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1 THE COURT: Please be seated.

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

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

5 THE COURT: Thank you, Mr. McCarty.

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

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

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

12 Anyone else here for the Plaintiffs? Nobody else?

13 Okay. Then who is here for the federal government?

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

16 THE COURT: Thank you.

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

19 THE COURT: Okay. Very good.

20 Now, here is here for the Intervenor Defendants?

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

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

25 THE COURT: Great. Thank you.

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

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

5 THE COURT: Thank you for being here as well.
6 Yes?

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

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

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

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

14 Anyone else?

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

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

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

25 THE COURT: Very good. Thank you.

1 MR. McCARTY: Thank you.

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

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

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

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

25 The core of the ACA is the individual mandate, guaranteed

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

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

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

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

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

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

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

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

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

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

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

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

1 at 169.

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

9 Related to the access of public health roles, the Fifth
10 Circuit has recognized that unrecoverable funds constitute
11 irreparable harm. That's in *Paulsson*, 529 F.3d at 312, and
12 Justice Scalia recognized the same in *Thunder Basin*, 510 U.S.
13 320 [sic].

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

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

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

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

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

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

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

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

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

14 First, if this Court issues an injunction as to only the
15 20 Plaintiff States, certainly the Intervening States and
16 non-participating states won't be affected at all. In fact,
17 there's no harm to balance.

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

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

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

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

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

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

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

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

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

13 Intervenors also suggest that the penalty would raise
14 revenue ad infinitum because taxpayers who incur the penalty
15 in 2018 and earlier will continue to pay that penalty in 2019
16 and the foreseeable and maybe unforeseeable future, but there
17 is no legal authority to support the idea that collection of a
18 prior tax is a continuation of the tax itself. Congress ended
19 the tax. It didn't suspend it. The fact is that not a single
20 cent of new tax revenue will be raised by the penalty post
21 2018. There is no more tax providing constitutional cover for
22 the individual mandate.

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

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

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

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

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

24 The Intervenor's argument that the individual mandate
25 does not impact the Plaintiff States ignores, as I mentioned

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

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

16 The Intervening States did not even attempt to address
17 the Plaintiff States' loss of their sovereign authority over
18 the insurance markets. As the Supreme Court said, this is not
19 only to the states' benefit, but also to citizens having the
20 interest in the diffusion of legislative power. And
21 interestingly enough, the Supreme Court said that in *NIFB* at
22 567 U.S. at 536.

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

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

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

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

9 THE COURT: Thank you.

10 MR. TSEYTLIN: Thank you, Your Honor.

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

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

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

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

12 Now, moving to guaranteed issue and community rating, the
13 statutory text already answers the question of severability,
14 which is that community rating and guarantee issue are not
15 severable from the individual mandate; and again, as was
16 conceded by the Obama Administration's DOJ and now the Trump
17 Administration. Now, the statutory text I'm referring to is
18 42 U.S.C. § 18091 (2)(I). And I will refer to this in my
19 presentation as subsection (2)(I).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Next, moving on to the subsidies. These are the
24 subsidies that Congress provided to those from between 100 and
25 400 percent to buy insurance products. Congress was providing

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

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

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

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

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

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

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

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

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

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

13 Thank you, Your Honor.

14 THE COURT: Thank you.

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

18 THE COURT: Nice to see you.

19 MR. HENNEKE: Thank you, Judge.

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

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

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

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

1 unconstitutional.

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

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

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

25 They all testified that in the absence of the Affordable

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

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

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

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

21 Thank you, sir.

22 THE COURT: Thank you.

23 MR. SHUMATE: Good morning, Your Honor.

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

25 MR. SHUMATE: May it please the Court. Brett

1 Shumate for the United States.

2 The United States has concluded that the Affordable Care
3 Act's individual mandate will be unconstitutional beginning in
4 2019. We also agree with the prior administration's legal
5 position in *NIFB* that the individual mandate, if it's declared
6 unconstitutional, cannot be severed from the guaranteed issue
7 and the community rating provisions of the ACA.

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

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

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

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

4 But next year the individual mandate will no longer have
5 the essential feature of a tax because it will no longer raise
6 revenue for the United States. In the Tax Cut and Jobs Act of
7 2017, congress reduced the tax penalty associated with the
8 mandate in § 5000A(c) to zero, but it left untouched the
9 requirement to purchase health insurance in § 5000A(a). As a
10 result, the Supreme Court's saving construction is no longer
11 available, and the requirement to purchase health insurance
12 must be declared unconstitutional under the holding in *NIFB*
13 that Congress does not have the power to require individuals
14 to engage in commerce.

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

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

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

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

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

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

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

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

13 Thank you, Your Honor.

14 THE COURT: Thank you.

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

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

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

21 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

1 they seek.

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

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

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

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

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

1 constitutional according to Supreme Court in *NIFB*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 We know that Congress intended to keep the rest of the
11 ACA in place when that is exactly what it did, when it amended
12 § 5000A last year and deliberately left the rest of the ACA
13 untouched.

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

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

1 remainder in tact.

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

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

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

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

25 So all of these precedents boil down to the simple

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

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

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

1 shared responsibility payment and change nothing else in the
2 ACA.

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

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

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

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

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

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

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

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

13 And even if it were somehow appropriate to consider the
14 intent of the Congress that passed an earlier version of
15 § 5000A, that Congress too would not have wanted wholesale
16 invalidation of this groundbreaking legislation just because a
17 later Congress reduced the shared responsibility payment to
18 zero.

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

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

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

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

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

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

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

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

25 The Court's highly unusual decision to strike down the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. ELIAS: I'm very sorry.

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

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

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

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

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

15 THE COURT: Thank you.

16 MS. PALMA: Good morning again, Your Honor.

17 THE COURT: Good morning.

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

20 THE COURT: Thank you for being here.

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

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

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

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

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

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

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

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

25 They cite to four Congressional budget or CBO reports,

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

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

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

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

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

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

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

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

1 injunction.

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

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

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

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

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

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

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

1 individuals.

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

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

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

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

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

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

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

1 Americans with pre-existing health conditions.

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

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

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

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

6 The federal government will also be harmed. In a 2015
7 report, the CBO acknowledged that a full repeal of the
8 Affordable Care Act will increase the budget deficit by
9 \$353 billion over ten years. Beyond those ten years,
10 repealing the ACA would cause budget deficits to grow rapidly
11 over time, averaging about \$3.5 trillion over the decade that
12 follows. In fact, the CBO in that report could not imagine
13 any scenario where repealing the Affordable Care Act did not
14 harm the long-term fiscal outlook of the United States.

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

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

25 Moreover, the American Health Insurance Plans, or AHIP

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

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

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

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

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

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

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

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

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

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

4 Before closing, Your Honor, I just wanted to take a
5 moment to address the suggestion by the Department of Justice
6 that the Court defer any preliminary injunction until after
7 open enrollment closes in mid December. Not all states' open
8 enrollment closes in December. California's closes January
9 15, Massachusetts closes January 23rd, and D.C.'s and New
10 York's closes January 31st.

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

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

20 THE COURT: Thank you.

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

25 You mentioned, at least as to the Individual Plaintiffs,

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

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

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

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

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

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

25 MS. PALMA: They are not compelled to purchase

1 insurance beginning in 2019.

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

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

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

13 MS. PALMA: Sure.

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

1 individual.

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

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

10 THE COURT: Okay.

11 MR. ELIAS: And then subdivision (b) says if you
12 don't do that, you pay a shared responsibility payment. And
13 then subdivision (c) says that payment is zero dollars in
14 2019.

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

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

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

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

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

8 THE COURT: Thank you.

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

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

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

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

1 dispositive, but it really pointed to the coterie of
2 characteristics that on the whole allowed it to understand the
3 shared responsibility penalty as a tax.

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

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

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

16 MR. ELIAS: Does Your Honor mean when they file in
17 2019 for 2018 or when they file for tax year 2019 in 2020.

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

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

1 shared responsibility payment at that point in time.

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

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

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

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

1 everyone.

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

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

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

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

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

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

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

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

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

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

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

1 of 5000A.

2 MR. ELIAS: I mean, this is not -- this case is
3 certainly not an affirmative challenge to that paragraph of
4 the Tax Cuts and Jobs Act, but that paragraph, that one
5 paragraph in this 185-page bill made a change to the
6 pre-existing § 5000A to (c) just by changing 2.35 percent and
7 \$695 to zero. So that one -- when it comes to remedy and when
8 it comes to what's the correct remedy, it's our position that
9 this was a pre-existing statutory provision that was 100
10 percent constitutional, and by changing (c) in this one
11 manner, that is, according to them, what makes 5000A as a
12 whole unconstitutional because that change to (c), according
13 to them, makes (a) unconstitutional within the same single
14 statutory provision. And so we believe that the correct
15 remedy -- no one has to affirmatively challenge the Tax Cuts
16 and Jobs Act for the correct remedy is to be, under *Frost*,
17 simply Xing out the amendment and reverting back to the prior
18 statutory scheme as it existed and was validated in *NIFB*.

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

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

1 Sentencing Guidelines mandatory --

2 THE COURT: Which was in the underlying provision.

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

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

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

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

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

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

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

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

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

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

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

1 guaranteed issue --

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

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

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

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

1 Congress.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 unconstitutional one.

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

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

16 MR. ELIAS: We do.

17 THE COURT: And why is that?

18 MR. ELIAS: Because --

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

25 MR. ELIAS: For two reasons, Your Honor.

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

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

10 MR. ELIAS: Of course not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 So I think we can't emphasize enough from our position,
7 Your Honor, that whatever Congress may have believed in 2010
8 in order to create these markets and marketplaces, Congress in
9 2017 made a categorically different judgment. And when
10 Congress decided that we can zero out the penalty and the
11 markets will remain stable and tax subsidies and pre-existing
12 conditions, everything that should remain in place, that was
13 what they intended to do. That's what they said over and over
14 they intended to do is change nothing else. So it is our
15 position that the Court should follow -- should be governed
16 by -- any severability analysis must be governed by that
17 expressly stated intent of Congress just last December.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 would be rightly troubled by that.

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

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

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

15 MR. ELIAS: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. ELIAS: I don't think --

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

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

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

6 THE COURT: That's all right.

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

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

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

5 MR. ELIAS: No, Your Honor, both because those
6 findings are not actually part of the operative statute, but
7 more importantly and most fundamentally, those are findings
8 made by a different Congress in relation to a different
9 statute made at a different moment in time talking about the
10 creating of markets. I mean, obviously Congress in 2017 knows
11 the markets have been created; that this adverse selection
12 concern is no longer -- in the current reality that we live
13 in, in the current universe that we operate in, this is no
14 longer a concern whatever may have been true in theory in
15 2010. But most fundamentally, a different Congress passed a
16 different version of § 5000A, and that is what those findings
17 speak to.

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

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

25 THE COURT: Thank you very much.

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

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

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

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

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

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

7 THE COURT: What is your view on the idea that in
8 2019 and beyond people will continue to pay into the Treasury
9 money based upon the previous year's mandates; therefore,
10 under the three prongs of *NIFB* there is still some revenue
11 being generated and paid into the Treasury because of the
12 penalty and, therefore, that's sufficient to invoke Congress'
13 taxing power and then, therefore, save the individual mandate?

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

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

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

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

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

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

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

23 MR. SHUMATE: On the standing question?

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Yes; on this question.

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

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

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

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

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

14 THE COURT: And why is that?

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

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

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

1 about their legal obligations.

2 THE COURT: Thank you.

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

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

7 MR. SHUMATE: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

11 And I think we had a very important concession, I think a
12 fatal concession from my friends from California, that the
13 2017 Congress could not, because it was acting under budget
14 reconciliation, amend away the statutory finding.

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

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

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

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

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

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

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

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

3 But even more on point, in the *Murphy* case, the most
4 recent case on severability, I think the Supreme Court used
5 very specific language. The question is would the Congress
6 that enacted the provision enact it again. The Congress that
7 enacted the constitutionally offensive provision here is the
8 2010 Congress. So while we don't believe that this temporal
9 judgment needs to be made because of the continuance of the
10 findings, the findings weren't there and we had to do a more
11 kind of gauzy inquiry like was done in the *Murphy* case, I
12 think you need to -- the Court is bound to follow the Supreme
13 Court's most recent instruction, which is *Murphy*, is to say
14 would the Congress that enacted the provision--guaranteed
15 issue, community rating--would have enacted them again.

16 And it wouldn't really make much sense to ask whether the
17 2017 Congress would have enacted community rating and
18 guaranteed issue again. As my friend on the other side
19 conceded, the 2017 Congress was acting under a very narrow
20 budget reconciliation process. They couldn't have possibly
21 enacted those provisions.

22 So to the extent the question is did the -- would the
23 2017 Congress have enacted guaranteed issue and community
24 rating? Of course not. That would have been impossible under
25 budget reconciliation. So even if you were to draw the *Murphy*

1 enactment test for severability into this and apply it to
2 2017, the answer would, of course, be the same.

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. TSEYTLIN: Right Your Honor. If Congress

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

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

7 MR. TSEYTLIN: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

17 THE COURT: Thank you.

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

25 What is your response on the harm to your clients in

1 2019?

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

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

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

24 THE COURT: Thank you.

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

1 address the *Ardoin* case --

2 MR. McCARTY: Sure.

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

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

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

23 THE COURT: Very good.

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

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

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

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

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

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

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

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

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

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

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

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

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

8 THE COURT: Thank you.

9 MR. TSEYTLIN: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

25 The Eleventh Circuit, with respect, was clearly

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

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

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

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 Mr. Henneke?

5 MR. HENNEKE: I do not, Your Honor.

6 THE COURT: Very good.

7 MR. SHUMATE: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Thank you.

6 MR. SHUMATE: Thank you very much.

7 MR. ELIAS: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

16 And if I may, Your Honor, this is I think highlighted
17 very directly by a letter that Senator Susan Collins wrote to
18 Jeff Sessions, the Attorney General, about this, about this
19 very case. And in that letter--we'd be happy to provide
20 copies--she said, "The severability argument you outlined in
21 your letter is focused on the wrong period of time.
22 Severability should not be measured by Congress' intent in
23 2010 when the Affordable Care Act was passed into law, but
24 rather by Congress' intent in 2017 when Congress amended it
25 through the Tax Cuts and Jobs Act. It is implausible that

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

8 This reflects the simple reality, Your Honor, that
9 Congress knows what the law is. They know is that this is
10 -- it's a -- what they might have enacted on a blank slate in
11 2017 is not relevant. They know that the ACA is in place, and
12 they are acting on that knowledge by changing one position and
13 -- changing one provision and leaving everything else in tact.

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

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

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

25 But for all the reasons we addressed in our response to

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

6 The preliminary injunction, in addition to the reasons
7 outlined by the federal government, even setting aside the
8 legal merits for the moment, the equities in the public
9 interest cannot possibly be served by such relief. It's not
10 only the harm to the Intervenor States. It bears noting that
11 there would be significant harm to the residents in the
12 Plaintiff States themselves. Thirty-nine million residents in
13 the Plaintiff States risk losing coverage because they had
14 pre-existing conditions. It's more than one in four Texans,
15 one in three in West Virginia, Alabama, and Mississippi. They
16 are at risk of losing coverage.

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

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

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

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

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

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

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

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

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

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

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

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

23 Thank you.

24 THE COURT: Thank you.

25 Did you have anything else?

1 Anything else from any of this others?

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

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

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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
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