

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION FOR COMMUNITY)	
AFFILIATED PLANS, ET AL.,)	CV No. 18-2133
)	
Plaintiffs,)	
)	Washington, D.C.
vs.)	October 26, 2018
)	3:00 p.m.
UNITED STATES)	
DEPARTMENT OF ENERGY, ET AL.,)	
)	
Defendants.)	
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TRANSCRIPT OF
MOTION FOR PRELIMINARY INJUNCTION HEARING PROCEEDINGS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

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1 PROCEEDINGS

2 DEPUTY CLERK: All rise. The United States
3 District Court for the District of Columbia is now in
4 session, the Honorable Richard J. Leon presiding. God save
5 the United States and this Honorable Court. Please be
6 seated and come to order.

7 Good afternoon, Your Honor. This afternoon, we
8 have Civil Case 18-2133, the Association for Community
9 Affiliated Plans, et al., versus the United States
10 Department of Treasury, et al.

11 Will counsel for the parties please approach the
12 lectern and identify yourselves for the record and the party
13 or parties that you represent, please.

14 MR. ROTHFELD: Charles Rothfeld, Mayer Brown,
15 representing the plaintiffs.

16 MR. PINCUS: Andrew Pincus, Mayer Brown, also
17 representing the plaintiffs. Good afternoon, Your Honor.

18 THE COURT: Welcome.

19 MR. MANDHANIA: I'm Ankur Mandhanian from
20 Mayer Brown also representing the plaintiffs.

21 THE COURT: Welcome.

22 MR. LYONS-BERG: Andrew Lyons-Berg, Mayer Brown,
23 also plaintiffs.

24 THE COURT: Welcome.

25 MS. ORLOFF: Good afternoon, Your Honor.

1 Serena Orloff for the government.

2 THE COURT: Welcome.

3 MR. HUMPHREYS: Bradley Humphreys for the
4 government, Your Honor.

5 MS. LIN: Jean Lin for the government, Your Honor.

6 THE COURT: Welcome.

7 All right, Counsel. We're here for argument in
8 this case. Each side will have a half hour. The plaintiff
9 will be able to reserve a portion of its time for rebuttal
10 argument. Decide as you wish how much you want to leave for
11 rebuttal.

12 You may proceed when you're ready.

13 MR. ROTHFELD: Thank you, Your Honor.

14 And if I may reserve five minutes for rebuttal?

15 THE COURT: Sure.

16 MR. ROTHFELD: Again, I'm Charles Rothfeld of
17 Mayer Brown representing the plaintiffs.

18 We are here seeking a preliminary injunction
19 against the enforcement of the Short-Term, Limited-Duration
20 Rule, which was issued by the departments here as an
21 interpretation of the Affordable Care Act.

22 We think -- we submit that the Rule is
23 inconsistent with the structure and purpose of the
24 Affordable Care Act, it can't be reconciled with the
25 statutory language that the Rule reports to interpret, and

1 that, therefore, the plaintiffs are likely to prevail on the
2 merits of this litigation.

3 THE COURT: Why isn't that just a correction to
4 return things to the way they were for most of the years
5 that this Rule existed?

6 MR. ROTHFELD: Well, I think it's not for a couple
7 reasons, Your Honor.

8 First of all, as a historical matter, before the
9 enactment of the Affordable Care Act, short-term,
10 limited-duration insurance was used exclusively as a
11 transactional form of coverage for people who were between
12 comprehensive plans. And it was a very limited form, very
13 limited aspect of the insurance market at that time, and so
14 people just did not regard it as a significant element of
15 the kind of insurance framework at the time that the ACA was
16 enacted.

17 I think in evidence of that is when the initial
18 rule that you referred to was promulgated in 1997. There
19 was no explanation given by the Departments as to why they
20 came up with the definition they used. There were just zero
21 comments, public comments, on that rule. It was just simply
22 not taken -- regarded as a very important part of the
23 process.

24 That changed dramatically with the issuance of the
25 new Rule, the 2018 Rule, because that Rule is designed,

1 clearly and expressly, to create --

2 THE COURT: You skipped over '16.

3 MR. ROTHFELD: Well --

4 THE COURT: They changed it.

5 The Administration that was in power in '16
6 changed the Rule from up to 12 months to up to 3, right?

7 MR. ROTHFELD: That's quite right.

8 THE COURT: That was an administrative decision
9 made by President Obama's administration that was the author
10 of the ACA, right?

11 MR. ROTHFELD: That's right, Your Honor.

12 THE COURT: And they did it to accommodate the
13 ACA, did they not?

14 MR. ROTHFELD: They did it because --

15 THE COURT: Think carefully before you answer that
16 question. Think carefully.

17 Was that not the purpose behind it?

18 MR. ROTHFELD: The purpose was to ensure that the
19 interpretation of the Rule was consistent with the statute
20 that it was designed to implement.

21 The reason that the Rule was issued in 2016 --
22 and, you're right, there was an interpretation issued in
23 that time -- but because -- after the enactment of the ACA,
24 for the first time, insurance companies began marketing
25 short-term, limited-duration policies as comprehensive plans

1 that were a substitute for ACA-compliant insurance, and
2 something that had never been used for before as a primary
3 form of insurance.

4 As a consequence of that, as the Departments
5 explained carefully in sort of reasoned explanation of 2016,
6 the reason that they did it at that time, the reason the
7 rule was issued in 2016, was because this change in the use
8 of STLDI was first -- because these policies are not subject
9 to the requirements of the Affordable Care Act, they were
10 allowing sort of inadequate forms of insurance to be
11 marketed.

12 Congress determined, in the ACA, that all forms of
13 insurance should have essential -- specified essential
14 benefits, and STLDI insurance is not subject to that, so
15 these new forms of insurance would be marketed without these
16 benefits.

17 In addition, and maybe more fundamentally, in
18 terms of the purposes of the Affordable Care Act, because
19 they're not subject -- these STLDI plans are not subject to
20 guaranteed issue, which means that people with pre-existing
21 conditions have to get insurance, they're not subject to
22 community rating, which means that insurance companies can't
23 discriminate against people who --

24 THE COURT: Why didn't they change it at the time
25 that they passed the ACA?

1 Why did they wait until '16?

2 MR. ROTHFELD: Because it had not been a problem
3 until that time.

4 Previously, as I say, before 2010, before the
5 enactment of the ACA, insurance had not marketed these plans
6 as comprehensive insurance.

7 THE COURT: It went into effect in '04, right?
8 Excuse me, in '14?

9 MR. ROTHFELD: The?

10 THE COURT: ACA?

11 MR. ROTHFELD: Yes.

12 THE COURT: Right.

13 So there was a two-year -- almost two years when
14 it was in place. They could have changed it sooner. They
15 didn't.

16 MR. ROTHFELD: Well, I think they -- as they
17 realized that there was a change in the marketing and the
18 use of these policies, they investigated it, they studied
19 it, they asked for public comment on it, and I think
20 reasonably promptly, as these things go, they issued the
21 rule in 2016.

22 THE COURT: So they were basically doing it to
23 sort of rejigger the relative competitiveness of the
24 marketplace?

25 MR. ROTHFELD: I think that they were concerned

1 that the use --

2 THE COURT: Agree or disagree?

3 MR. ROTHFELD: Well, I disagree to say that they
4 were rejiggered.

5 I think what they were trying to do was maintain
6 the marketplace as it existed at the time of the enactment
7 of the ACA and as Congress intended it to operate when it
8 enacted the ACA.

9 The problem with these policies is that because
10 they're not subject to community-rating guaranteed issue,
11 the central-benefits limitations, they can be marketed --
12 they can be much cheaper, and they can be marketed to people
13 who are young and who are healthy, and draw them out of the
14 ACA risk pool.

15 The theory of the ACA is that everybody should be
16 in the same -- a single risk pool. That's the thing that
17 makes economically feasibly guaranteed issue. That's what
18 makes it possible to cover people with pre-existing
19 conditions. It's not for that --

20 THE COURT: So they were doing it to help save the
21 ACA's conceptual framework?

22 MR. ROTHFELD: I think that's a fair way to put
23 it.

24 They were using -- they were doing it to conform
25 the meaning of short-term, limited-duration to its

1 historical use and to a use that was consistent with the
2 rest of the ACA in which this provision is embodied.

3 THE COURT: So they were concerned about the
4 competitive impact it would have on the ACA's insurance
5 framework?

6 MR. ROTHFELD: Yes, they were concerned about the
7 competitive impact it would have on companies, like
8 plaintiffs here, who were selling ACA-compliant plans.

9 They are subject to the ACA's requirements, and,
10 therefore, they have to cover people with pre-existing
11 conditions, they have to have community rating, and so their
12 rates are going to have to take into account of that.

13 The problem with the marketing of these STLDI
14 plans, as primary forms of insurance, is that they're going
15 to attract young, healthy -- they're going to be cheaper,
16 they're not going to be as comprehensive, they're going to
17 attract young, healthy people, they're going to draw them
18 out of the ACA-compliant plans.

19 THE COURT: Well, isn't it good that they be
20 insured?

21 Because there are a lot of people who fall into
22 the category you've just described, who are not buying
23 insurance right now: They're healthy, they're young, and
24 they're not -- because the penalty and the mandatory
25 requirement of joining in the ACA is no longer in existence.

1 They're not buying insurance.

2 At least this way, they'd have insurance. Isn't
3 that, from society's point of view, a net gain, for people
4 who aren't insured are getting insurance or would get
5 insurance?

6 MR. ROTHFELD: I'll give you two responses to
7 that, Your Honor.

8 First of all, Congress has thought about that.

9 Congress thought about that when it enacted the
10 ACA.

11 Congress thought about that when it changed the
12 ACA in 2017 to zero out the penalty that you referred to.

13 And Congress thought that the system that works
14 the best, the only way to treat --

15 Let me take a step back.

16 The theory of the ACA is that everybody should be
17 able to get adequate health insurance, and that includes
18 people with pre-existing conditions. In order -- and it
19 should be done through a private insurance system, not
20 through a government single-payer program.

21 If it's going to be done that way, then the risk
22 has to be spread universally; otherwise, it becomes
23 economically unfeasible to provide coverage to people with
24 pre-existing conditions.

25 And the more that you draw out the young and the

1 healthy people and put them into these separate plans and
2 you kind of segregate into kind of the high-risk, high-cost
3 plans, people who have pre-existing conditions, it becomes
4 economically impossible to cover them with insurance.

5 And so Congress made the determination that you're
6 talking about and said everybody -- there are tradeoffs, but
7 the tradeoff is we're all in this together, everybody has to
8 be in the single risk pool, and that they mean that you
9 got -- I'm sorry, Your Honor, I don't --

10 THE COURT: Don't we have enough data now to know
11 that people who are healthy and young have already taken
12 themselves out of the game; and that, by adopting this rule,
13 they would at least get back in the game, in the sense that
14 they would have insurance?

15 These people have voluntarily taken themselves out
16 of the game, which has had whatever impact it would have on
17 the spreading of risk, which is your, understandable,
18 concern.

19 These people are out, they took themselves out.

20 MR. ROTHFELD: I don't think that's correct,
21 Your Honor, as a factual matter.

22 Certainly, some people have chosen not to get
23 insurance at all.

24 THE COURT: Do we need to do discovery on that
25 issue?

1 MR. ROTHFELD: I don't think so.

2 I think that they're --

3 THE COURT: Why not?

4 MR. ROTHFELD: I don't think that that is a
5 factual question for the Court at this time, because I think
6 Congress has made this determination.

7 Congress said this is the structure we want to put
8 in place.

9 THE COURT: What if I'm right that the people who
10 would be attracted to this new rule would be people who have
11 already taken themselves out of the game?

12 So, as a result, the people who would be
13 benefiting from this new rule, taking it from up to 3 to up
14 to 12, would be people who are uninsured and who at least
15 would have insurance. Wouldn't that be a net gain for
16 society? If I'm right.

17 I'm giving you a hypothetical, obviously. But if
18 I'm right and if the facts bear me out, wouldn't that be a
19 net positive impact for society that people who are taking
20 themselves out and are uninsured would have insurance at
21 least?

22 MR. ROTHFELD: Well, I think that is the
23 determination that has to be made by Congress.

24 I mean, Congress --

25 THE COURT: Well, wait a minute. What about -- we

1 do fact-finding all the time around here.

2 MR. ROTHFELD: Well, but I don't think it's a
3 fact -- plus, I say, Your Honor, I think that Congress has
4 already established the structure in the ACA of how it wants
5 it to operate. It wants everybody who has insurance to be
6 in the pool, to be in the same pool.

7 THE COURT: Well, once they got rid of the
8 mandatory requirement, that's a re- -- they reconceptualized
9 the whole process, didn't they?

10 MR. ROTHFELD: I think not for two reasons,
11 Your Honor.

12 First off, I think, factually, the fact is, people
13 are continuing to buy insurance, they're continuing to buy
14 ACA-compliant insurance. They want insurance. And if the
15 kind of insurance that's available is ACA compliant --

16 THE COURT: Some people are.

17 MR. ROTHFELD: Many people are.

18 THE COURT: Yes.

19 MR. ROTHFELD: I think that that's --

20 THE COURT: People with pre-existing conditions
21 are.

22 MR. ROTHFELD: And I think -- and not only -- yes.

23 THE COURT: Which makes perfect sense; that makes
24 perfect sense.

25 But while that's going on on one track, on a

1 different track, people who are healthy and young and who
2 don't want to pay the cost that the insurance markets have
3 been steadily increasing, right, they don't want to pay
4 those costs, they've been taking themselves out of the game.

5 MR. ROTHFELD: Well, I --

6 THE COURT: They're not in the game; they're not
7 buying insurance.

8 MR. ROTHFELD: And I'll say two things in response
9 to that, Your Honor.

10 First of all, I think, factually, I have to
11 respectfully take issue.

12 Certainly, some people are not buying insurance,
13 but I think many people, many young, healthy people are
14 continuing to buy ACA-compliant insurance because that's
15 what's available and they want to be insured. So I take
16 issue with the factual premise of your statement.

17 But I think, more fundamentally, for present
18 purposes, you know, we're talking about the validity of a
19 regulation, whether or not it's consistent with the statute
20 that it's purporting to interpret.

21 Congress had in mind a particular vision, when it
22 enacted the ACA, of people -- of everybody buying minimally
23 adequate insurance, insurance that provides these benefits,
24 and that -- as we've been discussing, that people with
25 pre-existing conditions, community rating, all of that is

1 part of the package that Congress put in place.

2 And if the agencies now think that the system is
3 not working, for reasons that your hypothetical suggests --
4 and it's not for them to say, well, Congress, you missed --
5 you misunderstood, you mispredicted how this was going to
6 work, it's up to Congress to say, well, if the way -- the
7 thing that we enacted is wrong --

8 THE COURT: Well, let me tell you what.

9 If for 19 out of 21 years the rule was up to three
10 months, why wasn't it up to Congress to change it in the
11 fall of 2016 instead of for the Administration of Obama to
12 change it?

13 MR. ROTHFELD: Well, I think --

14 THE COURT: Why wasn't that the answer then?

15 Go back to Congress and let Congress decide to
16 increase it -- excuse me, decrease it --

17 MR. ROTHFELD: I think --

18 THE COURT: -- for three months?

19 MR. ROTHFELD: In 2016 -- the initial regulation
20 that was an interpretation of the HIPAA statute, which
21 initially promulgated in 1997 and then it became a final
22 rule in 2004 -- that's the rule that you're referring to --
23 when Congress enacted the ACA, it kind of put the STLDI
24 provision into the ACA, along with a lot of other
25 provisions, and I think the interpretation of 2016 was an

1 interpretation of the ACA use of the term.

2 The ACA has a lot of other things in it, which,
3 I think, make very clear Congress had in mind --

4 THE COURT: I'll take judicial notice of that.

5 MR. ROTHFELD: Well -- I'm sorry, Your Honor?

6 THE COURT: I'll take judicial notice of that.

7 MR. ROTHFELD: Well --

8 THE COURT: It has a lot of other things in it.
9 You talk about a hodgepodge.

10 MR. ROTHFELD: Well -- but among the things that
11 it has in it --

12 THE COURT: Right.

13 MR. ROTHFELD: -- are, A, another term that uses
14 the word short -- short coverage gap, which is defined in
15 the ACA as being 90 days, three months, which corresponds
16 with the 2016 rule.

17 THE COURT: Right.

18 MR. ROTHFELD: It also has special enrollment
19 provision requirements, which assure that nobody will go
20 without ACA-compliant coverage for more than 90 days.

21 And so the 90-day term that was chosen in 2016 is
22 consistent both with the short coverage gap language and
23 with the broader structure and operation of the ACA.

24 So it made perfect sense for the Departments to do
25 what they did in 2016, particularly when they were looking

1 at the purposes of the ACA and how they were being
2 frustrated by a broader use -- kind of the pre-ACA use --
3 pre-ACA length of the understanding of short-term,
4 limited-duration insurance.

5 So it made perfect sense, in 2016, for the
6 agencies to do what they did, it was completely consistent
7 and, I would say, compelled by the ACA. The problem now is
8 the attempt by the Departments to say, well, never mind, we
9 were wrong in 2016.

10 But I should say, in saying that they're changing
11 their minds -- they didn't say that the reasoning of the
12 2016 regulation was wrong. They said nothing about that.

13 In 2016, the reasoning was, you're drawing people
14 out of the single pool, and that's destructive to the system
15 as a whole. And you're giving people insurance which do not
16 provide the essential -- Congress -- the benefits that
17 Congress regarded as essential, and that is a bad thing, and
18 we should stop it.

19 The Departments now don't take issue with that at
20 all, they don't respond to that at all. They simply say,
21 well, this is not putting more people under insurance
22 coverage.

23 But that was not the purpose of the Rule in 2016.
24 The purpose of the rule was to avoid destruction of the ACA.

25 And so the problem now is that the Departments

1 have reversed course and have taken an approach, which is
2 simply inconsistent with the congressional theory of the
3 ACA.

4 I think no one denies -- I don't think the
5 Departments deny that when Congress enacted the ACA, it had
6 in mind this concept it was going to be a single-risk pool.

7 THE COURT: Well, the ACA that was adopted in 2010
8 is not the ACA that's in existence today, especially in
9 light of recent congressional decisions; is that correct?

10 MR. ROTHFELD: The only change that I think --

11 THE COURT: Well, it's a pretty substantial one
12 that the mandate is gone, is it not?

13 MR. ROTHFELD: Well -- I'll say yes.

14 THE COURT: Wouldn't you say that was the
15 linchpin? The keystone to the ACA was the
16 mandatory-compliance requirement and that there would be tax
17 penalties if you didn't comply?

18 MR. ROTHFELD: I --

19 THE COURT: Come on. Be candid, Counsel. Be
20 candid.

21 MR. ROTHFELD: I always try to be candid with the
22 Court.

23 THE COURT: Well, try to be here, because, you
24 know, that was pretty central, was it not?

25 MR. ROTHFELD: Well, at the time of the debate on

1 the ACA in 2010, it was thought to be an important part of
2 it. That certainly is true.

3 But I would say now, when Congress zeroed out the
4 penalty in 2017, it considered these questions, and it
5 was -- it got a significant amount of data suggesting that,
6 in fact, the penalty was not the key to people getting
7 ACA-compliant insurance, and that people would continue to
8 buy into this ACA-compliant system, even without the
9 penalty, and, in fact, they have continued to do so. The
10 proof is in the pudding.

11 And so I think --

12 THE COURT: Is there not substantial data that
13 since the ACA came into existence, that young, healthy
14 people increasingly have not been signing up for it? Isn't
15 there lots of data on that, sir?

16 MR. ROTHFELD: Frankly, Your Honor, I don't know
17 the answer to that question.

18 I do know that there's lots of --

19 THE COURT: You don't know if that's true or you
20 don't believe it's true?

21 And if you don't believe it's true, tell me --
22 show me the data that shows the opposite. Tell me where it
23 is.

24 MR. ROTHFELD: Well, I can tell you that there are
25 many more people who are insured now than were -- or

1 I should put it the other way. There are many fewer
2 uninsured people --

3 THE COURT: No, no, no. Let's go back to my
4 question. My question -- that wasn't my question.

5 I know there are more people insured now. That's
6 not the issue. The issue is the young, healthy people and
7 how much loss has been sustained and them signing up for the
8 program once it came into existence.

9 There's been a decrease, a marked decrease in
10 their signing up, has there not? That's why the
11 insurance -- these insurance systems have been failing in
12 various parts of the country: Not enough young, healthy
13 people have been signing up for it. Come on. You know
14 that's true. And if it's not true, then show me the data
15 that says otherwise.

16 MR. ROTHFELD: Well, I --

17 THE COURT: Do you have it?

18 MR. ROTHFELD: I don't have it in front of me.

19 THE COURT: You don't have it.

20 MR. ROTHFELD: Frankly, I do not think that's
21 that's correct. I mean, I think that --

22 THE COURT: You don't think -- what's your basis
23 for not thinking that's correct?

24 MR. ROTHFELD: That --

25 THE COURT: It's been reported on extensively.

1 MR. ROTHFELD: That the markets have been
2 stabilized; that premiums, actually, this year have come
3 down under the ACA.

4 And so I think it took a while for --

5 THE COURT: Isn't the big concern of the insurance
6 companies here that if this Rule were to stay in place, that
7 it would harm their ability to competitively provide
8 insurance in the market for people with pre-existing
9 conditions?

10 MR. ROTHFELD: Well, it is -- among my clients who
11 are insurers, the Acap companies, I mean, yes, that is
12 right, they're concerned that.

13 THE COURT: They want those young, healthy people
14 to offset the expenses and costs of taking care of people
15 who have pre-existing conditions. I mean, that's basic,
16 isn't it?

17 MR. ROTHFELD: Yes. I mean, that's right.

18 THE COURT: Of course.

19 MR. ROTHFELD: But I think -- I guess I put it a
20 different way.

21 I think what they want, what Congress wanted when
22 it enacted the ACA, which was --

23 THE COURT: Which Congress wanted?

24 MR. ROTHFELD: I'm sorry?

25 THE COURT: The Congress in 2010 or the Congress

1 that repealed the mandatory requirement?

2 Which Congress?

3 The current Congress?

4 MR. ROTHFELD: The Congress that enacted the ACA
5 and put in place the current provisions which we're talking
6 about being undermined by the expansion, the vast expansion
7 of STLDI --

8 THE COURT: The Congress that put the ACA in place
9 in 2010 believed that the Rule was going to be -- for STLDI
10 was going to be up to 12 months, not up to 3. That's what
11 that Congress thought was the playing field.

12 MR. ROTHFELD: Well --

13 THE COURT: It was the administration, in its
14 waning hours, its last two months, that changed the Rule
15 before the new administration came in, right?

16 MR. ROTHFELD: I guess I would respectfully
17 disagree with that, Your Honor.

18 I don't think that the Congress --

19 THE COURT: Which part do you disagree with?

20 MR. ROTHFELD: I don't think Congress that enacted
21 the ACA in 2010 had in mind a specific length of STLDI --

22 THE COURT: Do you have any basis in legislative
23 history to show that that's true?

24 MR. ROTHFELD: Well, I sort of have a negative,
25 which is that there was absolutely zero discussion of what

1 STLTI meant, or STLTI at all, at the time of the ACA
2 enactment, because -- and I think there's no doubt about
3 this -- that because historically it was simply not a
4 significant part of the insurance market, as I said at the
5 outset, it was designed as a transitional protection for
6 people who have routine plans, the ACA was designed to give
7 those people protection, because they weren't going to be
8 able to get ACA-compliant plans if they fell within the
9 gap -- if they lost coverage for no reason of their own --
10 through no fault of their own. And so I think Congress
11 simply did not focus on that specific number.

12 And, again, the proof is in the pudding. When the
13 regulation that set the 12-month term was promulgated in
14 1997, there were no public comments about it, no one took
15 notice of it because it was not a big deal, it was not
16 terribly important.

17 THE COURT: What was the public commentary like
18 when they changed it from up to 12 to up to 3?

19 MR. ROTHFELD: In the most recent, there were
20 12,000 comments, almost all of which were violently opposed.

21 As we show in our brief, out of 340 comments that
22 were submitted by people, you know, by healthcare providers,
23 by doctors, by hospitals, 338 were opposed to the Rule.

24 So I think that demonstrates graphically that this
25 is -- this is not a restoration of the system that was in

1 place before. It was in a radical transformation if the
2 Rule goes into effect and operates in the way it's supposed
3 to operate.

4 And I should make clear, there's no doubt about
5 the intended purpose of the new Rule, which is to create an
6 alternative insurance market that is going to compete with
7 ACA-compliant plans.

8 That's what the Rule itself says. It says, an
9 additional choice for consumers that exists side by side
10 with the individual market coverage. It's what the HHS
11 Secretary has been saying repeatedly; that it's designed to
12 provide additional -- bringing of cheap options to
13 individuals trapped under the ACA, more affordable options
14 for millions of forgotten men and women.

15 And the idea is --

16 THE COURT: Is there any effort underway right now
17 in Congress to change this?

18 This has been in effect how long?

19 How many months?

20 MR. ROTHFELD: I'm sorry, the current Rule?

21 THE COURT: Yeah, the current Rule. Three months,
22 four months?

23 MR. ROTHFELD: It goes -- it has just gone into
24 effect.

25 Frankly, Your Honor, I can't bring up when it was

1 initially promulgated but...

2 THE COURT: Of course not. It's been at least a
3 number of months, right?

4 MR. ROTHFELD: Right.

5 THE COURT: Right.

6 So you would think by now there would be some kind
7 of -- if it's as big a concern as you say it is -- within
8 Congress, you would think by now there would be some efforts
9 in Congress to try to change it.

10 MR. ROTHFELD: It's not Congress's responsibility
11 to step in and correct errors that are made by --

12 THE COURT: To protect existing legislation?

13 Are you serious when you say that: It's not
14 Congress's responsibility?

15 MR. ROTHFELD: I think it's not Congress's
16 responsibility to slap down agencies when the agencies
17 misinterpret --

18 THE COURT: You like it when the agency rules in
19 the way you want it to rule, but you don't like it when the
20 agency doesn't rule in the way you want it to rule.

21 You liked it when they changed it back in 2016,
22 but you don't like it when they change it now.

23 MR. ROTHFELD: Well, I --

24 THE COURT: And, of course, agencies in the case
25 of this particular discussion here, are being run by

1 administrations of a completely different philosophical
2 approach to ACA, right?

3 MR. ROTHFELD: Well, I concede, Your Honor, that I
4 like it when agencies do things that I agree with, that is
5 true.

6 THE COURT: Exactly.

7 MR. ROTHFELD: But I think it is not Congress's --

8 THE COURT: Your candor is refreshing. Thank you.

9 MR. ROTHFELD: Well, thank you. I appreciate
10 that, Your Honor.

11 THE COURT: Thank you.

12 MR. ROTHFELD: It is not the responsibility of
13 Congress, whenever agencies misinterpret legislation to pass
14 a new law, to correct it.

15 As Your Honor surely knows, the books are full of
16 decisions in which courts have said, agency constructions
17 are inconsistent with what Congress has done, and it's the
18 Court's responsibility, when presented with a case like
19 this, to say --

20 THE COURT: Well, let me ask the question more
21 basically: What has been the hue and cry, if any, from
22 Congress in response to this change in rule?

23 Can you point me to examples of committees or
24 subcommittees or debate that's been going on to try to get
25 it changed somehow or another by Congress?

1 MR. ROTHFELD: I can't, Your Honor, although,
2 frankly, I simply do not know whether there has been --

3 THE COURT: Would a silence acquiescence -- is
4 silence a favorable reaction?

5 MR. ROTHFELD: Absolutely not.

6 As, again, I just think it is fundamental that
7 when Congress legislates, the agencies interpret; and if the
8 agencies get it wrong, people like us come before the Courts
9 and say, the agencies got it wrong and you have to measure
10 the --

11 THE COURT: I guess that's like most problems;
12 they want the Courts to fix it, hmm?

13 MR. ROTHFELD: Well, I think, in this case, it's
14 not the Congress's responsibility to follow what the
15 agencies are doing and police them and enact new legislation
16 when they misinterpret what Congress has done.

17 As the Court truly knows, that is not historically
18 how these agency errors have been corrected.

19 THE COURT: Well, you're coming up on the
20 25-minute mark.

21 Do you want to explain to me, in the minute or two
22 you've got left, if you want to preserve five minutes, do
23 you want to explain to me how there's irreparable harm here?

24 MR. ROTHFELD: Yes, Your Honor, I'm happy to do
25 that.

1 For the reasons that we've been talking about, the
2 rule goes into effect --

3 THE COURT: The rates have already been set for
4 '19, right?

5 How is there going to be any irreparable harm
6 if -- look, a PI is an extraordinary remedy, as you well
7 know, okay. If you've already filed this lawsuit -- after
8 you filed the lawsuit, you came in and filed the PI, okay,
9 fine. If you don't get a PI, there's still a lawsuit in
10 place, obviously.

11 What's --

12 MR. ROTHFELD: Well, the irreparable harm,
13 I think --

14 THE COURT: Where's the harm that's going to
15 happen between now and the PI going into effect, if you were
16 to win?

17 MR. ROTHFELD: It's quite basic, Your Honor.

18 The point of the Rule is to create a new form of
19 insurance that's going to compete with my client's
20 ACA-compliant plans.

21 THE COURT: But we don't know if it will compete
22 successful or not successfully. We have no way of knowing
23 that. It's premature.

24 MR. ROTHFELD: Well, it has been -- well, I guess
25 two things about that, Your Honor.

1 First of all, as a matter of the competitor
2 standing doctrine, I don't think it's ever been thought
3 necessary to show that there has been injury that's already
4 occurred.

5 If there's been a new competitor who's been
6 allowed in the market, and there's -- the point of the
7 competition is to take business away from the plaintiff, the
8 D.C. Circuit has said repeatedly, and, I think, very
9 logically, that is sufficient to confer standing per se,
10 that's the end of the matter.

11 I'd also add, even on top of that -- and although
12 I think that's good enough --

13 THE COURT: I'm not talking about standing.
14 You're mixing apples and oranges.

15 MR. ROTHFELD: Your Honor -- I'm sorry.

16 THE COURT: I'm talking about irreparable harm.

17 MR. ROTHFELD: Yes.

18 THE COURT: The D.C. Circuit happens to be, on the
19 issue of irreparable harm, pretty tough, as it should be.

20 MR. ROTHFELD: Let me continue on that,
21 Your Honor.

22 As a consequence of this new competition, it is,
23 I think, certain that clients are going to be taken away --
24 consumers are going to be --

25 THE COURT: You think, but you don't know.

1 MR. ROTHFELD: Well, we have --

2 THE COURT: How am I to know?

3 MR. ROTHFELD: We have affidavits in the record
4 submitted by CHC, one of Acap's members, predicting that
5 they'll lose 10,000 customers.

6 THE COURT: That's speculation.

7 They don't know. That's their best guess.

8 MR. ROTHFELD: Well, I think, Your Honor, whenever
9 you make projections, Your Honor, you are making an informed
10 determination based on the evidence you have before you.

11 THE COURT: I think the D.C. Circuit requires more
12 than speculation. They need proof of actual harm that will
13 be incurred.

14 MR. ROTHFELD: But I think the D.C. Circuit has
15 said that you assume --

16 THE COURT: At least the old D.C. Circuit. Maybe
17 not the current D.C. Circuit.

18 MR. ROTHFELD: Well, I think every D.C. Circuit
19 decision that dealt with this issue, that I'm aware of, has
20 said --

21 THE COURT: You dealt with what issue, irreparable
22 harm?

23 MR. ROTHFELD: Irreparable harm has said that you
24 presume that economic factors lead to their predictable
25 results.

1 And the predictable result here is that clients
2 are taken away -- customers are taken away from THC; and if
3 they lose their customers, they lose business. That is
4 irreparable injury, because it can't get -- we can't get it
5 back from the government.

6 I mean, as this Court said in the --

7 THE COURT: Why wouldn't it make more sense to see
8 how it plays out and then come back with a PI in six months?

9 MR. ROTHFELD: Well, at that point, it's too late.
10 Customers have been lost. We can't get --

11 THE COURT: The rates have already been set for
12 next year.

13 MR. ROTHFELD: But if -- I think the issue here is
14 not the rates being set, it's the loss of customers.
15 There's an open-enrollment period going on as of
16 November 1st.

17 THE COURT: Sir, the STLDI right now is only going
18 to be up to 12 months, right?

19 The people who are signing up for it are only for
20 12 months. If we go six months into it, at least we'll have
21 a base of data to see what extent, if any, it's having a
22 harmful impact on the rest of the insurance industry. We
23 don't have that data right now.

24 MR. ROTHFELD: For our clients, we will have lost
25 their customers and they can't get them back, and they will

1 have signed up in the next two months for STLDI insurance.
2 They will have left the ACA-compliant policies.

3 THE COURT: But, perhaps, on a short-term basis,
4 maybe they'll conclude it's not good.

5 MR. ROTHFELD: I mean, they're out for a year at
6 that point.

7 They can't -- under the ACA, they can't enroll in
8 ACA-compliant plans, except during a special and
9 open-enrollment period.

10 And having signed up for these non-ACA-compliant
11 plans, if those plans lapse, they won't be able to get back
12 into the ACA-compliant plans.

13 Meanwhile, we've lost the business, and I think
14 that is very clearly irreparable injury.

15 THE COURT: So it's about holding on to that
16 business, okay.

17 MR. ROTHFELD: Well, yes, Your Honor. That's what
18 standing is; that's what irrevocable injury is in this
19 context.

20 THE COURT: In the end, this is about the
21 insurance industry, that caters to the ACC, being protected,
22 right? Protecting their interests, by not allowing
23 competition to come in?

24 MR. ROTHFELD: Protecting the interest -- my
25 clients are nonprofits. They're protecting the interests of

1 their customers, sort of low-income people, who are trying
2 to get --

3 THE COURT: Yeah. But the people who are going to
4 sustain harm here, by your own admission -- and I might add,
5 practically true -- are insurance companies that are doing
6 it for profit, right?

7 MR. ROTHFELD: Some, yes. But some no.

8 As I say, some --

9 THE COURT: Well, these are not-for-profit
10 insurance companies?

11 MR. ROTHFELD: Yes, the Acap plans are
12 non-for-profit community plans. So yes, Your Honor.

13 But if I can reserve whatever time I have left, I
14 would appreciate it.

15 THE COURT: One minute.

16 MR. ROTHFELD: Thank you, Your Honor.

17 THE COURT: You're welcome.

18 MS. ORLOFF: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MS. ORLOFF: Serena Orloff for the government.

21 THE COURT: Serena Orloff, all right.

22 MS. ORLOFF: Your Honor, the motion should be
23 denied because plaintiffs make none of the compelling
24 showings that they must make to obtain the extraordinary
25 relief that they seek.

1 And as you finished up with plaintiffs, you were
2 discussing irreparable harm. But to take one step back, we
3 think plaintiffs don't have even Article III standing here.

4 THE COURT: Yeah, let's talk about the standing
5 for a minute.

6 MS. ORLOFF: So --

7 THE COURT: The D.C. Circuit loves standing.

8 MS. ORLOFF: They do, Your Honor.

9 THE COURT: That is one of their favorite issues.
10 So let's talk about standing.

11 Why don't they have standing, in your judgment?

12 MS. ORLOFF: So their main theory of standing is
13 the Competitive Standing Doctrine. They invoke it on behalf
14 of CHC.

15 But the D.C. Circuit has been clear that the
16 Competitive Standing Doctrine applies only when the
17 competition is direct and in the same market.

18 And the Competitor Standing Doctrine is not,
19 Your Honor, an exception to the *Clapper* standard that injury
20 is certainly impending.

21 And so the reason that the D.C. Circuit has
22 required direct and current competition in the same market
23 is that, without that aspect of the competition, you can't
24 know that if the Court enters the injunctive relief that
25 plaintiffs seek, that CHC is actually going to be able to

1 compete for these customers that may be seeking different
2 products altogether.

3 And I think the Court touched on that in its
4 discussion earlier, that, in fact, these STLDI products are
5 very different products from the ACA-compliant products.
6 They're -- they don't offer the essential health benefits.
7 They don't offer guaranteed issue and community ratings.
8 They don't have the out-of-pocket maximums. There are many,
9 many protections.

10 THE COURT: Indeed, we don't even know, at this
11 point, to what extent they'll even be attractive to young,
12 healthy people who otherwise would rather keep their money
13 in their pocket and use it for other purposes.

14 MS. ORLOFF: Correct.

15 THE COURT: We have no data. We have no way of
16 knowing.

17 If this was, let's say, open season is, what, two
18 months long, basically?

19 MS. ORLOFF: I think it's a one month or 35 days.

20 THE COURT: It's early November to the end of
21 December, right? So basically, it's two months, okay?

22 If we're a month into open season, at least where
23 there's some data as to how attractive these potential other
24 alternatives are -- we have no data right now.

25 MS. ORLOFF: I think that's right, Your Honor.

1 This is all very --

2 THE COURT: They want me to crystal ball what's
3 going to happen here. I don't have a crystal ball; they
4 don't issue me one with the courtroom.

5 So how am I supposed to conclude that there's a
6 basis to believe that this is going to be necessarily
7 harmful or injurious to the insurance industry? How do I
8 know that?

9 MS. ORLOFF: You can't know it, Your Honor.

10 And that's why we think plaintiffs have not even
11 shown standing, because these people that are going to buy
12 STLDI products -- and there was some findings on this in the
13 Rule -- are, in large part, people that have dropped
14 insurance altogether, and who are looking at the difference
15 between no insurance or STLDI insurance, and that was the
16 goal of the rule, which was to serve this population.

17 Plaintiffs also have invoked standing on behalf of
18 consumers and providers. We think those theories are highly
19 speculative and foreclosed by the D.C. Circuit's opinion in
20 the *American Freedom Law Center* case that we have cited to
21 you in our papers.

22 And because plaintiffs haven't shown standing,
23 they, obviously, also have not shown irreparable harm.

24 The Court is correct, the irreparable-harm
25 standard in the D.C. Circuit is extraordinarily high, and

1 I have never -- I've seen no case applying the Competitor
2 Standing Doctrine to irreparable harm.

3 And what the *Wisconsin Gas Company* --

4 THE COURT: That's really -- that Doctrine really
5 applies to a different issue altogether. It applies to
6 standing. It doesn't apply to irreparable harm necessary
7 for a PI.

8 For PI, they want to see real harm that's either
9 imminent or actual at the time, certain and pending.

10 MS. ORLOFF: Correct.

11 "Certain and great and immediately impending" is
12 the language that the D.C. Circuit has used.

13 And we just don't have that here. What we have is
14 conjecture and speculation.

15 Plaintiffs have alluded to an affidavit that was
16 submitted. Your Honor, speculation in an affidavit,
17 conclusory statements in an affidavit, they're still
18 conclusionary. The Court is not required to accept them
19 just because they're in an affidavit. And, in fact, doing
20 so would run afoul of the D.C. Circuit's standard for
21 irreparable harm. They need to show facts showing that
22 they're going to be immediately injured, and that that
23 injury is great.

24 THE COURT: Remind me when this Rule was passed.

25 MS. ORLOFF: I'm sorry, the Rule?

1 THE COURT: Yeah.

2 MS. ORLOFF: In August, Your Honor.

3 THE COURT: It went into effect in September,
4 right?

5 MS. ORLOFF: In October.

6 THE COURT: In October?

7 So it's been in effect for a matter of just a few
8 weeks, three weeks --

9 MS. ORLOFF: Correct.

10 THE COURT: -- something like that?

11 And the sign-up period is early November to the
12 end of December, as I understand it, roughly.

13 Okay. So now here we are, next week is the first
14 week of November, next Wednesday or Thursday or something
15 like that, right? And you think you're getting an opinion
16 from this Court in a week on a matter of this complexity and
17 enormity?

18 I'm in the middle of an eight-week trial. And
19 I have this little thing called the CVS/Aetna merger that
20 I'm also wrestling with.

21 You think you're going to get an opinion in the
22 next week? You'd be lucky to get an opinion out of me in
23 four to six weeks. Where are we in four to six weeks?
24 We're almost completely through the sign-up period.

25 Assume for the sake of discussion that I rule

1 against the plaintiffs, and don't give you the PI, do you
2 think you have time to get me reversed in the D.C. Circuit
3 by the end of the sign-up period? The answer is: No, it's
4 not possible.

5 I mean, think this through, Counsel. You're
6 coming in here at the eleventh hour and 58th minute, looking
7 for a PI, under circumstances where the period that you're
8 concerned about is going to be certainly almost completely
9 over by the time I issue a ruling.

10 This isn't practical, and there's all kinds of
11 data that neither side seems to have at its disposal to help
12 the Court decide about this case.

13 For example, you heard me asking him questions
14 about this data that I'm talking about.

15 Do you believe the data shows, to the extent it
16 exists, that healthy people have been staying out of the
17 market?

18 MS. ORLOFF: Yes, Your Honor.

19 In fact, the data is in the Rule, and the Rule
20 shows that enrollment dropped, I think it was, 20 percent
21 among unsubsidized consumers between 2016 and 2017, even
22 before this Rule was passed.

23 And so the purpose of the Rule was to provide an
24 option for those people, the people that are not being
25 served by the ACA.

1 THE COURT: So people who otherwise wouldn't be
2 insured, the hope is, if I understand it correctly, correct
3 me if I am wrong, the hope is that people who otherwise
4 wouldn't be insured, by their own voluntary conduct, would,
5 all of a sudden, have an option that would enable them to be
6 insured, because they've made a decision, apparently, on the
7 ACA --

8 MS. ORLOFF: That's correct.

9 THE COURT: -- that they don't want to go that
10 way?

11 MS. ORLOFF: That's correct, Your Honor.

12 THE COURT: So this is a way to fill in the gap
13 for people who are challenged, as opposed to forcing them
14 either to choose between no insurance or the ACA.

15 MS. ORLOFF: That's correct.

16 THE COURT: How is it in the public-policy
17 interest to do that, to deny them that option? Tell me.
18 Obviously, you wouldn't agree.

19 MS. ORLOFF: Well, obviously, we don't think it's
20 in the public interest to deny people insurance options who
21 will otherwise go without insurance altogether, and that's
22 what this rule was intended to do.

23 And to address plaintiff *Chevron* Step One
24 argument, there's nothing in the ACA that forecloses this.

25 First of all, the argument's illogical because the

1 free short-term, limited-duration insurance was a term
2 defined under HIPAA. And in 2010, Congress chose to retain
3 that exemption unchanged at a time when the Departments'
4 regulation was substantially similar to what has been
5 restored by the Rule.

6 Congress undertook an extensive amendment of the
7 public health service act at that time. It could have
8 changed the definition of STLDI had it wanted to. It did
9 not do that.

10 And under those circumstances, the Court has to
11 presume that Congress knew the regulatory definition and
12 approved of it. It makes no sense to say that Congress
13 enacted the ACA but disapproved of the then-existing
14 definition of STLDI.

15 Plaintiffs have cited some cases that they believe
16 stand for the opposite conclusion. Those cases are off
17 point because they all refer to congressional inaction as a
18 basis to conclude that Congress has ratified some sort of
19 administrative definition that is contrary to the statute.

20 We don't have anything that's contrary to the
21 statute here. The phrase "short-term, limited-duration
22 insurance" is ambiguous; the agencies have always asserted
23 the ability to define that ambiguous term, and, for two
24 decades, the 12-month definition was the definition that
25 existed.

1 Plaintiff's argument that the context of the ACA
2 mandates an alternative definition is also, I think, wrong
3 on every level, really, Your Honor.

4 There are risk pools for individual health
5 insurance plans and small health insurance plans. Creating
6 risk pools for those markets was just one of many objectives
7 that were in the Affordable Care Act.

8 The Affordable Care Act is a huge and immensely
9 complicated statute. And while it, on the one hand, tried
10 to create a market for these ACA-compliant products; on the
11 other hand, Congress recognized that there were many other
12 kinds of additional alternative insurance and health
13 coverage options that existed, and it didn't foreclose any
14 type of alternative health insurance option that was not in
15 the ACA-compliant market.

16 THE COURT: So plaintiff's counsel suggests,
17 without knowing, that there's grave, great -- widespread and
18 great concern about this change in the Rule that's
19 reflective -- reflected in the comments that were submitted
20 in response to the Rule being publicized.

21 Where is the pushback in Congress? Have you seen
22 any evidence? Can you point to any examples of the relevant
23 health committees in Senate -- House and Senate
24 subcommittees and full committees reacting negatively to
25 this change in the STLDI rule and threatening to amend or

1 fix the law to take it back to the up-to-three-months
2 standard that the prior administration had modified it to?

3 MS. ORLOFF: I'm not aware of any activity in that
4 regard, Your Honor.

5 But what I do know is that, of course, all
6 regulations have to go through congressional review under
7 the Congressional Review Act, and this Rule did just emerge
8 from congressional review pursuant to that Act, and Congress
9 did not make any changes to the Rule.

10 Just to get back to the plaintiff's point about
11 the risk pools, that point is also overblown, because
12 87 percent of consumers in the exchange markets receive
13 subsidies to insulate them from the costs of insurance, and
14 also, importantly, to insulate them from the costs of any
15 increases in insurance premiums.

16 So this idea that premiums are going to keep going
17 up and up and up, and people are going to fall off the
18 exchanges, I think, ignores that reality, that you have --
19 that there is a mechanism for keeping people in the
20 exchanges, and the subsidies were the mechanism that
21 Congress chose.

22 Congress did not foreclose every alternative
23 option that might exist, and we know that because Congress
24 expressly retained the STLDI exemption, and Congress
25 retained a number of other exceptions too, which we have

1 cited in our paper -- our papers, student health coverage,
2 accepted benefits, religious health-sharing ministries,
3 group health plans. There are just many other types of
4 alternative health coverage options that Congress did not
5 purport to regulate in the ACA, and those have always
6 existed alongside ACA-compliant insurance.

7 THE COURT: I mean, the publicly stated
8 overarching purpose for the ACA has always been to get -- to
9 make sure everyone is insured.

10 That was, like, the ultimate objective of the ACA,
11 at least as I've always understood it that's been publicly
12 bandied about by politicians on both sides of the aisle and
13 by administrators on both sides of the aisle. Let's make
14 sure everyone has got coverage, let's try to give everyone
15 coverage.

16 Well, here we have a situation where a group,
17 through its own conduct, is not opting for the ACA option,
18 and the Administration is trying to provide them some form
19 of option in this regard, and they otherwise would go
20 without insurance, because they've already shown, by their
21 conduct, that they're not going to opt for the ACA choice.

22 I'm having a hard time understanding how that is
23 consistent with the overarching goal of making sure everyone
24 is insured.

25 Do you see any way that that squares?

1 MS. ORLOFF: No, Your Honor.

2 We think providing coverage where someone would
3 otherwise go without coverage altogether is absolutely in
4 the overall interests of the Affordable Care Act. That's
5 what Congress sought to do.

6 Congress didn't intend to punish people who were
7 not purchasing ACA compliant insurance by taking away all
8 other options and making them go uninsured altogether. We
9 think that's an absurd outcome and an absurd interpretation.

10 Plaintiffs make some other textual arguments,
11 Your Honor. One of them is that the Court should interpret
12 the word "short" in STLDI to mean the same thing as the word
13 "short" -- in the phrase "short-coverage gap" in the ACA.

14 There's a couple problems with this argument,
15 Your Honor. The first is that STLDI is a phrase enacted in
16 HIPAA, not the ACA, and it makes no sense to look at how a
17 word was used in the ACA to understand what Congress
18 intended in HIPAA 14 years earlier.

19 But, more importantly, the Court should look at
20 what the word "short" qualifies in each instance.

21 Crest referred to three months as a short coverage
22 gap. That means that Congress understood that there would
23 be longer coverage gaps.

24 Two, including for periods of unaffordability and
25 hardship that were recognized in the Act.

1 And there's no indication, as the Court has
2 already acknowledged, that Congress wanted to prevent people
3 from obtaining insurance if they had a coverage gap of
4 longer than three months. That would be an absurd outcome.

5 The plaintiffs have also said that the Rule is
6 arbitrary and capricious because the agencies did not
7 explain why they deviated from the rationale in 2016.
8 That's just not true, Your Honor.

9 The agencies explained that the Rule had not
10 succeeded in stabilizing the risk pool, and it had not
11 succeeded in keeping people in the ACA-compliant plans, and,
12 as a result, premiums had continued to rise and people had
13 continued to drop coverage. And so now the agencies were
14 going to provide an option for those people that would allow
15 them to be insured rather than go without insurance
16 altogether.

17 Plaintiffs also contend that the Departments
18 failed to address a comment, noting that if people had
19 short-term, limited-duration insurance, they might get
20 locked out of coverage if their coverage lapsed and they got
21 some sort of health condition in the meantime that would
22 prevent them from going through underwriting.

23 As we note in our brief, the Departments did
24 address that concern, and they noted that the problem is far
25 worse if you have an STLDI plan of only three months,

1 because then, of course, you're subject to re-underwriting
2 every three months, as opposed to a longer period where you
3 know you have coverage.

4 THE COURT: Well, if you've got a 12-month limit,
5 as it was before and is now, that basically covers you the
6 period -- from the sign-up period in one year till the
7 sign-up period in the next year.

8 And if you try it for a year and for whatever
9 reason you don't like it, you can then opt to go into a
10 different plan that's of a short-term duration or you can go
11 with the ACA, if you think it's going to be more protective,
12 but at least you have the choice, right?

13 MS. ORLOFF: That's right, Your Honor.

14 And, finally, Your Honor, on the balance of the
15 equities and the public interest, I think we've already
16 touched on many of these.

17 But I would just note, the markets have
18 anticipated this change, states have begun to use their
19 authority to issue guidance, to the extent they want to,
20 based on their own state's specific concerns.

21 STLDI issuers have begun to develop these products
22 and apply for regulatory approval to sell them.

23 ACA-compliant issuers have priced them into their
24 products for 2019.

25 So there is no benefit to consumers that would

1 come from Your Honor enjoining the rule; and, in fact, it's
2 the opposite.

3 An injunction would not only cause confusion, but
4 it would deprive consumers, who would otherwise go without
5 insurance altogether, of an alternative that allows them to
6 be insured.

7 So for all of these reasons, we think the Court
8 must deny the motion.

9 THE COURT: Very good.

10 Thank you.

11 MS. ORLOFF: Thank you.

12 THE COURT: You've got a minute.

13 MR. ROTHFELD: Thank you, Your Honor.

14 I will have four very quick points which I will
15 try to squeeze into my minute.

16 First of all, in terms of injury to the plaintiffs
17 here, the CHC has submitted an affidavit indicating that
18 it's likely to lose up to 10,000 customers if the Rule goes
19 into effect. That's clearly irreparable injury, which is
20 demonstrated in the record.

21 THE COURT: But that's their forecast. That's
22 their best guess, right?

23 MR. ROTHFELD: That is their estimate.

24 And if the Rule works as it is designed to work
25 and does what it's intended to do, it will draw people out

1 of the ACA-compliant plans.

2 Which leads to my second point, which is, the fact
3 is that the government's own figures demonstrate that there
4 are going to be people who leave ACA-compliant plans, go
5 into STLDI plans. There are materials that are submitted by
6 the plaintiffs, affidavits and studies confirming that.

7 And your question, will healthy people be -- stay
8 in the ACC plans. The fact is, people who will leave the
9 ACC plans for the STLDI necessarily are the young and
10 healthy people, because they are currently in the ACC plans;
11 and if they have pre-existing conditions, they're not going
12 to be accepted into the STLDI plans.

13 Third, just in terms of -- you asked about
14 discretions of the support for the Rule and recognition that
15 the Rule is destructive, I note that participating in this
16 litigation on our side are the leading groups of physicians
17 like the American Medical Association, leading groups of
18 patient advocacy organizations, like the American Cancer
19 Society, the leading groups of consumers of healthcare, like
20 the AARP, they all say that this is going to be a very
21 destructive rule, that it's going to hurt the healthcare
22 system, it's going to hurt individuals in the healthcare
23 system.

24 And finally on the timing question which you
25 raised, special enrollment is going to begin on November 1st

1 and continue well into December, special-enrollment
2 enrollees almost always come en masse towards the end of the
3 process.

4 So if there could be a quick ruling, then you
5 asked whether it's possible to affect the way in which
6 people are acting, and the answer to that is yes.

7 If this Court could rule or if the D.C. Circuit
8 got into it and the determination could be made prior to the
9 end of open enrollment, that would have a significant and
10 immediate impact on what people are doing.

11 THE COURT: But after the open-enrollment period
12 is over, people who don't have insurance right now who are
13 young and healthy can still sign up for STLDI programs, can
14 they not?

15 MR. ROTHFELD: They could, but they could not get
16 into the ACA programs.

17 And so if ultimately --

18 THE COURT: But, remember now, the question was
19 people who are no -- who are currently without insurance,
20 the young, healthy types in particular, if they don't sign
21 up by the end of the open-enrollment period, they still can
22 join an STLDI program, those kind of people, not people who
23 are in the ACA.

24 MR. ROTHFELD: That is correct, Your Honor.

25 But I guess I would emphasize again that there are

1 people who are young and healthy and are now in
2 ACA-compliant programs, and they're going to be dragged out
3 of those programs --

4 THE COURT: What do you meaning "dragged out"?

5 MR. ROTHFELD: Dragged --

6 THE COURT: That's pretty dramatic language.

7 MR. ROTHFELD: Lured out.

8 THE COURT: That might be attracted away. How
9 about attracted away?

10 MR. ROTHFELD: They will be drawn out one way or
11 another by the lower prices, and, I think, sometimes by
12 deceptive marketing, frankly, and there's significant
13 evidence publicly about --

14 THE COURT: Deceptive marketing?

15 MR. ROTHFELD: For STLDI plans.

16 And I think that the bottom line is that there are
17 some people who are currently in the ACA plans, who are
18 likely to be attracted by the STLDI as an alternative for
19 whatever reason because they're cheaper or for whatever
20 reason, if they find themselves in those plans, and
21 ultimately, they will not be able to get back into the ACA
22 until the next enrollment period, which is a year away.

23 THE COURT: Let me ask you a practical question.

24 Because, you know, there's -- sometimes, we, as
25 lawyers, have to be practical.

1 Why wouldn't it make more sense to withdraw the PI
2 and just litigate this case and get a ruling somewhere near
3 the end of the year?

4 Whichever way I rule, it's going to be appealed.
5 It doesn't matter how I rule. It's going to be appealed.
6 If you win, they appeal; if they win, you appeal.

7 The practical reality is that by the time I rule
8 here, there isn't -- the program -- when I say "rule," let
9 me be very clear to those sitting in the audience who don't
10 know how this works.

11 I have to write an opinion.

12 These are the pleadings. Take a look. Six and a
13 half inches. And that doesn't count the amicus.

14 The D.C. Circuit wants an opinion, and they like
15 bows and whistles. They like it nice and neat. They like
16 it all wrapped up for them.

17 For me to crank out an opinion like that while I'm
18 in the middle of an eight-week trial -- take a look, here's
19 the evidence, seven binders six inches thick.

20 And like I said a minute ago, I've got this
21 CVS/Aetna merger going on.

22 MR. ROTHFELD: Well, I --

23 THE COURT: Why? Why are you coming in here
24 looking for a PI under these circumstances, under this time
25 frame, to me, makes zero sense.

1 MR. ROTHFELD: Well, I --

2 THE COURT: We can litigate the case in the normal
3 case. I can expedite the briefing. We can do final
4 briefing. And you'll get an opinion probably sometime at
5 the beginning of the year. Then you take -- whichever side
6 loses appeals it, because I know where you're headed.
7 You're headed to the Supreme Court. That's what this is all
8 about.

9 We don't have two of the Supreme Court advocates
10 in the nation here by accident. Come on. You both have
11 argued 25 to 35 arguments in the Supreme Court. We know
12 what's going on here.

13 What you have done is jump the line by bringing a
14 PI. But you're bringing it at the eleventh hour and 58th
15 minute. It doesn't make any sense.

16 And the pressure you're putting on this Court to
17 turn something out that fast -- and, by the way, I'll have
18 to write a second opinion later on the merits.

19 It just doesn't make any sense.

20 MR. ROTHFELD: Well, if --

21 THE COURT: To me, it makes no sense.

22 I understand you're responding to your client's
23 wants.

24 MR. ROTHFELD: Well, Your Honor, if I may,
25 I guess, three very short points.

1 First of all, I sympathize with you; I see the
2 binders behind you, and they are kind of alarming, so
3 I'm sorry that you're in this position.

4 Secondly, I appreciate your --

5 THE COURT: Don't be sorry.

6 MR. ROTHFELD: I appreciate your reference to our
7 litigation background.

8 But that's not why we're here. We're here
9 because --

10 THE COURT: You're not being practical.

11 MR. ROTHFELD: The traditional reason for seeking
12 a preliminary injunction is that we are facing irreparable
13 injury.

14 THE COURT: Well, that's a big question.

15 MR. ROTHFELD: Well --

16 THE COURT: Believe me, that is a big and open
17 question.

18 MR. ROTHFELD: But that --

19 But your Honor poses the question why are we here
20 now.

21 That is why we are here now. There's an
22 open-enrollment process, which is about to start, which is,
23 for the first time, going to make these STLDI plans
24 attractive to people who otherwise would be enrolled in the
25 ACA.

1 It's going to draw people out of the ACA-compliant
2 plans. It's going to injure my clients who market those
3 plans. It's going to injure my clients for the benefit
4 of --

5 THE COURT: But that's your best guess, sir. That
6 is nothing more than your best guess.

7 You and your people, your insurance people,
8 whatever, that's what you think is going to happen.

9 Why don't we wait and see what happens? Maybe if
10 we push this hearing back another six weeks, we'll have some
11 data.

12 There is no data right now. This is all
13 speculation on your part.

14 MR. ROTHFELD: Well, I guess I would say,
15 Your Honor, a couple things, again, Your Honor: People tend
16 to wait to enroll until the end of the special-enrollment
17 period, so I think we're not going to know that much until
18 the special-enrollment period comes to a close, number one.

19 Number two, if the Rule operates as it's predicted
20 to work by --

21 THE COURT: Predicted.

22 MR. ROTHFELD: -- not only by my client --

23 THE COURT: Good choice of word.

24 MR. ROTHFELD: -- by the actuaries who have
25 studied it, by the experts who've looked at it; but by the

1 government itself, it is designed to do a particular thing.
2 It's designed to take people who are now in the ACA and give
3 them an option to go somewhere else.

4 I mean, you are talking --

5 THE COURT: That's not what you just said.

6 Hold on.

7 That is not what the advocate for the government
8 just said. You've misrepresented it.

9 She said it is designed for people who no longer
10 have coverage to have an option of damage. That is what she
11 said.

12 You're misrepresenting what she said. She didn't
13 say it's for people who are signed up in the ACA to leave
14 it.

15 MR. ROTHFELD: But --

16 THE COURT: That's not what she said.

17 MR. ROTHFELD: -- the government's own figures
18 demonstrate that there are going to be millions of people
19 ultimately who are going to leave ACA-compliant programs and
20 take STLDI plans instead.

21 THE COURT: Look, you and your clients don't have
22 a right to a PI. It's extraordinary relief.

23 And as she correctly noted, the D.C. Circuit
24 appropriately is very tough and demanding, as it should be,
25 for the extraordinary relief you're asking for here on the

1 issue of irreparable harm, and it should be that way.

2 And what you've got to offer on the
3 irreparable-harm issue is the best guess of the people who
4 work for your clients. Nothing more than that. The best
5 speculative guess as to what's going to happen, and that's
6 what you're basing this on.

7 No-data best guess.

8 MR. ROTHFELD: Well, I --

9 THE COURT: And so look, you've already made your
10 decision as to what you're going to do. But I'm giving you
11 fair notice right now. If you think I can turn out an
12 opinion on a matter of this complexity and sensitivity and
13 national significance in a matter of a few weeks, you're
14 dreaming, dreaming, it can't be done.

15 And, by the way, the Judge who's saying this is
16 the Judge who turned out a 172-page opinion in the *AT&T* case
17 in six weeks.

18 So I know how this works, and you're not being
19 practical at all. You're doing what you're doing by seeking
20 extreme relief --

21 MR. ROTHFELD: Well --

22 THE COURT: -- when you don't have to.

23 You'd get an opinion in the normal course of
24 things, somewhere near the end of the year, beginning of
25 January.

1 You make your own choice; talk to your clients.

2 MR. ROTHFELD: Well --

3 THE COURT: But if you lose the PI, if you lose,
4 there will be no chance that you'll get an appellate review
5 of that by the time the end of the enrollment period ends.
6 There just won't be enough time.

7 You know how the D.C. Circuit works, you've argued
8 there what, 100 times, 200 times. You know how they
9 operate. Even on expedited briefing.

10 Pincus is smiling. I would be smiling too if I
11 was in his chair. He knows exactly what I'm talking about
12 here.

13 Let's be practical here.

14 MR. ROTHFELD: Well, Your Honor, we are sort of
15 prisoners of the calendar. There's a special-enrollment
16 period that's going on --

17 THE COURT: No. You're prisoners of your own
18 judgment.

19 MR. ROTHFELD: Well --

20 THE COURT: You're prisoners of your own judgment.

21 You've cast your client's fate the way you cast
22 it. That's your choice; you made your decision. You can
23 reverse it, if you wish, if you have the judgment to. If
24 you don't, I'm just telling you, if you think I'm going to
25 turn out an opinion in this case in the next few weeks, it's

1 not possible, no judge could do it. It's too complicated,
2 it's too large, it's too consequential, it can't be done in
3 a matter of a few weeks, especially when I'm in the middle
4 of a trial. So that's just reality.

5 And, by the way, we work nights and weekends every
6 week in my chambers.

7 So be practical, Counsel, think it through, talk
8 to your clients, maybe you'll come to the right decision.

9 We're in recess.

10 DEPUTY CLERK: All rise.

11 This Honorable Court will stand in recess until
12 the return of court.

13 (Proceedings concluded at 4:15 p.m.)

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C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: November 1, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

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