hear a single senator say that they also thought they were repealing protections for people with pre-existing conditions."

So we know, Your Honor, we know without a shred of doubt that when Congress reduced the shared responsibility payment to zero, it did not intend to change any other feature of the ACA. That policy judgment represents the will of the people as expressed through democratically elected representatives. Striking down community rating, guaranteed issue, or any other provision of the ACA would directly subvert that stated intent, which well-settled severability law prohibits.

In fact, that is why a partisan group of scholars, including scholars who were part of the last two Supreme Court challenges to the Affordable Care Act, submitted an amicus brief in this case unanimously agreeing that under black letter law principles of severability, the entirety of the ACA must be severed and upheld if this Court strikes down the minimum coverage provision. These conservative, libertarian, and liberal scholars concur that Congressional intent is embodied in the text and the substance of the amendment itself which changed nothing else about the ACA.

Now, the Plaintiffs' and the Federal Defendants' only response to all of this is to insist that the Court should

reach back to examine the intent of Congress in 2010, the Congress that passed the original and fully constitutional version of § 5000A, but neither the Plaintiffs nor the Federal Defendants have cited any authority, and we are aware of none, that supports the notion that when striking down a statutory amendment enacted by one Congress for purposes of conducting a severability analysis a court should look back to consider the intent of a different Congress that passed a different version of the statutory provision in question. That is not the law. Every severability case discussed by both parties looked at the intent of the Congress that actually passed the allegedly unconstitutional provision.

And even if it were somehow appropriate to consider the intent of the Congress that passed an earlier version of § 5000A, that Congress too would not have wanted wholesale invalidation of this groundbreaking legislation just because a later Congress reduced the shared responsibility payment to zero.

For starters, there is no reason to believe that the Congress that adopted the ACA would have wished to invalidate the majority of the ACA's provisions which it effectuated years before the minimum coverage requirement became effective. In 2010 and 2011, for example, Congress provided tax credits for small businesses to subsidize health coverage for their employees. It allowed children to stay on their

parents' health insurance until age 26, and it prohibited insurers from imposing lifetime dollar limits on the value of coverage and from denying children coverage based on pre-existing health conditions. By implementing these and the vast majority of the ACA's provisions years before it implemented the minimum coverage provision, Congress made clear that it did not consider them dependent upon one another.

And the result is no different when considering the ACA's community rating, guaranteed issue, and pre-existing condition exclusion ban provisions, which are also severable from the minimum coverage, as the Eleventh Circuit correctly held. As the Eleventh Circuit found, none of the ACA's insurance industry reforms, including these reforms, contain any cross reference to the minimum coverage provision or make their implementation dependent upon it.

Community rating and guaranteed issue also further other stated goals of the 2010 Congress, including reducing administrative costs by eliminating medical underwriting and preventing insurance companies from completing based on risk selection. The ACA's community rating, guaranteed issue, and pre-existing condition exclusion bans will further these Congressional purposes even in the absence of a shared responsibility payment. The Congress that passed the ACA would not wish to revert back to a situation where millions of

Americans with pre-existing health conditions cannot obtain affordable coverage.

In any event, Your Honor, the intent of Congress in 2010 has no legal relevance in this case. The last acting Congress in 2017 amended § 5000A, and its intent when it made that amendment is the only one that matters for purposes of determining the severability remedy.

I would like to say just a few words about the extreme severability position advocated by the Plaintiffs in this case. With just a single exception, Your Honor, the modern Supreme Court has never struck down the entirety of a federal statute because a single provision was unconstitutional, which is the extraordinary relief that the Plaintiffs seek here. The one outlier, of course, is the Court's recent decision in *Murphy*, so I'd like to just briefly address that case, Your Honor.

In that case, the Supreme Court held that a statutory provision prohibiting state from authorizing sports gambling was unconstitutional. It then went on to quote that the statute's remaining and closely related provisions which prohibited state-run sports lotteries, private sports gambling schemes operated pursuant to state authorization, and the advertising of sports gambling were not severable and had to fall as well.

The Court's highly unusual decision to strike down the

remaining statutory provisions was due to the truly anomalous results that no doing so would have caused. For example, sports gambling in private casinos would have been legal while state-run sports lotteries would have been prohibited; a result that the Court concluded, quote, "would have seemed exactly backwards to the Congress that enacted that statute." In severing the unconstitutional provision would create what the Supreme Court called a perverse policy whereby in the people of a state legalized sports gambling, federal law would make it illegal, but if the state outlaws it, federal law would have permitted it.

The Court concluded that Congress would never have contemplated, quote, "that such a weird result would have come to pass," end quote. So *Murphy* is the exception that proves the rule.

In all of the Supreme Court's other modern severability cases, six in total, including *Regan Booker*, *Ayotte*, *Alaska Airlines, Free Enterprise*, and *NIFB* itself, the Court severed the unconstitutional provision of the federal statute and saved the rest of the statute. In conclusion, the minimum coverage provision requirement remains constitutional.

As the Supreme Court said in *King* V. Burwell quote, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible. We must interpret the act in a way that is consistent with the

former and avoids the latter." But at a bare minimum, if the Court strikes down the minimum coverage requirement, it must adhere to Congress' stated intent in 2017 to leave the rest of the ACA in place.

Now, if I may, Your Honor, just very briefly respond to a few points raised by my colleague before I turn it over to Ms. Palma.

So first, my colleagues on the other side emphasize the legislative findings of Congress in 2010 very heavily, and there are a few points I would like to make about that.

First, and most fundamentally, those legislative findings were for a different statute passed by a different Congress. And as we laid out, they don't have any relevance to the severability question based on the amended version of § 5000A.

Moreover, those legislative findings are not part of the operative statute, and they are not a severability clause. They don't in any way, shape, or form tell the Court what Congress would have intended, whether it would have intended community rating and guaranteed issue if it could not have the individual mandate as well. The purpose of those findings was a very different one. The purpose of those findings was expressly stated in the first sentence which says that it was to show that not buying insurance, quote, "substantially affects interstate commerce." So those legislative findings were drafted with a different purpose in mind and do not

speak--and the Eleventh Circuit discusses this in length--to the very different question when it comes to severability.

In addition, what those -- when you take the language of those findings on their face, it says these are -- it talks about it being essential to, quote, "creating effective health insurance markets." Those markets have already been created. They were created years ago, and Congress in 2017 looked at the already created markets and made a very different policy judgment. So whatever Congress may have thought in 2010 about the importance of community rated guaranteed issue relative to the mandate, Congress, after the markets had been created, made a very different assessment in 2017, and that is the assessment that governs.

Now, the federal government continues to make this unfettered adverse selection argument, the notion that without -- that if there's no mandate but community rate and guaranteed issues stay in place, we would have unfettered adverse selection, as Congress was with clearly concerned about in 2010. As a matter of severability law, that's wrong that's wrong for the reasons I've explained, but as a matter of fact, it is also wrong for many reasons. Every piece of available evidence that we have says exactly to the contrary.

First and foremost is the CBO report that told Congress that their markets would remain stable even without a shared responsibility payment. Moreover, there were amicus briefs

submitted from literally every segment of the insurance industry to this Court saying otherwise. From the Americas Health Insurance Plan, from doctors groups, patients groups, hospital groups, the American Medical Association, the Medical Cancer society --

THE REPORTER: Excuse me. If you would slow down just a little bit, please.

MR. ELIAS: I'm very sorry.

All of these groups that represent virtually every have segment of the insurance industry have said to the contrary that the market will remain stable even without a shared responsibility payment. In fact, America's health insurance plans, they have said, quote, "Striking down community rate and guaranteed issue would up-end a steadying market, not save it."

And we also know, as a matter of fact, Your Honor, premiums have been filed in all 50 states for 2019, and they are stable and the markets are working, and 2019 will open just fine, and those all of a those premiums have already baked in a zero dollar penalty. The market has already adjusted to that new reality, and there is not unfettered adverse selection as a factual matter, as the federal government incorrectly claims.

I would also note, Your Honor, in rebutting that point, the small businesses' amicus brief that was submitted also

notes how important it is to maintain the generous tax credits for small businesses, and how community rate and guaranteed issue have unleashed -- have struck back a job block. So we talked about how millions of Americans would stay in their current job just for the healthcare, and then having these important consumer protections in place frees them up to leave their jobs and to do other things which actually unleashing growth in the economy and in various industries. And we actually -- we thought that that amicus brief was very powerful for explaining why these provisions absolutely should stay in place from the perspective of small businesses as well.

So with that, Your Honor, thank you for your indulgence, and I will turn it over to my colleague Ms. Palma.

THE COURT: Thank you.

MS. PALMA: Good morning again, Your Honor.

THE COURT: Good morning.

MS. PALMA: Thank you for the opportunity to address the Court.

THE COURT: Thank you for being here.

MS. PALMA: I will be addressing the three remaining requisites for the Plaintiffs to obtain the extraordinary remedy of a preliminary injunction.

Because Plaintiffs are not harmed by the reduced shared responsibility payment, they lack Article III standing and

they certainly cannot meet the much higher showing of irreparable harm.

Beginning with irreparable harm, the Individual Plaintiffs will suffer no injury whatsoever because, beginning in 2019 and under *NIFB*, they may forego minimum coverage and pay zero dollars in penalties. In *NIFB* the Supreme Court stated, "but imposition of a tax nonetheless leaves an individual with a lawful choice to do or not to do a certain act, so long as he is willing to pay a tax levied on that choice."

Turning to the Plaintiff States, they claim that the zero penalty will cause millions of their residents to enroll in Medicaid and CHIP and increase their state costs. This is wrong for three reasons.

1. The minimum coverage requirement does not force individuals to obtain healthcare coverage.

2. The minimum coverage requirement does not create Medicaid or CHIP eligibility. Therefore, any of their residents who sign up for those programs in 2019 have lawful entitlement to do so independent of the minimum coverage requirement.

3. They have not offered evidence to support that there will be increased enrollment in their CHIP and Medicaid programs.

They cite to four Congressional budget or CBO reports,

which I'll discuss in greater detail in a moment. But I will note here that none of the cited reports provide evidence that residents from the Plaintiff States who do not already have insurance will seek out coverage in 2019, even though there is no penalty for failing to do so, and that they will do so through their Medicaid and CHIP programs instead of seeking coverage through an employer, the private market, or by any other means.

Also the CBO report that they cite on page 19 of their moving brief actually states in Table 1 that Medicaid enrollment will remain relatively stable from 2018 to 2028.

I'd also like to address the declarations that they have submitted on this point. As part of their moving papers, they submitted a declaration from the State of Texas that discussed an increase in their Medicaid enrollment following the ACA. However, that declaration attributes that increase to ACA improvements in the enrollment and renewal process, the coverage of former foster children to the age of 26, and to increased focus and outreach from the ACA.

As part of their reply, they also submitted a declaration from the State of Georgia. That declaration states that it is likely that the penalty caused some individuals to secure Medicaid. However, that declaration does not say that Georgians will seek Medicaid coverage in 2019 when there is no penalty. Thus, Plaintiffs have not -- have failed to support

the claim that they will be harmed in any way by the zero dollar penalty, and any harm they are alleging stemming from other provisions of the Affordable Care Act not at issue here is irrelevant.

National Federation of the Blind of Texas V. Abbott is Abbott right on point. In that case a plaintiff had standing to challenge one provision of the law related to charitable contributions, but the Fifth Circuit rejected that plaintiff's claim that it could also challenge a different related provision because the two provisions were allegedly inseverable. In this case the Court stated, "but the seemingly intertwined fates of two provisions does not eviscerate Article III's requirements."

And with that I'd like to address the issue of standing further.

To satisfy Article III's case and controversy requirement, the Plaintiffs must show injury in fact traceable to the minimum coverage requirement that can be redressed by a favorable decision of this Court. As the Supreme Court stated in *Hollingsworth v. Perry*, the doctrine of standing thus, quote, "serves to prevent the judicial process from being used to usurp the powers of the political branches," end quote. And under binding Fifth Circuit authority, *Barber v. Bryant*, Plaintiffs must offer sufficient evidence to make a clear showing that they have standing to maintain a preliminary

injunction.

In *Barber v. Bryant*, the Fifth Circuit confirmed that, quote, "Since these are not mere pleading requirements but, rather, an indispensable part of Plaintiffs' case, each element of standing must be supported with the manner and degree of evidence required at the successive stages of litigation," end quote.

Plaintiffs don't even come close to meeting this requirement because, as discussed previously, there is no injury stemming from the only provision that they are challenging in this case.

In regard to the Individual Plaintiffs, in *Hotze v. Burwell* the Fifth Circuit held that only individuals who lack minimum coverage have Article III standing to challenge that provision. The Court stated that Plaintiffs, quote, "who already have minimum essential coverage ordinarily will not have an injury in fact for standing purposes." Because that is the case here, the Individual Plaintiffs lack standing. And I'd also like to note that the *Hotze v. Burwell* case also states that generalized grievances regarding the Affordable Care Act, such as grievances related to increased premiums, et cetera, is insufficient to confer standing.

If the Individual Plaintiffs nevertheless continue to purchase minimum coverage in 2019, any harm from that decision is self-imposed and cannot establish standing.

In *Clapper v. Amnesty International*, the Supreme Court held that plaintiffs may not, quote, "manufacture standing merely by inflecting harm on themselves." The Fifth Circuit has denied standing on similar grounds in *Zimmerman V. City of Austin*. In that case the Court held that any loss resulting from a candidate's subjective decision to forego soliciting contributions was not caused by the challenged fundraising limit law, and that decision created only a hypothetical self-inflicted injury.

Turning to the Plaintiff States, in *Clapper v. Amnesty International*, the Supreme Court held that a speculative chain of possibilities cannot confer standing. That is the case here. The Plaintiffs cite the 2017 CBO report. That report states, quote, "With no penalty at all, only a small number of people who enroll in insurance because of the mandate under current law would continue to do so solely because of a willingness to comply with the law."

That report, Your Honor, does not say that this unknown small number of people reside in the Plaintiff States and they will seek out coverage in 2019 through their Medicaid and CHIP programs. That is not concrete, actual, or imminent injury. Rather, that is conjectural, hypothetical injury that rests on a speculative chain of possibilities. The alleged harm is also not cognizable because Medicaid and CHIP are entitlements for which the states have already agreed to cover all eligible

individuals.

This Court has similarly rejected unsupported state standing in *Crane v. Johnson*. In that case this Court held and the Fifth Circuit affirmed that Mississippi did not have standing to challenge the DACA program based on a report that estimated the average cost of immigration six years prior to the DACA program being initiated. The same is true here where the cited reports fail to support the assertions being made by the Plaintiffs.

Thus, Plaintiffs lack both injury in fact and causation under the standing test. But they also lack redressability because a decision striking down the minimum coverage requirement as unconstitutional will in no way address their alleged harms. In fact, an injunction enjoining the entire Affordable Care Act, or just enjoining the minimum coverage requirement, guaranteed issue, and community ratings provision will in no way change the number of Medicaid and CHIP enrollees in the 13 of the 20 Plaintiff States, like Texas and Georgia, that have not expanded their Medicaid.

I'd like to now turn to the equities. Here the alleged harm to Plaintiffs is far outweighed by the devastating harm to the Defendant states and their residents. If an injunction is issued, the Defendant states stand to lose $608.5 billion in federal funds for Medicaid and marketplace spending. Uncompensated care costs would rise again, reversing past

gains. Six million of their residents would be kicked off their Medicaid. Their residents would lose billions of dollars in tax credits to purchase insurance. And millions of residents with pre-existing conditions would become unable to purchase or access health coverage. These harms, supported by declaration, far outweigh any alleged harm to the Plaintiff States.

Lastly, the public interest weighs against entering an injunction. Eight years into its existence, everyday Americans depend on the Affordable Care Act and the healthcare system depends on the Affordable Care Act for its day-to-day operations. As Texas just conceded, the Affordable Care Act touches every aspect of the American healthcare coverage system. As a result, an injunction would be devastating to Americans, to the healthcare system, to all levels of government, and to the economy.

In the Fifth Circuit under *Star Satellite v. Biloxi*, B-I-L-O-X-I, Plaintiffs have the burden to show that a preliminary injunction will not be adverse to the public interest. Because of the following widespread harm, Plaintiffs cannot meet that burden.

An injunction will strip the coverage and protections of the near 12 million Americans who gained coverage through Medicaid expansion, the near nine million Americans who receive tax credits to buy insurance, and the 133 million

Americans with pre-existing health conditions.

As noted by the American Cancer Society in their amicus brief, this will impact Americans with chronic diseases, including the 1.7 million Americans who will be diagnosed with cancer just this year, and the 15.5 million Americans with a history of cancer as of January 2006, the 30.3 million Americans with diabetes, and the 84 million Americans with pre-diabetes, the 13.1 million Americans with COPD, and the 26.5 million Americans with asthma, and the 33.6 million Americans with some form of chronic lung disease.

It's worth noting that before the Affordable Care Act, even pregnancy and expectant parenthood was a declinable medical condition. Without access to insurance, Americans would again face poor health outcomes, financial ruin, and death. An injunction will take Americans back to the time before the Affordable Care Act when, as discussed by the American Cancer Society in its brief, Americans with chronic diseases like cancer and cardiovascular disease face medical bankruptcy, postpone necessary medical care or filling prescriptions to avoid the expense, split pills or skip dosages of medications, or pay less for basic necessities such as food and heat to help pay for medical expenses.

The healthcare programs in this country will also suffer, including Medicare. The ACA made several reforms to strengthen and protect Medicare. An injunction will reverse

those reforms and threaten Medicare trust fund insolvency. An injunction will also threaten the care of people with disabilities and seniors funded by the Community First Choice option, a program that allows people with disabilities and seniors to remain in their homes and in the community.

The federal government will also be harmed. In a 2015 report, the CBO acknowledged that a full repeal of the Affordable Care Act will increase the budget deficit by $353 billion over ten years. Beyond those ten years, repealing the ACA would cause budget deficits to grow rapidly over time, averaging about $3.5 trillion over the decade that follows. In fact, the CBO in that report could not imagine any scenario where repealing the Affordable Care Act did not harm the long-term fiscal outlook of the United States.

The brief submitted by the economic scholars speaks to the enormous disruption to the U.S. economy should an injunction be issued, including the aforementioned harm to the budget deficit.

And according to the Small Business Majority Foundation in its brief, small businesses would also be affected. The loss of tax credits and ACA market reforms will increase -- will decrease mobility and increase job lock where individuals are forced to stay in a job because of the healthcare benefits.

Moreover, the American Health Insurance Plans, or AHIP

brief, addresses the harm to the insurance market and insureds, including what would happen if tax credits and the risk judgment program suddenly go unfunded. Healthcare providers will once again face massive uncompensated care costs.

The residents of the Plaintiff States would also be harmed. The 1.2 billion Medicaid expansion enrollees in seven of the Plaintiff States will lose their coverage. In addition, the United States Department of Health and Human Services estimates that there are 39 million residents with pre-existing conditions living in the 20 Plaintiff States. An injunction will threaten their healthcare coverage.

Thus, due to the profound harm to both -- to the public interest that will result from a preliminary injunction, including harm to millions of Americans, to medical providers, to the healthcare system, to the economy, and to the government at all levels, Plaintiffs' request must be denied.

Yet despite the evidence before the Court, the Plaintiffs have failed to address the significant disruption and harm that will result from an injunction. They also fail to address the enormity and practical implications of the relief they are requesting. They don't address, for example, what sort of oversight would be required from this Court to oversee the dismantling of federal law in 50 states, including healthcare programs at all levels of government.

It is for this reason, as discussed in the AHIP brief that the options considered by the 115th Congress all recognize that a repeal could not be immediate or without substitute and should, instead, be accompanied by some transition period toward some replacement.

Here it is worth noting that the purpose of a preliminary injunction is to maintain the status quo until the merits of the case can be adjudicated. But in this case the Plaintiffs aren't seeking to maintain the status quo; they are seeking to blow it up. And in the Fifth Circuit, mandatory injunctions are particularly disfavored and proper only in rare instances. And, Your Honor, this is not one of those rare instances.

In conclusion, enjoining the Affordable Care Act will cause catastrophic harm to all Americans, while the reduction of a tax to zero dollars hurts no one at all. Based on the law and equities, this Court should deny the request for preliminary injunction.

However the Court rules, we would also respectfully request that it issue an immediately appealable order. If for any reason this Court were to enter an interlocutory judgment, we respectfully that it certify that order for appellate resolution under 28 U.S.C. § 1292(b).

Should the Court enter any injunction, we also respectfully request that the Court stay that order pending appeal or, at a minimum, that it stay it for a limited period

of time to allow us to seek a stay directly to the Fifth Circuit. In light of the gravity and import of the legal questions presented, a stay is warranted and appropriate.

Before closing, Your Honor, I just wanted to take a moment to address the suggestion by the Department of Justice that the Court defer any preliminary injunction until after open enrollment closes in mid December. Not all states' open enrollment closes in December. California's closes January 15, Massachusetts closes January 23rd, and D.C.'s and New York's closes January 31st.

And on that note, I'd like to say that issuing an injunction, irrespective of the time, that -- the disruption that will result is not mitigated by when the injunction is entered. The disruption will come from the issuing of the injunction, not when it is issued.

With that said, Your Honor, I'd like to again thank you for the opportunity to address the Court, and unless the Court has any questions, which will be addressed by my colleague Mr. Elias, we are prepared to submit.

THE COURT: Thank you.

Let me follow up with some questions. I will just work backwards by parties in the reverse order, and then once I'm done I'll give you-all a chance to follow up and close uninterrupted.

You mentioned, at least as to the Individual Plaintiffs,

that they would not be harmed because the tax amount is zero. Is the focus on the tax amount being zero or is the focus on the mandate--that is, they're being ordered to purchase insurance under the law--the tax bill doesn't repeal that provision--and they feel compelled to comply with the law as good citizens even if the penalty is zero? So is the focus of harm the zero dollar payment, or is the focus of harm what the law is doing to the individuals?

MS. PALMA: The focus, Your Honor, is on the fact that the penalty has been reduced to zero dollars as of January 2019 so, therefore, there can be no harm from a penalty of zero dollars.

With regard to the issue of feeling compelled to purchase insurance, that's just wrong as a matter of law under *NIFB*.

THE COURT: They're not required to purchase minimum coverage?

MS. PALMA: Under -- yes, Your Honor, that is correct. They are not compelled because, again, the Supreme Court stated --

THE COURT: Well, I guess what I'm asking is -- you're saying they're not compelled, and when you -- are you saying they are not compelled because there is no financial consequence, or are you saying the law does not mandate that they purchase coverage?

MS. PALMA: They are not compelled to purchase

insurance beginning in 2019.

THE COURT: Does the law mandate that they purchase coverage?

MS. PALMA: Not under the binding Supreme Court authority, Your Honor.

THE COURT: Okay. And go ahead and flesh that out for me. In other words, the tax bill eliminated Section (c) of 55000A. It didn't eliminate any other provision. And so why doesn't the text of the law as it exists today, or on January 1st, 2019, mandate that the Individual Plaintiffs purchase minimum coverage. And your colleague can answer, too.

MS. PALMA: Sure.

MR. ELIAS: Your Honor, our position is that the fundamental construct that the Supreme Court laid out is that there is always a choice. It never mandated that you buy insurance. It always gave individuals a choice to either buy insurance or pay the tax associated with it. And I think the most pertinent quote from *NIFB* is this one by Chief Justice Roberts. "Those subject to the individual mandate may lawfully forego health insurance and pay higher taxes or buy health insurance and pay lower taxes." And it is our position that that is true this year when there is a tax penalty, and it is true next year when there is a zero dollar tax penalty. There is always a lawful choice that is given to the

individual.

THE COURT: Thank you. And so what is the text of the mandate? Read the text of the ACA that combined with the penalty states that a person has to purchase minimum coverage?

MR. ELIAS: Sure. So the text of subdivision (a) says, "An applicable individual shall, for each month beginning after 2013, ensure that the individual and any dependent of the individual who is an applicable individual is covered of the minimal essential coverage for each month."

THE COURT: Okay.

MR. ELIAS: And then subdivision (b) says if you don't do that, you pay a shared responsibility payment. And then subdivision (c) says that payment is zero dollars in 2019.

THE COURT: And so the shall language as it exists in 2019, in your view, is not mandatory; shall is permissible.

MR. ELIAS: Shall gives the individuals the same choice they've always had--to either purchase or pay the tax associated with it.

THE COURT: Because one of the cases your colleague cites that I wrote, *Crane,* says shall means shall; shall means mandatory.

MR. ELIAS: I understand that, Your Honor. Our position is -- you know, in *NIFB*, Chief Justice Roberts said, Even though it says the word shall, CBO estimates four million

people will pay the penalty instead. And Congress didn't intend to create four million outlaws, so shall in this case, in this context, means you have a choice--you can purchase insurance or you can pay whatever tax Congress says. And that choice is always present and, you know, that's why the Court said multiple times it's a lawful choice and you may lawfully forego insurance because shall means you have a choice.

THE COURT: Thank you.

And let me just -- and you both can stand there, or you don't have to. I have some follow-up with you on the tax issue.

MR. ELIAS: Yes, Your Honor. I'd be happy to answer.

THE COURT: Are those three provisions that the amount is paid into the Treasury, it produces some income for the government, it's calculated based upon traditional tax formulas, gross income, dependents, deductions, that sort of thing, are those the only three guideposts that I'm to look at to determine whether this is a tax or not? Are they mechanically applied? Are there other considerations?

MR. ELIAS: In *NIFB*, Your Honor, I don't think the Court applied a mechanical analysis. I think the court said the shared responsibility payments looks like a tax in many features, and it listed a number of those features. In that particular analysis, it didn't say any one feature was

dispositive, but it really pointed to the (unintelligible) of characteristics that on the whole allowed it to understand the shared responsibility penalty as a tax.

THE COURT: Do you contend, then, that if a single dollar is paid into the Treasury in 2019 from a previous year's shared responsibility payment, that that satisfies the production of some revenue to the Treasury?

MR. ELIAS: Yes, we do, Your Honor. We believe produces revenue means when does it arrive at the U.S. Treasury.

THE COURT: And so in terms of the three factors, the first factor, I think, is paid into the Treasury by taxpayers when they file their tax returns. When they file their 2019 tax returns, will they be obligated to pay any of the shared responsibility payment, the tax, into the Treasury?

MR. ELIAS: Does Your Honor mean when they file in 2019 for 2018 or when they file for tax year 2019 in 2020.

THE COURT: Correct. When they file their 2019 tax return, will they be required to pay the shared responsibility payment, tax, with their tax return? Because that's the way it's written in *NIFB* is paid with their tax return.

MR. ELIAS: Right. So in April of 2020 when folks are paying their taxes for 2019, absent any further action by Congress, and assuming all of those taxpayers are filing on time, in 2020 when filing for 2019, they wouldn't be paying a

shared responsibility payment at that point in time.

THE COURT: And then the second prong was the -- it's a tax--it can be fairly read as a tax, I guess to be accurate--it can be fairly read as a tax in this case because it is calculated using these formulas--the minimum amount that Congress has set, which is now zero, or how much have they made, what are those other figures that go into it. They won't be doing that anymore based upon their 2019 tax obligations. Is that -- do you agree with that?

MR. ELIAS: I think that is -- there will be -- because there is a zero dollar tax, there will be no need to go further and say how many filers exist in this household, what is their income. Just as, you know, for 2018 individuals who don't pay federal taxes don't have to pay a shared responsibility payment based on their current tax status as well.

THE COURT: Right. Okay. And then there would be no -- in addition, there would be no calculation of intermittent coverage. So (b)(3) provides that the amount is calculated for any month they lack health insurance in a taxable year. So in 2019 it won't matter. Is that right? For tax year --

MR. ELIAS: For tax year 2019 there would be no need to do these calculations as to how many dependents and what have you, because with the zero dollar tax it's the same for

everyone.

THE COURT: Okay. Let me ask you -- let me move to another subject with you, if you don't mind.

In the *Frost* case, isn't it the case that the plaintiff was challenging the later enacted provision that allowed the corporations to get the petitions and, therefore, if they just had those sufficient numbers, irrespective of public necessity, they got the permit? They were challenging the later enacted provision in that case. Is that -- do I understand that correctly?

In other words, in 1919 the provision said, You can get this gin if, among other things, you satisfied public necessity and the commission that they enacted would take that into account to make sure that the areas are appropriately covered and not inundated with too many gins. And then 10 years later, or whatever the number was, they enacted a provision that said any corporation that had this many public signatures saying they wanted it they could also get a permit, and that -- and when you read those two together, that created the equal protection violation because you are treating people differently and without a good reason, according to the Supreme Court.

My question to you -- that's my understanding of the facts. Do you think I don't understand them correctly, the sequence of things?

MR. ELIAS: I believe the Court stated the sequence correctly. I think the only -- I would just say that the amendment -- so the licensing scheme wasn't -- it was on the books from the 1919 statute. The only change made 10 years later was the removal of the public necessity requirement. So to get a cotton gin license, you don't need to show public necessity anymore.

And so, yeah, and so that drafting of that change -- on a blank slate you could always pass a licensing scheme that didn't include that requirement, of course, but by changing the pre-existing statutory scheme to take away that requirement, the intersection between the two is what created the protection violation.

THE COURT: Very good. And so my question to you, though, is didn't the Plaintiff in *Frost* challenge the later enacted proviso that did away with the public necessity? Because he satisfied public necessity, so he wanted to keep it.

MR. ELIAS: Yes, he changed -- yes. That's right.

THE COURT: And so in this case, in terms of how *Frost* would apply to this case, is there anyone in this case challenging the 2017 enactment?

MR. ELIAS: Well, nobody is challenging the constitutionality of the Tax Cuts and Jobs Act as a whole.

THE COURT: Or just that provision that repeals (c)

of 5000A.

MR. ELIAS: I mean, this is not -- this case is certainly not an affirmative challenge to that paragraph of the Tax Cuts and Jobs Act, but that paragraph, that one paragraph in this 185-page bill made a change to the pre-existing § 5000A to (c) just by changing 2.35 percent and $695 to zero. So that one -- when it comes to remedy and when it comes to what's the correct remedy, it's our position that this was a pre-existing statutory provision that was 100 percent constitutional, and by changing (c) in this one manner, that is, according to them, what makes 5000A as a whole unconstitutional because that change to (c), according to them, makes (a) unconstitutional within the same single statutory provision. And so we believe that the correct remedy -- no one has to affirmatively challenge the Tax Cuts and Jobs Act for the correct remedy is to be, under *Frost*, simply Xing out the amendment and reverting back to the prior statutory scheme as it existed and was validated in *NIFB*.

THE COURT: And what -- so you have *Frost*. What do -- -- are there cases where the courts have invalidated -- for remedial purposes invalidated provisions that were not challenged?

MR. ELIAS: Yes. *Booker* I think, actually, Your Honor, is a good example of that. So in *Booker* the Supreme Court struck down the one statutory provision that made the

Sentencing Guidelines mandatory --

THE COURT: Which was in the underlying provision.

MR. ELIAS: Which was the underlying provision being challenged --

THE COURT: And then it excised a portion that was enacted by a later Congress that was part -- that was linked to the underlying provision.

MR. ELIAS: I don't believe it was enacted by a later Congress in *Booker*.

THE COURT: It was enacted in 2003. I know.

MR. ELIAS: Then I will defer to the Court on that.

THE COURT: Because the original -- and I have another *Booker* question of you, so I don't want to get ahead of myself. But the original provision was the Sentencing Reform Act which enacted 3553(a) and 3553(b) 3553(a) said the Sentencing Guidelines are advisory; in essence you shall consult the Guidelines and these other factors. 3553(b) said you shall impose the Guidelines sentence unless something is met. And so the challenge in *Booker* was to 3553(b) enacted by the Congress in 1986, and they challenged it under Sixth Amendment grounds, you can't -- you have to have a jury find these things if they're mandatory in that fashion.

In 2003 with the Protect Act, Congress amended many things, including enacting a provision that says on appeal appellate courts are to look at departing from the mandatory

nature of the Guidelines de novo, and the Supreme Court said, Well, you can't have them both. If you don't have 3553(b), you can't have the 2003 amendment.

But again, they were still, it seems -- they were focused on the underlying provision. And necessarily the Plaintiff in *Booker*, the one that prevailed--there were several Plaintiffs; it was a consolidated case, obviously--were challenging those provisions.

And so that's what I'm wrestling with here is you are saying *Frost* applies, and *Frost* does do what you say, it strikes down the later enacted provision which made -- which rendered the underlying provision unconstitutional, but the Plaintiff in that case was challenging that. *Booker* was challenging all provisions that made the Guidelines unconstitutional under the Sixth Amendment. Where is that in this case?

MR. ELIAS: So I want to make sure I understand the Court's question. I guess -- well, first of all, just with respect to *Booker*, the reason that the single additional provision was struck down in *Booker* was because that provision depends upon the Guidelines' mandatory nature and contains critical cross references to the now excised section. So both of those were necessary, in the Court's view, to take down another provision that would otherwise be lawful. And, of course, our position here is that community rate and

guaranteed issue --

THE COURT: Can you say that again? Otherwise -- what would otherwise be lawful?

MR. ELIAS: The Supreme Court said, We're only going to strike down the one unconstitutional provision and only the one additional provision and only because it contains critical cross references to the unconstitutional provision and depends upon the Guidelines' mandatory nature. So we understand that to mean if -- the only way you can strike down lawful provisions through a severability analysis is if there is critical cross references within the statute and it is textually dependent upon one another. And, of course, our position here is that community rate and guaranteed issue contain no textual cross references to the minimum coverage provision, nor are they textually dependent upon it.

And in terms of -- I think Your Honor was getting at the issue of like which legislative intent am I looking at.

THE COURT: That's my next question, yes, is the next legislative intent. Because it does seem from the language of these cases that the Supreme Court is saying look to the Congress that enacted the original provision. Even in *Murphy*--which I know you reference as an outlier, but it was just decided a few months ago--they say the -- I've got the quote written here somewhere. That you look to the Congress that enacted the underlying legislation. We look to that

Congress.

And so why would I not -- let's just assume that I don't buy your argument that it's still a tax and that the Commerce Clause saves it, and let's assume that I believe the mandate would fall, so we're looking at severability, why don't these cases clearly point to the fact that you look to the Congress that enacted the underlying legislation?

MR. ELIAS: I don't think that's the paradigm that most of these cases have, Your Honor. Most of these cases -- in *Murphy*, for example, the federal statute at issue was passed by a single Congress, and I don't believe it was an amendment -- there was no later amendment by a later Congress to any of the statutory provisions that allegedly created the unconstitutionality, that created the constitutional flaw.

One of the cases that we cite as well as them in *Free Enterprise*, there actually was the interplay between two federal statutes--the Securities and Exchange Act of 1934, I believe, and Sarbanes-Oxley. And in that case -- this perhaps is the best example of the position that we're taking here. In that case, the Supreme Court looked at only the intent of the Congress that passed Sarbanes-Oxley and how those new provisions -- and what that Congress would have intended if the commission it created couldn't be at will, what would that later Congress enacted that provision have intended.

So I think that it -- I'm certainly not aware of any

paradigm where Congress passes a statute in a particular format, a later Congress amends that statute and only that amended version is allegedly unconstitutional, and courts then look at what would the original Congress that passed a different version of that provision, what would they have wanted. The courts look I believe in every case to what -- the Congress, whether it's enacting it as a first order of business or just amending it, what did this Congress intend to do when it made this amendment.

And I think *Free Enterprise* actually is -- it's not precisely on point, but it basically fits that same paradigm where the Court looked at the later Congress that passed a later federal statute, the interplay of which with an earlier federal statute created a constitutional flaw.

THE COURT: If that's the case in *Booker*, why wouldn't the Supreme Court look to the 2003 Congress that passed the Protect Act? Because that Congress clearly, as pointed out in the *Booker* remedy dissents clearly said that Congress wanted it to be mandatory and wanted it to be harder to depart -- for district judges to depart from the Guidelines than they were doing. But Justice Breyer said, We looked to the Congress that originally passed the Sentencing Reform Act, and that Congress clearly would have preferred what they did than what the dissent wanted.

MR. ELIAS: So I apologize that I don't recall that

part of the opinion looking at an earlier Congress, and I would simply say that the severability and analysis in *Booker* really turned on functionality. And the Court acted, as it almost always does, with a scalpel and not a sledgehammer. And it said, Only this one additional provision which cross references it and is textually dependent upon the unconstitutional provision, we will only strike that and we will leave everything else in place because we want to do the least damage to the will of the legislature. And I believe that is the underlying animating concern in almost all of the Supreme Court's modern severability analysis.

THE COURT: In the *Free Enterprise* case, that -- the Supreme Court in that case said, When evaluating whether the rest of the statute should remain, severability again, you look to the statute's text for historical context that makes it evident that Congress, faced with these limitations, would have preferred no statute at all to the truncated version.

If I believe that it is appropriate to rely on the 2010 version -- Congress' version of the ACA, do you believe that there is text in the 2010 ACA or its historical context that make it evident, as *Free Enterprise* says, evident that Congress would have wanted the ACA with no individual mandate to no ACA at all?

MR. ELIAS: Yes, we firmly believe that even governed through the lens of 2010 and that Congress' intent,

as the Eleventh Circuit held--and it was the only court of appeals who addressed this issue--Congress in 2010 would have wanted everything else in the ACA to remain in place even if it couldn't have had the individual mandate as well.

THE COURT: And so the -- okay. And let me ask you this. Do you believe that the framework that the joint dissent utilized in *NIFB* -- obviously since you believe the Eleventh Circuit's right, you believe they were wrong, those court justices were wrong. But I'm asking you about the framework they utilized, that they wrote in the opinion. Is that the proper framework for me to look to to -- if I get to this point, to answer this question?

MR. ELIAS: No, it is not, Your Honor. We believe that the dissent's framework actually departed from settled law in a number of critical respects. So, for example, Justice Scalia said, We sometimes apply the presumption of severability, but not always. And he has argued there has actually always been a presumption of severability; not only when the Court expressly said so, as in *Regan*, but also whenever it repeats that it must be evident that Congress would not have wanted these provisions if it couldn't have had this one, too. We think in effect that is a presumption.

And I would note that the one case Justice Scalia cited for that proposition he dissented from. He disagreed with the fact -- that was *Minnesota versus Mille Lacs* case. Justice

Scalia disagreed with the core of the majority not giving the presumption to the executive order at issue in this case.

But in addition, the Court -- the dissent in *NIFB* plucks that word manner from the *Alaska Airlines* decision and basically makes an argument that any time you remove one piece from a federal statute, it's not going to operate in the manner intended by Congress. And that's not the severability law. It's always going to be true that if you have a complicated federal statute, if you remove one piece the other pieces will not work exactly as Congress intended because Congress intended for all of the statute to operate as it drafted it, as it enacted it.

The standard is actually a much higher one. The standard is is it evident, not just reasonable, not just possible, but is it clear-cut that these other provisions are so important to the Congress that passed this that they would not have wanted provision (a) and (b) if it couldn't have had provision (c), which is unconstitutional, too. That's a very, very high bar, and I think appropriately so, because for a court to sever other provisions of a statute that, number one, the parties don't have standing to challenge, they're not being harmed by these other provisions; and, B, to strike down other concededly lawful provisions of a federal statute passed by Congress, it should be a very high bar to show that we're going to take down lawful provisions along with the one

unconstitutional one.

So I do -- with all due respect to Justice Scalia and the dissenters in that case, they didn't -- instead of focusing on is it evident and sort of the *Booker*, you must sever -- if it's at all possible, we must salvage rather than destroy, all of that great language from an abundance of modern precedent, they just plucked the word manner out of *Alaska Airline*s and said, All the pieces now work exactly in the manner if you just remove one, and that's always going to be true, and every federal statute would come down in its entirety if that were really the standard.

THE COURT: Do you feel that the federal government in 2010 erred when they conceded that the community rating and guaranteed issue provisions could not be severed from the individual mandate.

MR. ELIAS: We do.

THE COURT: And why is that?

MR. ELIAS: Because --

THE COURT: In 2010. Right? You've talked a lot about the history has revealed this can work and these are all operating, but back then when they made that concession, why do you believe they were wrong there, particularly given the text of the findings that Congress voted on and the president signed, as your colleagues discussed.

MR. ELIAS: For two reasons, Your Honor.

First, we believe that the Obama Administration put undue emphasis on these legislative findings and treated them more like a severability clause than the purpose they were drafted for, which was simply to show that not purchasing insurance affects interstate commerce. So it's simply misapprehended, the reason of those findings from the text. They were not to show that Congress --

THE COURT: Do you mind if I interrupt you just so I don't lose this chain of thought?

MR. ELIAS: Of course not.

THE COURT: Because I read that in your brief, and -- but does that -- how do you square that argument with the use of the findings in *King v. Burwell* where Justice Roberts wrote, We need to uphold the law, not destroy the law, the quote that you've been relying on, and he uses those findings to reach that conclusion because he said, Based upon *NIFB*, we wouldn't be separating all of these provisions, and Congress clearly, clearly considered them to be central.

So why would the majority in *King v. Burwell* talk about the findings at all since the Commerce Clause wasn't at issue in *King v. Burwell*, if findings are not there for the courts to look at based upon their ordinary meaning, their textual meaning?

MR. ELIAS: In that case the Chief Justice was trying to come up with a good reason not to follow the plain

language of the statute. Right? So what was likely a drafting error, Congress didn't expressly state that states and federal exchanges could both access the tax credits. And so I think that Chief Justice Roberts drew heavily on those legislative findings in order to say, This is really important, the tax credits are really important to the function of the ACA. They were one of the three pillars to make the insurance affordable, and it would be devastating to rely on a hypertechnicality to disallow those credits for a large number of citizens in our country.

So that was the reason Chief Justice Roberts pulled from those particular legislative findings to reach a result where he said, Given the catastrophic harm that would occur here, we're going to say that this isolated provision, we're going to zoom out and say it's not straight forward and that it is ambiguous and we know that Congress really intended for tax credits to be broadly available to the American people.

THE COURT: And I guess -- so if you could just answer my question, then. He clearly used those findings in a case that had nothing to do with the Commerce Clause and those findings were important to that decision, *King v. Burwell*, so am I able to use the findings in this case or not?

MR. ELIAS: Respectfully, we would submit that these particular -- I mean, obviously our first order of argument is that the 2010 Congress' intent is irrelevant; that 2017 should

be the sole focus of the Court's inquiry. But if we are looking at 2010, we still believe that it is not appropriate to use those findings for this purpose because they were written for a different purpose.

The Eleventh Circuit we think really has the correct analysis here. The question for purposes of the Commerce Clause and whether Congress has power to enact something is very different than severability. You know, that question of severability is, Are these other provisions so important that I would not take them if I don't get this one, too.

THE COURT: Okay. But in making that decision, you're looking at statutory text and context of the law, and so what better statutory text would you have but for these express intentions of Congress?

I wrote down the other day when I was reading this, all -- it appears to me that every single justice who considered -- who either wrote on their own or joined in opinion, every single justice in *NIFB* and *King* v. *Burwell* essentially says that it is clear -- that Congress is clear -- that the 2010 Congress is clear that but for the requirement of an individual mandate, you cannot separate it from the guaranteed issue and the commute rating.

Justice Ginsburg in her opinion in *NIFB* said essentially, This Congress, the 2010 Congress, satisfied the Gordian knot problem that New Jersey and Vermont and all these other states

who tried to do this without a mandatory -- an individual mandate failed. Massachusetts solved it. Congress followed Massachusetts' lead, and they would not have issued these other provisions but for that. So every single justice, the dissenters, the majority, however you characterize them, concluded this.

MR. ELIAS: Your Honor, I would point back to the language of these findings itself and what they actually say, which is that these provisions are essential to creating healthy insurance markets. And whatever Congress may have believed was essential to creating the markets, to getting them off the ground, that's not necessarily true once the markets have been created and have been in effect for years.

So we also believe there is a temporal limitation inherit in the text and in the way that Congress wrote those findings when it said that these are important for creating the markets.

In 2010 -- it's important to remember, in 2010 this was a brand new experiment, these markets hadn't been created, none of the marketplaces existed, and Congress was for sure concerned with adverse selection. But that is not the situation, of course, that we have today. We have functioning markets that have already adapted to a zeroing out of the penalty. And then, of course, most importantly in our view, Congress in 2017 looked at the current state of the world,

read the CBO report that said the markets will remain stable, and decided that they could de-link community rate and guaranteed issue from the individual mandate. And that was a very sound and supported policy judgment that has been borne out by the real world that we live in.

So I think we can't emphasize enough from our position, Your Honor, that whatever Congress may have believed in 2010 in order to create these markets and marketplaces, Congress in 2017 made a categorically different judgment. And when Congress decided that we can zero out the penalty and the markets will remain stable and tax subsidies and pre-existing conditions, everything that should remain in place, that was what they intended to do. That's what they said over and over they intended to do is change nothing else. So it is our position that the Court should follow -- should be governed by -- any severability analysis must be governed by that expressly stated intent of Congress just last December.

THE COURT: And you say they expressly stated this intent last December. When you say they expressly stated their intent to keep these other provisions in place, they obviously didn't when they wrote zero. That says nothing about what they intended otherwise. You're saying I should draw -- I should rely on the individual statements from Senator Hatch and Senator Scott and Congressman Ryan, or are you saying that's the inference I should draw?

MR. ELIAS: Both, Your Honor. So they stated that if they wanted to change anything else they would have done so. I mean, by definition if they wanted to take away protections for people with pre-existing conditions or revoke the subsidies or change anything else, they would have done that in the legislation and they elected not to. So the very fact that they didn't do something shows what they intended.

But if there were any doubt about it, we absolutely think the Court should draw upon the legislative history where Republican after Republican after Republican who voted for this bill said, You're misconstruing what the statute is. We're not taking any of these things away. All we're doing is saying we're not going to force you under a penalty -- with a penalty to get insurance. We think you should, you will have subsidies if you're low income, you'll be protected if you have a pre-existing condition; we just don't want you to pay a penalty if you choose not to purchase insurance.

And conversely, Your Honor, I don't believe there is any legislative history--I've certainly seen none--that any Republicans believe to pass this bill that they believed that they were stripping Americans of any other part of the ACA when they passed this legislation. They certainly did not believe in any way, shape, or form that they were taking away subsidies or pre-existing condition protections.

So, yes, so we think it is -- you know, based on what

Congress did and didn't do in 2017, and all of the legislative history that confirms that, Congress wished to leave this law in place, and with this one exception, and that intent is and what should be the guidepost for the Court as it considers severability.

THE COURT: Did you find any statement, Republican or Democrat, in the legislative history that says zeroing out the tax in this fashion will kill the entire ACA and we fulfilled our campaign promise?

MR. ELIAS: I don't think so, no.

THE COURT: If I find something like that, how would I balance a -- or a Democrat. Since you focused on Republicans, were there Democrats said -- that prompted Republicans to make these statements? Were there Democrats who said this is going to kill the entire ACA?

MR. ELIAS: I will be candid. I didn't read the Democratic statements for the purposes of trying to put forward before the Court what the intent was.

THE COURT: My question to you, then, is since we're looking -- since you want me to look at what individual senators or congressmen said, if I find a senator or a House member who says the opposite, how would I balance those two to come to a conclusion as to Congressional intent, hypothetically? We don't know it exists, but hypothetically. How do I resolve that?

MR. ELIAS: I think any statement to the opposite would have to say, In zeroing out the penalty this is what we intend. I mean, it's not -- it's well-known that many Republicans wished to repeal the entirety of the ACA but they didn't have the votes to do it. But if a Republican actually said, In zeroing out the penalty we are trying to take down the rest of the ACA and we think that's what we're doing, then I suppose that could be analogous. I don't think there are statements that are that specific that you can find.

But I would also say -- I mean, it would be -- if that was the intent, if the intent was to make one small change that then someone could sue over and bring down the rest of the ACA, that would raise very serious questions about political accountability in our democracy. You know, it would be almost as if -- for example, if Democrats come to power and they wish to repeal the Tax Cuts and Jobs Act but they don't have the votes to do it, they only have the votes to make one small change, which someone then sues and says the entirety has to be thrown out, politicians could avoid making tough choices, taking tough votes, and the political accountability that is demanded in our democracy would be, I think, very troubling. If there are were actually any demonstrable intent on a Republican to zero it out because they thought then some later court, without them having to take the tough vote to do it, would pull down those other provisions as well, I think we

would be rightly troubled by that.

THE COURT: Let me ask you along those lines, if the legal proposition that Congress acts with knowledge of Supreme Court interpretations applies here, why wouldn't -- why wouldn't the proper inference from zeroing out the tax be that Congress knew that the only saving of the ACA in *NIFB* was that the Supreme Court fairly read the penalty as a tax, for the reasons we have talked about, Congress knew that, and so Congress zeroed out the tax number and the percentage and eliminated the ability to fairly read as a tax, therefore causing the ACA or at least the mandate to fall?

MR. ELIAS: Well, number one, I'm not aware of statements by Republicans who voted for this bill --

THE COURT: No, no, no. I'm sorry. I've left that.

MR. ELIAS: I'm sorry.

THE COURT: You've answered it very helpfully to me and I appreciate it.

My question to you is if there is a legal proposition that says Congress is presumed to act with knowledge of Supreme Court interpretations, why wouldn't the inference to be drawn from zeroing out the tax be that they knew that the only way the mandate was upheld was because it could -- a dollar figure could be fairly read as a tax, we're going to eliminate that, and so that eliminates the ability to fairly read it as a tax. Why isn't that the proper intent to be

drawn from the 2017 enactment that you and the law professors that you mentioned, everybody focuses on the 2017 Congress? Why isn't that the proper inference to be drawn?

MR. ELIAS: I think that inference would presume that Congress was then knowingly making a federal statute unconstitutional, which would be I think troubling in and of itself. But even if -- and I certainly don't know of any extemporaneous evidence to suggest that that is, in fact, the case--that Republicans voting for this bill knew and believed that they were making § 5000A unconstitutional. If they were willingly doing that, that would I think raise the serious political accountability questions I just mentioned.

But I would even say on top of all of that, that still wouldn't change the severability analysis, which the severability analysis, even if the minimum coverage provision is becoming unconstitutional, the question is when the Congress last acted that made this change to 5000A, what would they have wanted, and when everyone who voted for the bill said, We don't want to change anything else, we're not harming people with pre-existing conditions, then presumably if it knows about *NIFB* then it knows about severability law, and if Congress acted with knowing about severability principles, then it would know all these statements about what it's intending are, in fact, going to govern any future legal challenge and would require severing the rest of the ACA from

just the mandate, because that's what Congress said -- I mean, that's not exactly what they said, but they said, We want to preserve everything else and that's what we're doing here, and they would know that severability law would govern that outcome as well.

THE COURT: One last question. I'm sorry to keep you up here so long, but let me just ask you, you mentioned in your presentation that the -- part of the reason we know what Congress intended was because Congress hadn't repealed the provisions and they tried several times.

Is there legal authority that supports the proposition that an Article III judge in conducting statutory interpretation looks to what Congress did not do?

MR. ELIAS: I think that this is -- I think there is authority to looking toward legislative intent, such as that that we cited. I think it is an unusual situation to look at what Congress did not do, but it's also a highly unusual situation presented here where Congress made one amendment to a pre-existing statute and otherwise left everything else in tact.

So I think that as a practical matter when the courts discuss over and over again what could Congress have intended -- would Congress have wanted to keep what's left of its statute if I couldn't have this one through provision two, it's our position that that has to be true, we know that's

true because that's exactly what Congress did. It's not this hypothetical inquiry which can be very nebulous, as Justice Thomas talks about, into what could Congress have wanted. If in this highly unusual and anomalous situation Congress made one small tweak and did nothing else, that action alone, both action and inaction in combination, definitively speaks to what Congress wanted, and so there is no counterfactual hypothetical inquiry that -- into Congressional intent.

We think that has to be -- that has to be the correct way to understand *Ayotte* and *Booker* and all of these Supreme Court cases that say you can't -- a court cannot impose a remedy that contravenes the intent of Congress; that that is the logical outcropping of those statements, and that this case in this respect is actually simpler than every other severability case cited by the parties.

THE COURT: If that's the case and they just simply had to do that, why didn't they just simply strike through those provisions of (2)(i) that Justice Ginsburg and Justice Roberts and the joint dissent that *King versus Burwell* so heavily relied on?

MR. ELIAS: I don't think --

THE COURT: In other words, to make their intent clear in the text of the 2017 statute as opposed to us having to wonder under 2017 -- you're saying it's counterfactual, and I'm asking you why is it counterfactual? They left those

provisions in place and they say what they say and Congress passed them and the President signed them, so why is it counterfactual?

MR. ELIAS: I'm sorry. I had a point and I momentarily lost it.

THE COURT: That's all right.

MR. ELIAS: Your Honor, the -- I think the simple answer to your question is that short of completely repealing a prior law on the books, Congress never goes back to revoke legislative findings. There would be no need to. I know of no instance--and we did so some research into this--where a later Congress would go back and deliberately repeal legislative findings made by a different Congress at an earlier moment in time. And number one, so that's why there would never be any need to do it; and, number two, they couldn't do that because they were acting through the budget reconciliation process. They didn't have the votes to pass legislation or to amend legislation. They only have the votes to act in budget reconciliation, which requires only a bare majority in the Senate and not a super majority. So it was literally impossible for them to do such a thing.

THE COURT: If that's true, though, then those textual findings remain. If they were unable to repeal them numbers-wise, those textual findings remain; and ignoring those findings, whether they have ever done it or not, I don't

know, but I take your word for it that you weren't able to find any, but bottom line, they remain, they continue to exist, if I were to ignore them, wouldn't that violate the doctrine that implied repeals are disfavored?

MR. ELIAS: No, Your Honor, both because those findings are not actually part of the operative statute, but more importantly and most fundamentally, those are findings made by a different Congress in relation to a different statute made at a different moment in time talking about the creating of markets. I mean, obviously Congress in 2017 knows the markets have been created; that this adverse selection concern is no longer -- in the current reality that we live in, in the current universe that we operate in, this is no longer a concern whatever may have been true in theory in 2010. But most fundamentally, a different Congress passed a different of § 5000A, and that is what those findings speak to.

This Congress 2017, this Congress amended that section, and what they intended to do when they amended it we strongly feel is the only appropriate indicator of legislative intent.

And just to reiterate, in budget reconciliation there was literally -- it would literally have been impossible for Congress to repeal those findings, but it would never have had any need to under the course of its business.

THE COURT: Thank you very much.

MR. ELIAS: Thank you so much, Your Honor.

THE COURT: Follow-up with the federal government as well.

What is the federal government's take on the statute I need to look at to determine the second prong of the *Free Enterprise* test on severability--the first prong, does it operate in a manner consistent with Congress; and the second prong is would that Congress have preferred the truncated version versus no version of all, or words to that effect? What's your view on that?

MR. SHUMATE: Our view, Your Honor, is that the Court looks to the enacting Congress, so at this case it would be the 2010 Congress, because the question for the Court to decide is would Congress have enacted these provisions had it known that the unconstitutional part had fallen out. And so the only Congress that enacted the other provisions of the ACA--and let's take, for example, guaranteed issue and community rating--was the Congress in 2010.

But ultimately I think this is really an academic debate for the point that you were discussing with my colleague from California, is that the text of the statute remains the same from 2010 to 2017. (2)(I) of the findings continues to say that the individual mandate is essential to the operation of community rate and guaranteed issue provisions. Congress did not change those findings in 2017.

The only thing that we know for sure about Congress' intent in 2017, I think it's undisputed, is that Congress wanted to pass a tax cut. That's all we know. Congress did not change the language in § 5000A(a) requiring individuals to purchase health insurance, and they didn't change the findings in section (2)(I).

THE COURT: What is your view on the idea that in 2019 and beyond people will continue to pay into the Treasury money based upon the previous year's mandates; therefore, under the three prongs of *NIFB* there is still some revenue being generated and paid into the Treasury because of the penalty and, therefore, that's sufficient to invoke Congress' taxing power and then, therefore, save the individual mandate?

MR. SHUMATE: That revenue, Your Honor, would be associated with the tax penalty as of this current year 2018. So the fact that revenue may trickle in in 2019 and '20 doesn't change the fact that as of 2019 § 5000A(c) will not generate any revenue for the United States as of 2019 and going forward. So I don't think that's a valid argument that would allow the Court to rely on the taxing power to save the mandate again, because as of next year the mandate will no longer generate any revenue for the United States because of the zero penalty.

THE COURT: And so it's your view that the proper focus as to whether this is a tax or not is whether the taxing

power is being operated at the time the mandate is being imposed?

MR. SHUMATE: I think that's right, Your Honor. You would look at 2019 and years going forward.

THE COURT: Do you believe -- just the same sort of question. Do you believe that the severability framework that the joint dissent outlines--just the framework; I know you don't agree with the outcome, but just the framework--is that the proper framework to consider this question in this case?

MR. SHUMATE: I do agree that's the proper framework, and my colleague from Wisconsin I think fairly summarized that test. I don't think that's all that different from what the Court applied in the *Murphy* case just a few months ago, Your Honor. So yes, I believe that's the proper framework.

THE COURT: In Footnote 3 of your brief when addressing the severability of the provisions you don't agree should be severable, you say that that would be improper, didn't the joint -- do you disagree with the joint dissent's resolution of this? In other words, they sort of dismissed that argument in a sentence or two with even a paren site in the middle of the sentence.

MR. SHUMATE: On the standing question?

THE COURT: Yes. On the other provisions. Right? I mean, they -- clearly they talk about pre-existing

condition, the community rate, and guarantee issue, but then they go into an analysis of what the Plaintiffs call in their brief the four major provisions--taxes and the exchanges and those things. And it looked like you-all, the Department, raised that issue, then the joint dissent those four justices dismissed it. You believe that's a wrong interpretation by those four justices?

MR. SHUMATE: I think the Supreme Court has done different things in different cases when addressing the severability question. In *NIFB* the dissenters didn't view it as necessary to find standing to challenge the other provisions in order to sever them, but in the *Prince* case that we cited in the footnote, the Court said there's really no need to consider the severability of other provisions that don't affect parties to the case.

And so to the extent the Court doesn't think that some of the Plaintiffs have standing to challenge other provisions beyond guaranteed issue and community rating, we don't think it would be appropriate for the Court to sever or to invalidate other provisions that none of the Plaintiffs have demonstrated standing to challenge.

So I think the dissenters were a little -- to me it's a little confusing about what they were saying in this case. They didn't fully grapple with *Prince* or other cases. But we would urge the Court to only limit any relief to Plaintiffs

who have demonstrated standing to challenge the particular provisions of ACA.

THE COURT: How would you answer, then, as it relates to the portion of the law that you and your colleagues on the -- at the Plaintiffs' table disagree on, how would you answer the *Free Enterprise* prong number two question? That is, what in the statutory text and the historical context exist in the 2010 version of the ACA indicates that the Congress would have preferred that what you believe would be a truncated version to no version at all?

MR. SHUMATE: I would first point the Court to the text of the findings, (2)(I) which expressly ties the mandate to guaranteed issue and community rating. As you mentioned earlier, pretty much all the justices in *NIFB* agree that those were closely intertwined. The United States agreed in *NIFB* that guaranteed issue and community rating could not function without the mandate, and again in *King versus Burwell*. But you don't have the same textual clues with respect to all the other parts of the ACA, and so that's why we would urge the Court to limit any severability to the three provisions we've identified.

THE COURT: And what do you -- and consistent with your position there, would you explain to me how in the textual findings when they talk about the individual responsibility requirement and the guaranteed issue, community

ratings, that they together with the other provisions of the act, why does that together with the other provisions of the act not tie them all together, in your view?

MR. SHUMATE: You mean tie the rest of the entire ACA?

THE COURT: Yes; on this question.

MR. SHUMATE: On this question. I think in subsection (2)(I) the Congress expressly is referring to the three provisions that we've identified, and it starts with under § 2704 and § 2705, there the Court -- excuse me. Congress is referring to guaranteed issue and community rating, and then they go on to say the individual mandate is essential to the operation of these provisions, because without them people would wait to buy health insurance until they get sick and they need it. So the mandate's essential to allowing the creation of these effective healthcare markets and to allow products that are guaranteed issue and that cover pre-existing conditions can be sold.

So I think the context of (2)(I) is expressly tied to these three provisions, and amongst all the findings I think those are the only three provisions that Congress was express about being closely intertwined in a way that the prior administration, and we agree, can't be separate and apart.

THE COURT: And so if I -- either when I get done or after December 15th, or January, whatever the dates are, if I

were to agree with the Department's position in this case, what would the -- what would I be enjoining? I only agree with your provision, your outcome, your preferred outcome.

MR. SHUMATE: If you agree with us, the Court should deny the preliminary injunction for all the equitable reasons. We can go to merits briefing and the Court could ultimately enter a final judgment next year. So if the question is what should a final judgment look like, it should be a declaratory judgment that the individual mandate is unconstitutional and cannot be severed from guaranteed issue and community rating. We think a declaratory judgment would be sufficient relief against the Government, and the Court wouldn't need to enter any type of judgment.

THE COURT: And why is that?

MR. SHUMATE: I think it's the Florida district court in the original ACA case only entered a declaratory judgment. The Court wouldn't need to enter an injunction. I think courts have said a declaratory judgment against the government is ordinarily sufficient relief; it operates in a similar manner as an injunction.

THE COURT: Because you're presumed to comply with --

MR. SHUMATE: The government is presumed to comply with the law, and the Court will then have a definitive interpretation of the statute that would advise the public

about their legal obligations.

THE COURT: Thank you.

MR. SHUMATE: I do have a couple of other points --

THE COURT: I'm going to let you-all have a final presentation, uninterrupted presentation before you leave since you've come so far.

MR. SHUMATE: Thank you, Your Honor.

MR. HENNEKE: Your Honor, do you have any questions for me?

THE COURT: I don't actually, so why don't you hold off on your final response, and then just let me ask some follow-up on severability questions, and then we can -- and then I'm going to give you-all a chance to make any final statement in response or just a final statement before you leave.

So let me just ask you, so you've heard my discussion with your colleague on the *Frost* case. What is your view on the application of the *Frost* case and this whole -- both considering whether the 2017 statute renders the earlier provisions unconstitutional both in terms of the constitutional interpretation and then whatever its application is in severability analysis?

MR. TSEYTLIN: Right, Your Honor. Thank you so much.

First of all, we think that *Frost* is completely

inapplicable. We think *Frost* is limited to the very special situation where the second legislation creates unconstitutional distinction. If you have an otherwise valid regime and then so you exempted, you know, all men from the regime or all women from the regime, *Frost* merely stands for the common sense proposition that because the new thing is an anathema, you just get rid of it.

Here -- it's very important to understand what the Supreme Court did in *NIFB*. My friend from California says, Well, the Supreme Court said everything that Congress did was a hundred percent constitutional and now there's a new problem that was created. That is emphatically not correct. What the Supreme Court said and what Chief Justice Roberts said in *NIFB* is that Congress in enacting the ACA tried to do something unconstitutional, they tried to enact an individual mandate under its Commerce Clause authority because Congress wrongly believed that it had the Commerce Clause power. What the Chief Justice said quite clearly is that, We're going to save Congress from its unconstitutional intent under constitutional avoidance.

What happens after the 2017 tax cut act is we're just back to what Congress meant to do in 2010, which is enact an unconstitutional mandate, and that Congress enacted (2)(I). It said that, We want to enact this mandate because we think we have Commerce Clause authority to enact that mandate; but

if the mandate falls, then, because of the essential finding, guaranteed issue and community rating, at minimum would also need to fall.

Now, as Your Honor has explored, no Congress subsequently has amended away that finding. That is, therefore, the conclusive intent of Congress. And while I do believe that if this Court was looking to choose between 2010 and 2017, you should choose 2010 because that is the constitutional culprit, if you will, but I think that there is no reason to go into that kind of temporal analysis when you have statutory text.

And I think we had a very important concession, I think a fatal concession from my friends from California, that the 2017 Congress could not, because it was acting under budget reconciliation, amend away the statutory finding.

I think the only way Your Honor could accept their position that the 2010 findings don't govern anymore is to find an implicit repeal of those findings. Implicit repeal is an indication that Congress actually repealed the thing and they just didn't say so explicitly. It's a very disfavored doctrine.

I think that doctrine is categorically unavailable, categorically unavailable when we have a concession that -- and I think an accurate concession that Congress, acting under the reconciliation rules that it was acting upon, couldn't have Explicitly repealed it. It would be quite bizarre and I

think an improper judicial overreach with respect to find an implicit repeal when the Congress was not acting under a regime that could have done that explicitly.

And it's also important to note that budget reconciliation is not some sort of internal operating procedure of the Senate. It's statutes. It's federal statutes also passed under presentment and signed by the President.

So since Congress could not have explicitly repealed the finding, and the only way to avoid the finding of being (unintelligible) governing is to find an implicit repeal. I think that closes off any avenue on that front. I think the Court just needs to confront the 2010 findings, the findings that remain in the law today just on their face.

THE COURT: All right. And I understand you think that under either statute the intent is evident. My question to you in response to your colleagues' argument that it is looking to the later enacted statute that the case authority directs judges to look to the Congress that enacted a provision that renders an earlier provision unconstitutional, that that's what the case authority directs me to look to. What's your response to that?

MR. TSEYTLIN: There is absolutely no authority that supports that proposition, Your Honor. In the first place, the very basics of bicameralism and presentments say that if

Congress enacts a law, including a finding, that's just the governing law of the United States.

But even more on point, in the *Murphy* case, the most recent case on severability, I think the Supreme Court used very specific language. The question is would the Congress that enacted the provision enact it again. The Congress that enacted the constitutionally offensive provision here is the 2010 Congress. So while we don't believe that this temporal judgment needs to be made because of the continuance of the findings, the findings weren't there and we had to do a more kind of gauzy inquiry like was done in the *Murphy* case, I think you need to -- the Court is bound to follow the Supreme Court's most recent instruction, which is *Murphy*, is to say would the Congress that enacted the provision--guaranteed issue, community rating--would have enacted them again.

And it wouldn't really make much sense to ask whether the 2017 Congress would have enacted community rating and guaranteed issue again. As my friend on the other side conceded, the 2017 Congress was acting under a very narrow budget reconciliation process. They couldn't have possibly enacted those provisions.

So to the extent the question is did the -- would the 2017 Congress have enacted guaranteed issue and community rating? Of course not. That would have been impossible under budget reconciliation. So even if you were to draw the *Murphy*

enactment test for severability into this and apply it to 2017, the answer would, of course, be the same.

THE COURT: I read in the Intervenor Defendants' brief when they talked about *Booker* being the most applicable Supreme Court case to follow in terms of severability, that they essentially said that this statute, like *Booker*--and I'm paraphrasing; this isn't a quote--but this statute like *Booker* was a complicated statute, it was a comprehensive statute, and so it was proper the leave the balance of the statute largely in place after excising the constitutional offensive provisions. And then *Booker* asks -- the remedy majority asked would Congress have preferred their remedy over no Sentencing Reform Act.

What's your response to how *Booker* applies? Is *Booker* factually applicable or outlier, or am I misreading it or are they misreading it?

MR. TSEYTLIN: *Booker* is certainly a complicated case. The Court rejected the dissent's suggestion of them grafting a jury trial right and that -- you know, that kind of thing would have been violative of Congressional intent, and I think that supports us.

Now, they made a different judgment on the other thing, but I think the two most applicable cases here, one is, of course, *NIFB*. We have four justices, now there are only four, that's not five, but I think they gave a definitive -- not a

definitive, but the most fulsome treatment of the exact question here. But I think the next most analogous case is really *Murphy*. That was a case -- that is the most recent case from the Supreme Court, and that was a case where the Court invalidated the heart of the bill, the requirement that the states keep the gambling prohibitions in line. And the Court then destroyed the entire act. Justice Ginsburg in her dissenting opinion used words that were almost identical to those used by my friend saying, Why would you do a wrecking operation; you should do a salvage job, and the Supreme Court rejected that.

And I would say the case is significantly easier in *Murphy*. In *Murphy* you didn't have an explicit finding like (2)(I), you didn't have a concession from two straight Departments of Justice from opposite parties of inseverability, and also in *Murphy* I think as the dissent -- the dissent has a pretty decent case to make that the statute would have worked just fine without the requirement that the states ban gambling. As the dissent explained, if the states banned gambling, then they're banned by the states. If they're not banned by the states, then the federal government would ban them. That's certainly a comprehensible scheme. The dissent made a pretty good case. But I think that the response was that's not the manner that Congress intended the statute to operate.

So even though the statute in *Murphy* would have operated just fine--by just fine, the policy outcomes would have been -- I think the policy outcomes under the dissent's view in *Murphy* would have been almost identical to the policy outcomes under the statute which is, of course, gambling would have remained banned. But the Supreme Court, nevertheless, rejected Justice Ginsburg's and Justice Breyer's suggestion and dissent and took down the whole statute because the statute wouldn't operate in the manner that Congress intended, even though the statute would have accomplished functionally the same ends under the dissent's view.

THE COURT: You mentioned that the joint dissent in *NIFB* gave the most comprehensive analysis of the severability issue to -- as it relates to the 2010 ACA. How am I to look at that today given that the majority in *NIFB* did sever the Medicaid expansion? So through the joint dissent, the joint dissent continually references the guaranteed issue, community rating, individual mandate, and the expansion, and so they're constantly referencing the expansion. Does that -- should that give me pause -- if I were to believe the joint dissent was correct in 2010, should that give me pause in 2017, given that the majority ruled that the expansion was severable and so that portion of the joint dissent is not an accurate representation of what the law became?

MR. TSEYTLIN: Your Honor, that's a very good point.

I think that is the one way in which the joint dissent doesn't fully graft onto situation today. I think that the way Your Honor should deal -- I mean, it's a joint dissent. It's just persuasive authority. I think Your Honor should take a look at whether the logic in the joint dissent would still apply if you just kind of, you know, blue penciled out their repeated reference to the Medicaid expansion which, of course, they would have invalidated.

My reading was that they would have reached the same decision, but you know, I could see how reasonable minds can differ. It certainly was referenced on almost every single time they mentioned the individual mandate, and I think with the significant caveat that, of course, the individual -- that the Medicaid expansion isn't mentioned in (2)(I). So to the extent that the joint dissent was relying upon (2)(I), and I think it was at least in some part, that stands on its own because, of course, the Medicaid expansion is not mentioned or even kind of tangentially referenced in (2)(I).

THE COURT: You mentioned blue pencil out. If -- what happens if in 2019 another Congress bumps the number back to $695, or whatever it is, or two and a half percent, what happens then? And relatedly, why was the act constitutional in *NIFB* if the tax hadn't -- if the shared responsibility payment hadn't been being made at that time?

MR. TSEYTLIN: Right Your Honor. If Congress

reenacts the tax, I think that the Chief Justice's opinion in *NFIB*, the avoidance interpretation would kick back in. You know, presumably on a hypothesis if Your Honor has entered a declaration or injunction --

THE REPORTER: I'm sorry. I'm having trouble hearing you. If you could speak up, please.

MR. TSEYTLIN: I'm sorry.

Presumably if Your Honor has entered the injunction that we have requested or a narrower injunction or a declaration, that would then need to be revised. I think this Court has -- and withdrawn, this Court has the authority to, of course, based on changed circumstances, you know, change of judgments on 60(b), and things of that sort.

Now, with regard to the delay of the individual mandate originally, I think the key point that the Supreme Court made on the taxing clause power is that Congress is authorized the collection of some revenue. The fact that the revenue isn't collected in the current year, it might be collected two years down the line, it's still Congress -- the question is what power is Congress using, and the power Congress is using there--assuming the Chief Justice's opinion was correct, as this Court must--is that it was using its power to collect taxes down the line.

Once it has repealed those taxes, then there is no money coming down the pike. Any speculation about a future Congress

enacting a new tax, of course they could enact a new tax. That would be a different law and that would require a constitutional analysis. I think my friends in California said the stroke of a pen they put the tax back into place. Well, with respect, the stroke of a pen is bicameralism and presentment. And if that occurs, there is a new law and there will be a new constitutional inquiry at that point, assuming that a case was brought before the Courts of the United States.

THE COURT: Okay. Very good. And I don't know if this goes to you or your colleagues there, but the issue of an injunction versus severing and entering a final judgment, which the federal government raised that as an issue and I sent out a supplemental order and you-all have responded essentially opposing it, why don't you address that either -- because it seems to me that either way, I deny your ruling, I grant your injunction, I grant a judgment and sever it out somehow, either way it's going to be available to be appealed immediately. I'm not even sure I would have to certify it on a 1292 basis, but maybe I should and maybe I would.

What is the difference? Why would it not be just as appropriate to say that the mandate is unconstitutional because there's no longer any taxing authority and -- but just say -- let's just say you agreed upon remedy, that I agree with that and, therefore, community rating and guaranteed

issue is gone? Why wouldn't I make that finding, sever it, and make a final judgment and then set a briefing schedule for the remainder of the issues?

MR. McCARTY: Yes, Your Honor. And certainly our position is that the appealability of the order, because of the importance of this question, is paramount. In fact, you know, whenever this Court issues its order, I would expect one of the two sides to appeal because, as we stated in our additional briefing, in this Court does not issue a preliminary injunction for any reason, that will essentially be a denial of our preliminary injunction. And obviously if it does, I would expect our friends on the other side to appeal. So I do think that that's paramount.

However, at the same time we've asked for an injunction because the ACA is unconstitutionally acting upon the states now, and courts have been quite clear that that sort of unconstitutional restriction on state sovereignty or that sort of violation of constitutional rights is generally held to be an irreparable harm. And in addition to that, there is irreparable harm that comes from the financial impact upon the states.

Now, there is a pragmatic approach that the Department of Justice presented to this Court and it said, Don't throw American healthcare markets into confusion. Well, I would suggest a couple of things.

One, if the Court restricts its injunction to only the 20 Plaintiff States and only guaranteed issue, community rating, and individual mandate, that does -- that compels no one to change anything. The insurers who are currently acting in the marketplace today can continue to offer the policies that they had generated and put forward for this year. However, states may begin to enact their own regulations, whether they be Massachusetts and the ACA-like provisions and, you know, certainly if the legislature of California wants to do that they are free to do it. Texas is also at that point free to begin making its own regulations. Insurance companies are free at that point to begin developing policies outside of the ACA restrictions of guaranteed issue and community rating.

So that -- in that instance, in that type of injunction, our position is that it does not throw the American healthcare insurance markets into any sort of chaos.

THE COURT: Thank you.

I would like to follow up with you on just one question as it relates to the Individual Plaintiffs, Mr. Henneke, and that is as it relates to your client, your colleague made the point that because you faced -- your clients faced zero consequence in 2019, they were not harmed, and your colleagues read from the *NIFB* opinion where the Chief Justice talked about the options that are available to an individual.

What is your response on the harm to your clients in

2019?

MR. HENNEKE: You know, our response, Your Honor, would be shall means shall. And in looking at *NIFB*, you know, the mandate, quote, "must be read as a command to buy insurance." That's at 574. My clients read that shall as mandatory, and look at the *Murphy* case where shall creates -- usually creates a mandate, not a liberty; and then in the *Valdez* Fifth Circuit case shall is mandatory in meaning, so that, you know, that obligation exists on them to purchase this product based on an unconstitutional obligation that's imposed on them, and they see that shall as not optional.

Now, you know, the other injuries that are caused to them are the continued injuries from the poor product, the poor healthcare, the failing services and increased costs, the Hobbesian choices that are faced under the current scheme and, of course, the lack of ability to obtain alternatives and yet comply with the law, which is their obligation as citizens to do so.

So, you know, it seems to present the argument, you know, from the other side may be somewhat analogous, you know, it's not a crime if you don't get caught, but I disagree, my clients disagree, and they take their obligation to follow the law very seriously and see the shall as meaning what it does.

THE COURT: Thank you.

THE COURT: Mr. McCarty, if I could just ask you to

address the *Ardoin* case --

MR. McCARTY: Sure.

THE COURT: -- if you would, in response to your colleagues' argument on that in the sense that there was no revenue going into the Treasury because ATF wasn't collecting the tax.

MR. McCARTY: Well, that case was, again--and I'll point actually to what Mr. Tseytlin said--the question did Congress exercise its taxing authority. In 2019 and forward in this case, Congress will have eliminated what was construed to be its taxing authority by Congressional act. Here in *Ardoin* there were two questions. There was a question of was there really a tax anymore because the ATF wasn't collecting it and it was on the sale of illegal weapons.

The important and crucial distinction in that case was that Congress had done nothing to repeal the tax. The tax was still on the books. It was exercising its authority. The ATF had chosen to refuse to collect the tax. And so it wasn't a question entirely of whether any revenue was coming in off the tax but, instead, whether Congress' taxing authority, according to its own legislative enactment, was still in place, and that's the primary difference.

THE COURT: Very good.

Let me do this while you're there. I wanted to give everyone a chance to present any final remarks they would like

to present in an uninterrupted fashion; don't feel obligated to, but in an uninterrupted fashion. And so since you led us off, I would start with you.

MR. McCARTY: Sure. Thank you so much, Your Honor.

I will not belabor points that I think we've discussed in a fulsome way today, but I do want to raise one issue concerning Intervening Defendants' arguments concerning state standing.

First and foremost, if we look at their responsive brief to our motion for preliminary injunction, there is essentially no discussion that the states don't have standing. And, in fact, if you look at their supplemental briefing on the question of whether this Court should convert this to a motion for summary judgment, they said, Well, you know, we want to be able to argue additional things, including standing.

In the face of no challenge to the state standing, this Court is more than free to rely upon the well-pleaded facts. And in our factual statements and in our declarations, several states make the point that these increased -- or the coercive effect of the individual mandate increases their healthcare roles, be they state and employee benefit roles or be they Medicaid roles. So that's first.

And secondly, related to standing, they have never addressed, either in their briefing or before the Court today, the infringement upon state sovereignty. And the issue is not

merely whether they believe the effects upon state sovereignty come from what they believe are severable provisions and we say are unseverable. The question instead really is whether the individual mandate itself is consistent with or preempts the state's sovereign ability to make its own choices about regulatory healthcare.

And I would suggest that this not a case where Texas didn't speak, for instance, on the issue of healthcare and whether there should be an individual mandate. Texas had a fulsome regulatory scheme in place and it lacked an individual mandate. Therefore, Congress' demand that there be an individual mandate stands and it stands in contrast to Texas' ability not to have that in place.

I would say that they talked a great deal about the idea that there is no compulsion, there is no real true mandate now because the tax is eliminated and, therefore, this could be upheld under Congress' Commerce Clause authority because there is no enforceable mandate. But that quote and that reference to Justice Roberts and his opinion that they could either buy insurance or pay the tax was in the context of his savings construction.

And there's an interesting quote later in the opinion by Chief Justice Roberts where he says this: "Justice Ginsburg questions the necessity of rejecting the government's commerce power argument given that § 5000A can be upheld under the

taxing power, but the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question."

Your Honor, if there's nothing further from the Court, I'm willing to pass the baton.

THE COURT: Thank you.

MR. TSEYTLIN: Thank you, Your Honor.

First, a couple of responses to questions that you might have asked other parties. You asked my friends from California whether there's any proposition -- any support for the proposition that failure to enact is somehow irrelevant to the Court's interpretation.

As we pointed out in Footnote 12 of your reply brief, the Supreme Court has specifically rejected reliance on anything like that. We cite there the *Pension Benefit Guaranty Corporation* case, *United States versus Wise*, there is a bunch of other cases that say that, so that's off the table. Their reliance on that is foreclosed by binding Supreme Court precedent.

Your Honor asked the United States about their footnote referring to standing on provisions that -- on other provisions that no one has tried to establish standing upon. They relied upon *Prince*. *Prince* I think is better read as a

prudential doctrine. The *NIFB* dissent is exactly correct on this point. They cite the *Williams versus Standard Oil* case. Now, that's an old case from the 1920s, but in that case it was the same kind of deal--the heart of the statute the price fixing was invalidated, and the Court went on the strike the other provisions. And the Supreme Court had no problem, even though there was no one that tried to establish standing on those provisions. And that's a governing case from the United States Supreme Court, so I think that kind of forecloses that issue. I think the dissent is entirely correct about that.

You know, another point that Your Honor was making with my friends of the United States is that there is -- you said by hypothesis there is not statutory text or as clear statutory text beyond guaranteed issue and community rating. I grant that for some of the provisions that I discussed I was more talking about the inferences, like the kind of inferences the Supreme Court made in *Murphy*. But I would say that if Your Honor was inclined to issue relief from with regard to guaranteed issue and community rating, I would ask Your Honor to also strongly consider adding the other insurance regulations which are of a very similar character to guaranteed issue and community rating, and they are I think fairly referenced also in (2)(I) when Congress says improved insurance products.

So I would -- while our primary position is that the

Court should strike down the ACA, if this Court was looking for the more limited position the United States articulated, I would strongly urge this Court to at least consider adding within guaranteed issue and community rating those other insurance regulations.

And if this Court were to issue that kind of injunction against guaranteed issue, individual mandate, community rating, and the other insurance regulations, that also could properly be limited to the 20 states, because all of those rules apply with regard to our own insurance markets. They would allow us to decide where products are sold within our states, as we had been doing before the ACA, and it wouldn't have any of the negative effects that my friends on the other side are concerned about.

One more point on the merits of severability. You asked my friends on the other side whether the United States made a mistake in 2010 in making that concession. I just want to point out in Footnote 2 on page 3 of California's and I think all of the states that are currently joined in the brief before the United States Supreme Court, those states specifically declined to contest that concession, so it's a pretty stark change in position now for them to be saying seven years later, Oh, the United States was wrong and the Eleventh Circuit was correct.

The Eleventh Circuit, with respect, was clearly

incorrect. The Eleventh Circuit said there was no textual cross reference between community rating, guaranteed issue, and the mandate. (2)(I) is that cross reference. I think the patent weakness of the Eleventh Circuit decision, with respect, has shown most clearly by the fact that the United States, the Obama Administration, the foremost offender of the Affordable Care Act, did not on appeal to the United States Supreme Court defend that position. So I think that shows the patent weakness of the Eleventh Circuit decision, along with how clear it is on the statutory text.

And in closing I'd just like to make a point a little off severability, but I think I need to say it on behalf of the people of Wisconsin. I heard some comments from my friends on the other side that suggested that there was some sort of, you know, disastrous healthscape before the ACA. In Wisconsin we were very proud of our high-risk pools that were nationally renowned that took care of people with pre-existing conditions. We had a variety of risk created products that were sold outside of those risk pools that were highly successful. We would better protect the people of Wisconsin once the constitutional individual mandate and the several provisions are removed, and we would ask Your Honor to strike down the entire ACA; but if not, at least guaranteed issue, community rating, the individual mandate, and also those other insurance regulations, to allow us to -- Wisconsin and the

other states to move back to the world before the ACA.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Henneke?

MR. HENNEKE: I do not, Your Honor.

THE COURT: Very good.

MR. SHUMATE: Thank you, Your Honor.

If I may, I'd like to make just two brief points in rebuttal; the first to respond to California's argument that the Court should invalidate the tax cut in 2017 if the Court finds the mandate to be unconstitutional; and second, I have a few other points on the remedy question that I'd like to emphasize.

So first on the question of what the Court should invalidate if it finds the mandate is unconstitutional, the Court should not in any respect invalidate the 2017 tax cut that Congress enacted for four quick reasons.

First, there is no claim in this case by any party that the Tax Cut and Jobs Act is unconstitutional. Congress reduces taxes all the time. There's nothing unconstitutional about that.

Second, the only provision that the Plaintiffs in this case are challenging as unconstitutional is the individual mandate in § 5000A(a) of the ACA, and that is the provision which, if the Court finds unconstitutional, triggers the

severability analysis. And as we've discussed today, the question is would Congress have enacted other provisions of the ACA if the individual mandate in § 5000A(a) were declared unconstitutional. And we've discussed what the answer should be, but in no respect should the answer be that the tax cut is unconstitutional.

Third, the only thing I think we can say for sure and that is undisputed is that Congress intended to reduce taxes for Americans in the Tax Cut and Jobs Act. So if the question in the severability analysis is what did Congress intend, I think that is the one thing that it is undisputed, that we know for sure, that Congress intended to reduce taxes. And I think it would turn severability analysis on its head if the Court were to overturn the one thing that we know for sure that Congress intended to do.

And then fourth, I'd like to refer the Court to page 25 of the dissenting opinion in *NIFB*. It is the slip opinion, page 25. And I'd just like to read one quote that I think is apt on this very question. The dissenters said, quote, "Imposing a tax through judicial legislation inverts the constitutional scheme and places the power to tax in the branch of government least accountable to the citizenry," end quote. I think that's exact what California would be asking the Court to do. To strike down a tax cut, the Court would be essentially imposing taxes on the American people, and that is

not something that a court should do. We should leave that to the people's elected representatives.

Finally, on the question of remedy, Your Honor, I'd like to kind of reiterate the points I made but elaborate just a little bit.

First of all, we think the Court should deny the motion for preliminary injunction for the reasons I stated earlier--that there could be a potential for chaos in the insurance markets if the Court were to enter a preliminary injunction at this stage of the year on the eve of the open enrollment period. I think we heard from the states, California and the other states, that there might be some variation when those open enrollment periods begin and end. I think that is a reason why we think supplemental briefing would be appropriate here to discuss what the impact of any injunction would look like, what the timing of that injunction would look like, and what the scope of any injunction should look like if the Court is inclined to grant any type of injunction at this period in the year.

I think we also heard from the Plaintiffs that perhaps it might not be disruptive to enter an injunction now, and perhaps the states could roll out insurance products that would be effective sooner rather than later. So I think that underscores why I think it would be appropriate for the Court to enter an order allowing the parties, say, 30 days to submit

any additional evidence or arguments on the scope of any remedy should the Court find any constitutional infirmity here.

And again, I want to also reiterate our point that I think a declaratory judgment would be appropriate against the United States here, and if the Court were inclined to do anything beyond enter declaratory judgment as to § 5000A(a), the Court should hold off on any injunction and allow us further briefing on the timing and the effect of any such injunction, because the last thing we want is for there to be chaos in the insurance markets and for people who currently have healthcare to lose that healthcare.

And finally, I just want to emphasize a point that the Department of Justice has made in a number of cases and I want to make sure the Court's aware, is that the Department of Justice strongly opposes any nationwide injunction. The Government has been briefing this in a number of cases. We think relief should be limited to the Plaintiffs in the case that have standing, and the relief should be limited to providing complete relief to the Plaintiffs in the case but not to other parties. So in this case we think complete relief could be granted to the Individual Plaintiffs in the case. Should the Court be inclined to enter any type of injunction, it should be limited to the Individual Plaintiffs in the case you feel that they are subject -- that are

continued to be subject to § 5000A(a), and leave it at that, Your Honor, and no go any broader than the Individual Plaintiffs.

I think that's all I have, Your Honor.

THE COURT: Thank you.

MR. SHUMATE: Thank you very much.

MR. ELIAS: Thank you, Your Honor.

There are several points I'd like to respond to and hopefully in a coherent fashion.

I will start with standing. Standing can be raised at any time, and the Court always has a *sua sponte* duty to consider it. And the Plaintiffs fundamentally bear the burden of proving standing. And what they cannot do, Your Honor, is bootstrap harm from other unchallenged provisions of the ACA to the standing analysis.

All of the harms that they talk about come from other parts of the ACA, not the individual mandate, not the minimum coverage provision. Those harms -- if they disagree with the employer mandate, they should challenge the constitutionality of it. They did not. And that's what the *National Federation of the Blind* Fifth Circuit says. You can't bootstrap harm purportedly flowing from other unchallenged provisions. That is not permissible.

The Plaintiffs have to show that § 5000A, the only provision being challenged, personally harms them. For the

individual Plaintiffs, that is disposed of with the language in *NIFB*. If you have a choice this year to pay $695 or get insurance, you have the choice next year to pay zero dollars or get insurance. The choice hasn't changed. And, you know, I think there's simply no way to square their position with the language within *NIFB*.

In terms of state sovereignty and all of the alleged burdens of the ACA, again that's bootstrapping harm from unchallenged provisions, which Article III does not permit. The only harm actually flowing from § 5000A that the states can point to is this contention that next year with a zero dollar penalty, some unidentified number of their residents will still believe they have to purchase insurance and will do so by applying for Medicaid and CHIP. Nothing in their declarations, in any of the CBO reports, says that--that individuals who reside in their states will erroneously believe they have to purchase insurance and will do so through Medicaid or CHIP. It is complete speculative. There is no harm to the Plaintiff States from this amendment to § 5000A.

In terms of severability, I'd like to make a couple of points.

First, my colleague from Wisconsin emphasizing the manner language, *NIFB* disposes of that notion. Right? Congress, when it enacted the ACA, intended for Medicaid expansion to be mandatory. It intended for every state in the country to be

compelled to expand Medicaid. And the Supreme Court said, No, we're striking that down. That is unconstitutional. But of course Congress would have intended it to be optional. So taken literally, the Court could not have come to the result in *NIFB* that it came to if they're arguing about the manner was correct. It clearly is not correct as a matter of law.

We are not arguing that any implicit repeal of these legislative findings is required. You know, my colleague says, They've admitted that there weren't votes to repeal the findings. As a logical matter, if that's true, it must be equally true that there were not the votes to strike down community rating and guaranteed issue or make any other change in the ACA. So they can't have it both ways. If there weren't votes to take down the findings, there were no votes to change any other operative provision of the ACA.

And if I may, Your Honor, this is I think highlighted very directly by a letter that Senator Susan Collins wrote to Jeff Sessions, the Attorney General, about this, about this very case. And in that letter--we'd be happy to provide copies--she said, "The severability argument you outlined in your letter is focused on the wrong period of time. Severability should not be measured by Congress' intent in 2010 when the Affordable Care Act was passed into law, but rather by Congress' intent in 2017 when Congress amended it through the Tax Cuts and Jobs Act. It is implausible that

Congress intended protections for those with pre-existing conditions to stand or fall together with the individual mandate when Congress affirmatively eliminated the penalty while leaving these critical consumer protections in place. If Congress had intended to eliminate these consumer protections along with the individual mandate, it could have done so. It chose not to."

This reflects the simple reality, Your Honor, that Congress knows what the law is. They know is that this is -- it's a -- what they might have enacted on a blank slate in 2017 is not relevant. They know that the ACA is in place, and they are acting on that knowledge by changing one position and -- changing one provision and leaving everything else in tact.

So we think it is fundamentally misguided to suggest that severability must turn on the intent of a different Congress that acted seven years prior in passing a very different version of § 5000A.

A couple of other points, if I may, Your Honor.

First, on remedy, certainly we agree with the federal government that no preliminary injunction should issue. It should be denied and the parties should proceed to summary judgment, and the merits should be fully fleshed out, and then the Court should issue whatever declaratory judgment or relief at the end of that process.

But for all the reasons we addressed in our response to

the Court's request, we think moving to summary judgment at this time would be improper. And, in fact, I don't think it could happen because the Federal Defendants haven't actually answered the complaint in this case, so it would be very premature to do that.

The preliminary injunction, in addition to the reasons outlined by the federal government, even setting aside the legal merits for the moment, the equities in the public interest cannot possibly be served by such relief. It's not only the harm to the Intervenor States. It bears nothing that there would be significant harm to the residents in the Plaintiff States themselves. Thirty-nine million residents in the Plaintiff States risk losing coverage because they had pre-existing conditions. It's more than one in four Texans, one in three in West Virginia, Alabama, and Mississippi. They are at risk of losing coverage.

And we know millions have gained coverage because of these protections. At least 3.6 million, as the amicus briefs pointed out, 3.6 million Americans were only able to get affordable coverage after the ACA was enacted. All of those gains are at risk, including to the very residents. So at a minimum, when considering the harm, the public interest, and the equities, in addition to the harm to our states, the Court should consider the harm to the individuals who live within the Plaintiff States themselves.

We also note that there would be harm -- even from a more limited injunction that only applied to the Plaintiff States, there would still be harm to the Intervenor States. Based upon historical patterns, patients flock to states that have stronger consumer protections. This occurred in Washington State in the '90s and occurred most dramatically in Massachusetts in the late 2000s. So, for example, in 2009 after Massachusetts enacted what was the precursor to the Affordable Care Act, 43,000 out-of-state residents came to its state and received almost a billion dollars in medical care. That's an inevitable reality. When people have very, very serious pre-existing conditions, they are going to continue to seek care whether they're insurable or not. It's only going to be uncompensated care, and that's going to occur more likely than states that have stronger consumer protections if a two-tiered system comes into play.

And this is especially likely in this case given how many Plaintiff States border the Defendant States. Illinois borders Wisconsin, Indiana, Mississippi [sic], and Kentucky. Minnesota borders North and South Dakota and Wisconsin. Kentucky borders Missouri, Tennessee, and West Virginia. And, of course, California borders Arizona.

It's also important to note that the risks go beyond just community rating and guaranteed issue. For example, it would be difficult to administer the tax credits that are an

essential linchpin for low income consumers if community rating and guaranteed issue were struck down. Tax credits are premised off the second lowest cost silver plan available in a geographic area. If there's no community rating and guaranteed issue, someone like me who has a history of cancer would have to get quotes from three different insurance companies. I would have to be medically underwritten by three different insurance companies, and the second lowest quote I get, my own my tax credit would be premised off of that.

It would be difficult, maybe not impossible, but it would be extremely difficult to administer tax credits in any way, shape, or form if community rating and guaranteed issue go by the wayside. The federal government in particular has not explained to the Court how risk adjustment tax credits or other parts of the ACA would function in practice if community rating and guaranteed issue were struck down.

Risk judgment is another point on this. You know, risk judgment transfers funds from plans with healthier enrollees to those with lower risk enrollees. And again, that's another key part of the provision that it would be challenging to see how that could function in practice without community rating and guaranteed issue. These are such critical and important consumer protections that they touch other insurance industry reforms.

And, of course, there would be a dramatic rise in

uncompensated care costs, and California and other states would have less healthy risk pools because, as I noted, people with cancer and heart disease, they still need care, and if they're uninsurable, or if insurance companies can revert back to the practice where they could exclude coverage of pre-existing conditions, so I could be denied coverage for cancer even if I otherwise had an affordable premium, people will still seek that coverage and it will end up falling on hospitals and ultimately state taxpayers to fund all of that uncompensated care when these folks become uninsurable.

So for sure for purposes of what's before the Court today, it cannot possibly be in the public interest to strike down these critical protections that millions and millions of Americans have come to rely upon, including millions of Americans in the Plaintiff States themselves.

So with that, Your Honor, I think we would respectfully submit that the Court should deny the preliminary injunction.

We would be happy to move to expedited cross summary judgment motions in order to have the merits of the legal issues, divorce from the equities and the harm, the public interest, the merits of those issues adjudicated in a comprehensive and complete fashion.

Thank you.

THE COURT: Thank you.

Did you have anything else?

Anything else from any of this others?

Okay. Well, you've given me all a great deal to think about. I appreciate very much you-all coming here and spending your time preparing for and attending this hearing. And I will think about what you-all have said and try to get something out just as quickly as I can. Thank you.

(The proceedings were concluded at 12:40 p.m.)

I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER. I FURTHER CERTIFY THAT THE TRANSCRIPT FEES FORMAT COMPLY WITH THOSE PRESCRIBED BY THE COURT AND THE JUDICIAL CONFERENCE OF THE UNITED STATES.

S/Shawn McRoberts 09/06/2018

_____DATE_____

SHAWN McROBERTS, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER