

**In the Matter Of:**  
**APPELLEES vs UNITED STATES**

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**ORAL ARGUMENT**

*July 09, 2019*

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1                           IN THE UNITED STATES COURT OF APPEALS  
2   FOR THE FIFTH CIRCUIT  
  No. 19-10011

3   STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF  
4   FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF  
5   KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and  
6   through Governor Phil Bryant; STATE OF MISSOURI; STATE OF  
7   NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA;  
8   STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH;  
9   STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY;  
10   JOHN NANTZ,

11                   Plaintiffs -- Appellees

12                   vs.

13   UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF  
14   HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S.  
15   DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES  
16   DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his  
17   Official Capacity as Commissioner of Internal Revenue,

18                   Defendants - Appellants

19   STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF  
20   COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF  
21   ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE  
22   OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA;  
23   STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT;  
24   STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

25                   Intervenor Defendants - Appellants

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26   ORAL ARGUMENT BEFORE  
27   Judge Carolyn Dineen King  
28   Judge Jennifer Walker Elrod  
29   Judge Kurt D. Engelhardt

30   July 9, 2019

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31   Presenters:  
32   Mr. Samuel Siegel  
33   Mr. Douglas Neal Letter  
34   Mr. Kyle Douglas Hawkins  
35   Mr. August E. Flentje  
36   Mr. Robert E. Henneke



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1                   \* \* \* \* \*

2           JUDGE ELROD: -11. State of Texas, et al.,  
3 versus the United States, et al., versus the State of  
4 California, et al. You may proceed.

5           MR. SIEGEL: Thank you, Your Honor. May it  
6 please the Court. Sam Siegel on behalf of the State  
7 defendants. I will be sharing my time with Mr. Letter from  
8 the House of Representatives, including dividing our  
9 rebuttal time, except that Mr. Letter will be going first on  
10 rebuttal, and I will be going last.

11           To start with the issues raised in the Court's  
12 supplemental briefing order, we think that the State  
13 defendants were clearly injured by the judgment below, and,  
14 therefore, have standing to appeal it.

15           JUDGE ELROD: You might want to move the  
16 microphone, or -- you are not --

17           MR. SIEGEL: Is this better, Your Honor?

18           JUDGE ELROD: I think so. Or just --

19           MR. SIEGEL: I will speak louder, Your Honor.

20           JUDGE ELROD: Speak louder.

21           MR. SIEGEL: Thank you, Your Honor.

22           JUDGE ELROD: Thank you.

23           MR. SIEGEL: But after the supplemental briefing,  
24 it was also now clear that all parties agreed this Court has  
25 appellate jurisdiction under Windsor. And that's because

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1 the federal government has now committed to continue  
2 enforcing the Affordable Care Act. Until a Court finally  
3 orders it not to do so, the federal executive suffers  
4 legal harm from the Court orders -- Court's below order,  
5 even though they now welcome it, and the participation of  
6 the States and House of Representatives insures that there  
7 will be an adversarial presentation of the issues in this  
8 case.

9           Turning to the other issues in this case, the  
10 central feature of this appeal is that when Congress --

11           JUDGE ENGELHARDT: In maintaining your standing,  
12 the intervenor states, are you necessarily conceding the  
13 standing of the plaintiff states?

14           MR. SIEGEL: No, Your Honor, we are not.

15           JUDGE ENGELHARDT: So, you are here in  
16 New Orleans in the Fifth Circuit telling us that the State  
17 of Texas doesn't have standing to litigate here. Explain  
18 that.

19           MR. SIEGEL: Yes, sir.

20           JUDGE ENGELHARDT: What is the distinction that  
21 you see that licenses you with standing here, but not the  
22 plaintiff states?

23           MR. SIEGEL: The judgment below, if it were ever  
24 to take effect, would cost the defendant states hundreds of  
25 billions of dollars in federal funds. The State plaintiffs

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1 rely on a theory of standing that they have not proved up.  
2           They argue that the individual mandate, even  
3 though it has been stripped of its alternative tax penalty,  
4 is going to cause people to enroll in their Medicaid and  
5 CHIP programs, but they haven't produced any evidence to  
6 support that suggestion.

7           That makes this case very similar to this Court's  
8 decision in Crane v. Johnson, where it held that Mississippi  
9 didn't have standing to challenge the DACA directive,  
10 because it hadn't shown that there were DACA recipients in  
11 the --

12           JUDGE ENGELHARDT: Don't they also cite to the  
13 CBO report that talks about the expenditures that they can  
14 reasonably expect to incur?

15           MR. SIEGEL: They do cite to the CBO report, Your  
16 Honor. That report concluded only that there are some small  
17 number of people, who even once the alternative tax has been  
18 zeroed out, will maintain healthcare coverage --

19           JUDGE ENGELHARDT: So, they only have a little  
20 standing?

21           MR. SIEGEL: No, Your Honor. They have not  
22 proved the final link in their causal chain, which is to  
23 show that there are individuals like that in their states  
24 who are enrolling in their Medicaid and CHIP programs. It  
25 is that link that they haven't proved up.

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1           And to go back to this Court's decision in Crane,  
2 I think the record here is very similar to the one that this  
3 Court held that Mississippi didn't have standing to  
4 challenge the DACA directive. And I might note that that  
5 case came to this Court on a 12(b)(1) motion to dismiss. We  
6 are here on summary judgment. The State plaintiffs' burden  
7 was hired here, and yet I think the records are very  
8 similar.

9           JUDGE ELROD: Well, actually, in that case,  
10 didn't Judge Owen write in her concurrence that Mississippi  
11 hadn't even really urged its proper standing? And that it  
12 would be a different case, it might be more similar to one  
13 of the U.S. Supreme Court cases, if Mississippi had urged  
14 its standing, because sometimes things that haven't yet  
15 occurred can still give rise to standing.

16           MR. SIEGEL: That may be the case, Your Honor,  
17 but I think they have the burden of coming forward and  
18 identifying and showing that there is some evidence that we  
19 can believe that people, because of a penalty-less mandate,  
20 are going to enroll in their Medicaid programs.

21           JUDGE ELROD: We do need to get back to your  
22 standing, but -- your client's standing, but before we do,  
23 could I ask a little bit about the record? Because you said  
24 the record was very similar in that case. I just want to  
25 make sure -- in the Crane case to this case.

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1 MR. SIEGEL: Yes.  
2 JUDGE ELROD: I want to make sure that I  
3 understand what the -- what y'all are calling the summary  
4 judgment record is. I have this Exhibit A, which are all  
5 the declarations from all the State, as well as the  
6 individuals, and then various people who work at the State  
7 say making certain declarations.  
8 This is in the evidentiary record for summary  
9 judgment, correct?  
10 MR. SIEGEL: Yes, Your Honor.  
11 JUDGE ELROD: Okay. Was there ever any motion to  
12 strike, or to say that some of these are conclusory, or  
13 anything of the sort that would have evidentially quibbled  
14 with Exhibit A?  
15 MR. SIEGEL: Not that I am aware of, Your Honor.  
16 JUDGE ELROD: In fact, your client did not argue  
17 in the District Court that there was a lack of standing,  
18 correct?  
19 MR. SIEGEL: We did make that argument at oral --  
20 in oral argument, and it was also addressed by the District  
21 Court, of course.  
22 JUDGE ELROD: But just -- just in passing in oral  
23 argument? It was never pleaded or put forth?  
24 MR. SIEGEL: It did not -- in our -- in our  
25 response to the motion for preliminary judgment, we did not

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1 raise the standing issue. We also did ask the Court to  
2 allow us to argue this and explore this further when it said  
3 it was considering entering summary judgment. And we argued  
4 it at the -- the hearing, Your Honor.  
5 JUDGE ELROD: Okay. So, if, in fact, as you  
6 argued, the record were insufficient to support this  
7 standing, or -- that would be because there is a -- this  
8 alone is not enough, or because there is some contrary  
9 summary judgment evidence, but there is no contrary summary  
10 judgment evidence, is there?  
11 MR. SIEGEL: And to be clear, our position is  
12 that it is not enough, Your Honor.  
13 JUDGE ELROD: Okay. So, if there was a fact --  
14 you are not saying there is a fact issue on the question?  
15 MR. SIEGEL: That is correct, Your Honor.  
16 JUDGE ELROD: So, we don't need to remand for a  
17 fact -- for a determined trial on the standing issue?  
18 MR. SIEGEL: That's correct, Your Honor. In our  
19 view, the evidence that they have produced is not enough to  
20 demonstrate that there are people enrolling in their  
21 Medicaid or CHIP programs, because of a zeroed-out  
22 individual mandate in its current form.  
23 JUDGE ELROD: Okay. Can we talk about your  
24 client's standing just a bit more?  
25 MR. SIEGEL: Yes, Your Honor.

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1 JUDGE ELROD: You -- you -- you believe you have  
2 standing because of the judgment that might take effect, but  
3 if a declaratory judgment that we are here on would take  
4 effect, how would that impact your client? That's not an  
5 injunction, it is just a declaratory judgment vis-à-vis  
6 these parties, in a partial summary judgment.  
7 MR. SIEGEL: Our understanding of that judgment,  
8 and I think Judge O'Connor's understanding of that judgment  
9 was that it did have injunctive effect. That's why --  
10 JUDGE ELROD: Well, he said it is not an  
11 injunction several times in his order.  
12 MR. SIEGEL: That's true, Your Honor, but that's  
13 why he entered a stay of his ruling pending appeal. And as  
14 part of that determination, he also concluded that his  
15 judgment would harm us. That's one of the necessary factors  
16 to enter a stay. Now, we have understood this judgment as  
17 binding the United States with respect to our -- with  
18 respect to our states.  
19 JUDGE ELROD: If it is not binding us with  
20 respect to your states, do you agree that you would lack  
21 standing in this appeal?  
22 MR. SIEGEL: No, Your Honor. For two reasons.  
23 First, I would want to know the scope of the remedy in order  
24 to determine whether or not it did impose practical harm  
25 on --

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1 JUDGE ELROD: Well, there is no remedy. It is  
2 just a declaration. So, just standing with just a  
3 declaration, how do you have standing?  
4 MR. SIEGEL: And if the federal government is not  
5 going to structure its affairs according to that declaratory  
6 judgment, and isn't going to start cutting off our Medicaid  
7 funds or making other changes, then we might not have  
8 standing just based on the practical harm.  
9 I do think that we also would suffer legal harm  
10 from the judgment below in the forms of possible collateral  
11 estoppel consequences, but this Court doesn't need to answer  
12 those questions, because all parties agree that it has  
13 jurisdiction under Windsor.  
14 And if I might, with that, turn to the merits.  
15 As I mentioned, the central feature of this appeal is that  
16 when Congress adopted the Tax Cuts and Jobs Act, it -- it  
17 made the individual mandate unenforceable.  
18 That means that the individual mandate no longer  
19 requires anyone to do anything. And that means that it can  
20 be upheld as either a precatory provision similar to those  
21 that Congress adopts and that no one thinks poses a  
22 constitutional problem.  
23 JUDGE ENGELHARDT: What other statutes are there  
24 out there that use mandatory language like the one here that  
25 are now suggestions for better living, or something like

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1 that? You used the word "precatory."  
2 What other statutes are there that the citizenry  
3 should know they don't have to really follow? Isn't that  
4 your argument, is that pay no attention to the "shall," just  
5 go forth and do good, and this statute should just be  
6 ignored if you so please?  
7 MR. SIEGEL: Your Honor, there are other  
8 provisions in the U.S. Code that include the word "shall,"  
9 and that aren't binding or aren't operative.  
10 For example, the -- excuse me, severability  
11 clauses include the word "shall," but Courts don't treat  
12 them as binding. They are merely interpretative aids.  
13 There are also inoperative provisions that have no effect  
14 currently, like Section 5000A, Subsection (c)(2)(B),  
15 Romanette i, which defines the amount of the alternative tax  
16 for the 2014 taxable year. That is another example of  
17 something that uses the word "shall" and has no effect.  
18 Now, Your Honor, we certainly find ourselves in  
19 an unusual situation. And the virtue of our position of  
20 understanding this as either a precatory clause or as a  
21 suspended, but by continuing with suspended exercise of the  
22 taxing clause is that it would allow this Court to uphold  
23 the individual mandate.  
24 And as NFIB underscored in this very context,  
25 when it is fairly possible to interpret a statute in a

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1 manner that will save it from a ruling of  
2 unconstitutionality, Courts have a duty to adopt that  
3 construction.  
4 JUDGE ENGELHARDT: But you will agree  
5 notwithstanding that the Congress could have included a  
6 severability clause, such as what you mentioned a few  
7 minutes ago, when it adopted the ACA in 2010. Couldn't  
8 it -- couldn't it have done so? It seemed like it did the  
9 opposite where it said this is a very comprehensive  
10 overhaul, and it set forth a bunch of factual findings.  
11 Couldn't Congress have said, "Oh, by the way, we  
12 think all of these provisions are such excellent ideas and  
13 helpful to the public that if any of them go by the wayside,  
14 well then we will want all of these to -- to be -- the  
15 remainder to continue to apply"?  
16 MR. SIEGEL: The Supreme Court has said that  
17 Congress' silence on this point is just that, silence, and  
18 it doesn't create a presumption against severability. If  
19 Congress doesn't include a severability clause, it doesn't  
20 create a presumption against severability. And it does  
21 bring me to the severability question here.  
22 JUDGE ELROD: Can we talk just a little bit  
23 more --  
24 MR. SIEGEL: Yes, Your Honor.  
25 JUDGE ELROD: -- about the merits? Why is the

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1 command not a command if the CBO says it is for some people,  
2 and, indeed, Blackstone himself said that people follow the  
3 law just to follow the law, because they want to be good  
4 citizens? So, without regard to whether there is a penalty,  
5 why isn't a command a command?  
6 MR. SIEGEL: And in NFIB, the Court said that  
7 this provision, even though it includes the word "shall,"  
8 doesn't have to be read as a stand-alone command to buy  
9 health insurance.  
10 JUDGE ELROD: Right. Because it was in  
11 conjunction with the tax. But the Chief Justice also said  
12 that the most natural reading of the provision was as the  
13 command.  
14 MR. SIEGEL: That's correct, Your Honor.  
15 JUDGE ELROD: So, if you no longer have the tax,  
16 why isn't it unconstitutional?  
17 MR. SIEGEL: Because it is possible to still  
18 understand this as a precatory provision that doesn't create  
19 any rights or obligations --  
20 JUDGE ELROD: But how can it be precatory if the  
21 most natural reading of it is a command that does require  
22 action by the federal government telling someone to buy  
23 insurance?  
24 MR. SIEGEL: Because, Your Honor, this is an  
25 alternative reading that is available to the Court. As I

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1 mentioned a moment ago, it is an unusual reading, but we  
2 think that the better course for this Court to chart is the  
3 one laid out by NFIB, which is to adopt this understanding  
4 of the individual mandate as either a precatory --  
5 JUDGE ELROD: If it doesn't apply, if this is no  
6 longer a tax, then what happens?  
7 MR. SIEGEL: Then there are no legal -- negative  
8 legal consequences for going without healthcare coverage.  
9 And NFIB --  
10 JUDGE ELROD: You are violating the law.  
11 MR. SIEGEL: You are not -- and that's what NFIB  
12 makes clear. You are not violating the law if you don't buy  
13 health insurance right now. Individuals who don't buy  
14 health insurance, nothing bad will happen to them. There  
15 are, to use NFIB's words, no negative legal consequences.  
16 And if I --  
17 JUDGE ELROD: Do you think that we are not at  
18 liberty to uphold this based upon the Commerce Clause, or  
19 the Necessary and Proper Clause be given that there have  
20 been five votes in the Court against those propositions?  
21 MR. SIEGEL: And we think the best way to  
22 understand this is as a kind of precatory provision.  
23 JUDGE ENGELHARDT: But do you agree?  
24 MR. SIEGEL: And, Your Honor --  
25 JUDGE ENGELHARDT: Judge Elrod asked if you

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1 agreed with that proposition, and I was hoping that you  
2 would --  
3 MR. SIEGEL: I think that there are -- the  
4 Commerce Clause, it can't be upheld on a basis. It can be  
5 upheld as either a taxing power or necessary and proper  
6 using the same construct that NFIB did.  
7 If the Court thinks that Congress requires an  
8 Article 1 power to keep this kind of provision on the books,  
9 it can look to the taxing power. Section 5000A still  
10 contains references to the number of dependents. It still  
11 has Subsection G, which says the IRS can't bring criminal  
12 prosecutions.  
13 Now, of course, it is not generating revenue  
14 anymore, but this Court in Ardoin rejected the argument that  
15 a law must generate revenue at all times to be upheld as a  
16 taxing power.  
17 JUDGE ENGELHARDT: Does the tax -- the 2017 tax  
18 cut to zero change to zero in the -- I believe it is 5000B,  
19 is that permanent absent further action from Congress, or  
20 does it have an expiration?  
21 MR. SIEGEL: And I would like to answer your  
22 question. I also want to make sure I have some time --  
23 JUDGE ENGELHARDT: Well, I would like you to,  
24 too. I would like to know, I mean, does it -- it seems like  
25 a yes-or-no question in terms of --

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1 MR. SIEGEL: Congress --  
2 JUDGE ELROD: We will make sure you have time to  
3 talk about severability. We want to hear about --  
4 MR. SIEGEL: Thank you.  
5 JUDGE ELROD: -- that, too. So, if you could  
6 please answer Judge Engelhardt's question.  
7 MR. SIEGEL: Thank you, Your Honor. No, without  
8 further action from Congress, that amount will be -- will be  
9 set at zero.  
10 JUDGE ENGELHARDT: Okay.  
11 MR. SIEGEL: So, on the severability question,  
12 the Supreme Court has instructed that the severability  
13 inquiry is one of congressional intent, and here we think  
14 the answer is straightforward. In this case, we know what  
15 Congress would have done by examining what it did in the  
16 text of the TCJA.  
17 It rendered the individual mandate unenforceable  
18 by zeroing out the only negative legal consequence for  
19 going without healthcare coverage, and at the same time  
20 chose not to repeal the preexisting condition protections,  
21 or any of the other important reforms made by the Affordable  
22 Care Act.  
23 And with that action, Your Honors, Congress  
24 expressed its views that the individual market and, indeed,  
25 the entire Affordable Care Act can operate without an

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1 enforceable individual mandate. Now, we think that that is  
2 all this Court needs to know to resolve the severability  
3 question. To use a different --  
4 JUDGE ENGELHARDT: The King versus Burwell  
5 opinion seems to be very specific in its language,  
6 particularly with regard to the guaranteed issue, the  
7 community rating provision. Of course, the individual  
8 mandate.  
9 And I know you have read that, as have most  
10 people involved in this. But it seems like the language  
11 used is pretty heavy when it comes to those provisions being  
12 interlocking or intertwining.  
13 How do we unravel that, in light of the King  
14 versus Burwell language?  
15 MR. SIEGEL: And that reflected the view of, I  
16 think, the 2010 Congress, but the question here isn't about  
17 what Congress thought in 2010, or what the Supreme Court  
18 said in 2015. It is, instead, what Congress did in 2017.  
19 And with its actions in the text of the TCJA, Congress made  
20 the individual mandate unenforceable, and chose to leave the  
21 rest of the ACA's provisions, including the preexisting  
22 conditions --  
23 JUDGE ENGELHARDT: But weren't they in a  
24 reconciliation process at that point? Weren't they limited  
25 in what they could do with regard to the tax bill in 2017?

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1 MR. SIEGEL: They were, Your Honor, but that  
2 doesn't change the analysis here. The relevant thing is  
3 that Congress made the individual mandate unenforceable. To  
4 use a different --  
5 JUDGE ELROD: The tax unenforceable, not the  
6 mandate itself.  
7 MR. SIEGEL: And there is no difference between  
8 the mandate tax and the mandate itself. And we know that  
9 for --  
10 JUDGE ENGELHARDT: But surely word had reached  
11 Congress from the Supreme Court building that the NFIB  
12 opinion had been rendered. I mean, surely Congress knew  
13 that the linchpin that Justice Roberts described had been --  
14 had been adjusted. Is that not correct? I mean --  
15 MR. SIEGEL: And Congress drew a different  
16 determination in 2017 --  
17 JUDGE ELROD: How do you know that?  
18 MR. SIEGEL: -- based on the circumstances.  
19 JUDGE ELROD: How do we know that some members of  
20 Congress didn't say, "Aha, this is the silver bullet that is  
21 going to undo the ACA" -- or Obamacare, if you prefer?  
22 The -- the ACA -- "and, so, we are going to vote for this  
23 just because we know it is going to bring it to a halt,  
24 because we understand the tax issue, and it is no longer a  
25 tax"?

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1 MR. SIEGEL: And, Your Honor, that would be  
2 imputing to Congress an intent to create an unconstitutional  
3 law. And also, Your Honor, there were several members who  
4 voted for the Tax Cuts and Jobs Act, and specifically came  
5 forward and said, "We are not repealing the preexisting  
6 protection conditions. We are not repealing the subsidies."  
7 That would mean they were misleading the American public and  
8 their constituents when they said those things.  
9 JUDGE ELROD: But the only way to know what  
10 Congress intended is what they say through their  
11 legislation. And they left in place the mandatory nature of  
12 the mandate. Can you help me with that, please?  
13 MR. SIEGEL: And, Your Honor, they made the  
14 mandate unenforceable by getting rid of the tax. And it is  
15 clear that Congress intended for the two things to be one  
16 and the same. The House of Representatives' reply brief at  
17 page 5 collects several statements from members of Congress,  
18 including Speaker Ryan, in which he said, "With this tax  
19 bill, we are," quote, "repealing the individual mandate."  
20 In addition --  
21 JUDGE ELROD: Can we use those -- those -- those  
22 faces in the crowd, or whether they are friendly or not?  
23 MR. SIEGEL: Yes, Your Honor, you can. The  
24 Supreme Court, in -- in resolving severability questions,  
25 has looked at things like statements of Congress. The CBO

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1 report also told members of Congress that there was no  
2 practical difference between zeroing out the alternative tax  
3 and repealing the individual mandate.  
4 JUDGE ENGELHARDT: Where are the --  
5 MR. SIEGEL: This Court --  
6 JUDGE ENGELHARDT: Where are the statements from  
7 those who voted in 2010 saying, "No worries. The individual  
8 mandate isn't really a mandate. Even though it says  
9 'shall,' we are voting on this today, and, Citizens, you  
10 still -- this is an option that you can pay a tax or you can  
11 buy the insurance"?  
12 Where -- since you are using quotes, and I have  
13 to tell you, I am not a fan of using quotes from elected  
14 officials who say a lot of things for a lot of reasons to  
15 support -- I am not a fan of using that to support an  
16 opinion in Court, because, as Judge Elrod said, we depend on  
17 the law expressing the will of the legislature, of the  
18 Congress at this point.  
19 But where are the statements, since you are  
20 bringing up all of these statements, where are the  
21 statements from 2010 saying, "Don't worry about the  
22 individual mandate. It is actually not something that  
23 requires you to buy insurance"?  
24 MR. SIEGEL: I don't know where their statements  
25 might be, Your Honor, but I would like to say that our point

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1 here doesn't rely on the statements of members of Congress.  
2 All the Court has to do is look at the text of the TCJA, see  
3 that Congress zeroed out the only thing that made the  
4 individual mandate enforceable.  
5 That is the beginning and the end of the  
6 severability analysis. These other things that we have  
7 pointed to, like the statements from members of Congress,  
8 like the 2017 CBO report, like the failed efforts at repeal,  
9 are just supporting pieces for us. This Court's analysis  
10 can begin and end with the TCJA. I also see I am over my  
11 time, but if I might --  
12 JUDGE ELROD: You may. But I have some  
13 questions. So, why don't we give -- give you three more  
14 minutes, and give the other side three more minutes.  
15 MR. SIEGEL: Yes, Your Honor. Thank you very  
16 much, Your Honor.  
17 JUDGE ELROD: So you may be heard. And then I  
18 will ask you questions.  
19 MR. SIEGEL: Right. And there is just one more  
20 point that I want to make here. Another frame that the  
21 Supreme Court has used to determine the severability  
22 question is one of functional similarities.  
23 And here if this Court were to declare the  
24 individual mandate unconstitutional and render it  
25 unenforceable, but leave the rest of the Affordable Care Act

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1 in place, it would be creating a statute that is not just  
2 consistent with Congress' design, but one that would operate  
3 in a manner that is exactly the way Congress designed things  
4 in 2017.  
5 So, for those reasons, and for the other  
6 contextual factors that we have pointed to here, including,  
7 I think, importantly the failed efforts at repeal that were,  
8 you know, those that were rejected by this Congress just  
9 months beforehand, before they voted to zero out this  
10 alternative tax, those are powerful indications that the  
11 remedy that is needed here, the one that is most consistent  
12 with Congress' intent, would be the one that does exactly  
13 what Congress did, which is to render the individual  
14 mandate, to declare it unenforceable as a matter of law, and  
15 sever it from the rest of the ACA.  
16 JUDGE ELROD: Counsel, can we turn back to the  
17 standing of the plaintiffs, please, for a moment? If in  
18 this declaration one of the states, I think it is Missouri,  
19 says that it has to pay \$50,000 to send out this -- for the  
20 year 2021, to send out this Form 1095-B to everyone, why  
21 isn't that a tangible cost that would render standing for  
22 the State of Missouri?  
23 MR. SIEGEL: Because that cost is imposed not by  
24 Section 5000A, but by other provisions of the ACA; namely --  
25 JUDGE ELROD: They say it is by -- that they have

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1 to do it because of this, and there is nothing in the record  
2 that says from an IRS official, or an expert that you have  
3 hired, that says it is really because of some other reason.  
4 So, why wouldn't the summary judgment record control on that  
5 point?  
6 MR. SIEGEL: Respectfully, Your Honor, I  
7 understand them to be pointing to 26 U.S.C. 6055 and 6056 as  
8 the reason that they have to issue these forms. That is not  
9 Section 5000A.  
10 And as this Court held, both in National  
11 Federation of the Blind, and in HOTS (phonetic), in order to  
12 bring a constitutional challenge to a particular provision,  
13 the plaintiffs first have to show that they are injured by  
14 that provision, then show that that provision is unlawful or  
15 unconstitutional, and only then do you get the severability  
16 analysis.  
17 JUDGE ELROD: Is there asymmetry in our standing  
18 analysis for plaintiffs and intervenors, legally?  
19 MR. SIEGEL: I don't think so, Your Honor. I  
20 think it is clear to us, at least, that the judgment below  
21 would cost us hundreds of billions of dollars in federal  
22 funds. Our position here is that the State plaintiffs  
23 haven't made out their evidentiary burden to show that  
24 Section 5000A is (inaudible).  
25 JUDGE ELROD: If we were in the D.C. circuit or

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1 the Tenth Circuit, would your answer be the same? Because  
2 they don't have that case.  
3 MR. SIEGEL: Yes, Your Honor.  
4 JUDGE ELROD: They have a different standing  
5 analysis.  
6 MR. SIEGEL: Yes, Your Honor. I think the answer  
7 would be the same. The requirements of Article 3 and what a  
8 party has to show at the summary judgment stage are the  
9 same.  
10 JUDGE ENGELHARDT: Who would have standing?  
11 MR. SIEGEL: No one would have standing.  
12 JUDGE ENGELHARDT: No one would have standing to  
13 contest a -- a mandatory enactment of Congress that says  
14 that a citizen shall do -- no one --  
15 MR. SIEGEL: No one, Your Honor, and that is  
16 because no one is harmed by this --  
17 JUDGE ENGELHARDT: We fought a war over that some  
18 200-and-something years ago and the king would say you have  
19 to do a tax.  
20 MR. SIEGEL: And it is not backed up -- and the  
21 important distinction here, Your Honor, is that it is not  
22 backed up with any negative legal consequences. If I don't  
23 buy healthcare coverage next year, nothing bad is going to  
24 happen to me. I won't --  
25 JUDGE ELROD: Is that your answer for the

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1 individuals? Because we haven't talked about the  
2 individuals.  
3 MR. SIEGEL: Right. That is my answer for the  
4 individual plaintiffs. They can satisfy their legal  
5 obligations by doing nothing. I see I am, once again, over  
6 my time, but I would be happy to answer further questions.  
7 JUDGE ELROD: I think we will catch you on the  
8 next round.  
9 MR. SIEGEL: Thank you very much, Your Honors. I  
10 appreciate it.  
11 MR. LETTER: May it please the Court. I am  
12 Douglas Letter. I am the general counsel of the House of  
13 Representatives. I have an overall theme that I want to hit  
14 in a moment, but because Judge Engelhardt's questions, I  
15 think, go right to the heart of this case, I would like to  
16 hit them first, if you don't mind.  
17 Judge Engelhardt, you were saying there is -- we  
18 have this mandatory language and, therefore, the people of  
19 the United States would know that there is a mandate.  
20 That's not correct.  
21 Remember, the Supreme Court said unequivocally in  
22 NFIB that there is a choice. It is not a mandate. There is  
23 a choice. You can either -- you shall maintain health  
24 insurance, or you pay this tax.  
25 So, that is the definitive interpretation of what

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1 the Affordable Care Act means. The Supreme Court said that.  
2 And, yes, Congress was well aware of that. Very well aware  
3 of that. And this Court, obviously, is bound by that.  
4 Everybody in this courtroom and the Congress, we are all  
5 bound by what the Supreme Court majority held in the  
6 Affordable Care Act case.  
7 We know that Congress has the authority to take a  
8 tax of a certain amount and make it zero. There is no doubt  
9 about that. Nobody can contest that. Congress did that.  
10 That means the choice is still there. The choice that the  
11 Supreme Court said was in this statute. At that time, the  
12 choice was maintain health insurance or pay a significant  
13 tax.  
14 The choice now is maintain health insurance, or  
15 there is no tax, there is no penalty. Congress, again, was  
16 free to do that. Absolutely nothing changed what the  
17 Supreme Court had told all of us is the law. And that is  
18 still binding now.  
19 So, we know definitively "shall" in this  
20 provision does not mean "must." Whatever it means in other  
21 statutes, the Supreme Court definitively told us "shall"  
22 does not mean "must." And to show exactly what -- Chief  
23 Justice Roberts knew exactly what he was writing when he  
24 said that for the majority.  
25 If you look at the -- the Supreme Court's NFIB

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1 decision, a key part, 567 US at page 2 -- 568, Chief Justice  
2 Roberts spoke about -- it says, "There are all sorts of  
3 people who are not going to be subject to the tax that was  
4 in the original statute."  
5 So, the question is -- so, Chief Justice Roberts  
6 says, "We would expect Congress to be troubled by the  
7 prospect of making all of those people outlaws." But,  
8 nevertheless, Chief Justice Roberts says, "It suggests,  
9 instead, that the shared responsibility payment merely  
10 imposes a tax citizens may lawfully choose to pay in lieu of  
11 buying health insurance."  
12 So, the Supreme Court gave us the answer already.  
13 And this ties in, then, with -- with my overall theme. What  
14 the plaintiff states are asking here, and, frankly, what the  
15 District Court did, is entirely inconsistent with how we  
16 know Courts are supposed to act.  
17 Because we know that Courts are required to  
18 uphold -- to give a statutory provision a possible  
19 interpretation if that is constitutional, as opposed to one  
20 that is not, and we know under severability you are  
21 directed, you are instructed to save everything you can  
22 unless it is evident, so the burden is on the other side.  
23 It is evident that Congress would not have met that. Would  
24 have preferred no statute.  
25 So, Your Honor, Judge Elrod, obviously, you are

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1 quite -- both -- you and Judge Engelhardt are quite correct  
2 to say we don't always trust statements by even the Speaker  
3 of the House and the Senate Majority Leader to tell us what  
4 something means.  
5 But, remember, we don't have to show that  
6 Congress would have wanted this Court to keep that language.  
7 The burden is on the other side to say it is evident.  
8 That's a high standard that Congress wanted this entire  
9 statute to be struck down.  
10 And, so, the District Court --  
11 JUDGE ELROD: Well, it doesn't have to have  
12 wanted it to. That is a hypothetical. It --  
13 MR. LETTER: No, the Court -- the Supreme Court  
14 has said in any number of severability decisions, you must  
15 uphold whatever can stand on its own.  
16 JUDGE ELROD: You are doing the severability  
17 part.  
18 MR. LETTER: Correct. Correct. But this  
19 applies as well to the first part, because as we know, my --  
20 as my colleague, Mr. Siegel, pointed out, Congress did know  
21 what had been done in NFIB, which, obviously, it was aware.  
22 And Congress said, "Okay, we are going to zero out the  
23 penalty."  
24 Texas says, "Hah, caught ya. You just did  
25 something unconstitutional, because you left in place the

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1 individual mandate, but you got -- you put the tax at zero.  
2 You just did something unconstitutional."  
3 But there is another way to read it. The other  
4 way is to actually follow what the Supreme Court said and  
5 say, "No, you haven't done anything unconstitutional. You  
6 made the tax zero" -- again, we -- everybody agrees Congress  
7 has the power to do that. And, so, a way of reading this is  
8 to save it and say that simply means the choice that  
9 Chief Justice Roberts made clear to all of us is there.  
10 I know Texas is unhappy with what Chief Justice  
11 Roberts did. They wish he had done something different.  
12 But he didn't. And that is the majority of the Supreme  
13 Court. And that is binding. And that was binding on the  
14 District Court.  
15 JUDGE ELROD: But you don't believe that -- well,  
16 obviously, you don't believe that the -- that the statutes  
17 changed, its changes have made that not a possible reading  
18 anymore?  
19 MR. LETTER: But that -- that, obviously, is not  
20 correct, Your Honor, because the change -- again, remember,  
21 the change was something Congress could do. And it made  
22 clear through this change that there actually was even less  
23 coercion than there was before.  
24 Again, remember before, Chief Justice Roberts  
25 said even with coercion, even when faced with this major tax

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1 penalty, you still have a choice. Now, the --  
2 JUDGE ELROD: It is not the degree of coercion  
3 that is at issue. Any coercion is -- is inappropriate,  
4 unless it can be justified. I mean, it is not the degree of  
5 coercion; it is whether or not it is tied to a  
6 revenue-producing rule.  
7 MR. LETTER: And -- and war.  
8 JUDGE ELROD: Isn't it?  
9 MR. LETTER: No, Your Honor. That -- that, I  
10 don't think is a question --  
11 JUDGE ELROD: That was essential to the NFIB.  
12 MR. LETTER: But, again, what we are drawing from  
13 NFIB is -- and there can be no dispute about this. The  
14 Supreme Court majority said there is a choice. You  
15 either -- you either -- you shall maintain health insurance,  
16 or you shall pay this tax penalty.  
17 And Congress has now said, and the ones who did  
18 speak, said, "We don't want there to be any tax penalty. We  
19 want the American people to continue to have a choice. In  
20 fact, we want to make it an even easier choice for them."  
21 JUDGE ELROD: Do you want to address your  
22 client's standing, or are you just here to be  
23 prudentially -- prudential assistance to us today?  
24 MR. LETTER: I am happy to, Your Honor. First of  
25 all, the main thing I want to say to you is under your

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1 precedent, you do not have to decide whether we are properly  
2 an intervenor here or not. The Ruiz case is binding all of  
3 this circuit. Because there is Article 3 jurisdiction,  
4 nobody can doubt that, under Windsor, it is quite clear, and  
5 I think all the parties agree on that. And because  
6 California, I think, as persuasively argued by my colleague,  
7 Mr. Siegel, does have standing. It doesn't -- this Court  
8 does not have to resolve whether the House has standing to  
9 intervene here or not.  
10 Now, we believe that Judge Southwick got this  
11 right, but this Court --  
12 JUDGE ENGELHARDT: What about Justice Ginsburg?  
13 Did she get it right in the House of Delegates case? That  
14 case is written pretty generally, and it is a new case.  
15 MR. LETTER: It is exactly that, Your Honor.  
16 And, obviously, she got it right. She wrote for the Supreme  
17 Court majority. So, it is right, yes. You and I both know  
18 that. But, remember, there the Supreme Court majority was  
19 dealing with a state. Let me back up just one more moment.  
20 Remember --  
21 JUDGE ENGELHARDT: Wrote it very generally. In  
22 fact, when I first saw the opinion, in light of the -- this  
23 case being on our docket, I was drawn to it and I said,  
24 "Well, it is probably written about the Virginia House of  
25 Delegates, and about how that state's legislative framework

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1 is set up."  
2 But maybe a little to my surprise, and yours as  
3 well, it seems as though the opinion is written in very  
4 general terms.  
5 MR. LETTER: Your Honor, remember, my first  
6 statement, which is you don't have to reach this. Under  
7 Ruiz, you don't have to. But, Your Honor, yes, there -- I  
8 think there is at least one sentence, maybe two, that are  
9 framed broadly. But the rest of the opinion makes clear  
10 that -- that Justice Ginsburg and the majority were talking  
11 about state, which is obviously what they should do,  
12 because --  
13 JUDGE ENGELHARDT: I guess we can all read it and  
14 take what we will with -- from it, but I don't read it that  
15 way at all. In fact, I think relegating her statements to  
16 one or two little -- statements that we should overlook, I  
17 think, is -- I didn't get that from the opinion at all.  
18 MR. LETTER: Your Honor, I don't -- I can't do it  
19 right this moment. If you want, I can read you all of the  
20 times that she says "state." And, remember, there is a very  
21 key difference.  
22 Justice Ginsburg -- again, the Supreme Court  
23 majority -- we won't personalize it. Let's make it Supreme  
24 Court majority -- said in Virginia only the Attorney General  
25 can litigate for the State, right?

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1 That's not true for the federal government. We  
2 know for the federal government, actually, Congress has  
3 provided and the Supreme Court has recognized all sorts of  
4 other people can litigate for the United States.  
5 For example, we have qui tam relators under the  
6 False Claims Act.  
7 JUDGE ELROD: Have we designated the House of  
8 Representatives as one of those bodies?  
9 MR. LETTER: Absolutely, Your Honor.  
10 JUDGE ELROD: Which one?  
11 MR. LETTER: 28 U.S.C. 530D says, "In combination  
12 with the Chadha decision" -- and I know, Judge Engelhardt,  
13 let's focus -- Justice Ginsburg mentions Chadha, but she  
14 says it might alternatively mean something else. You  
15 combine Chadha with 530D. 530D says that the executive must  
16 notify both houses of Congress. I am one of the people it  
17 is supposed to notify when it is going to quit, when it is  
18 not -- when it is going to basically let down the American  
19 people and not defend a statute like this, even though there  
20 is obviously valid arguments to be made in support of it.  
21 When that --  
22 JUDGE ELROD: Would it let down the American  
23 people if -- if a co-equal branch of government says  
24 something is unconstitutional? Haven't they actually taken  
25 an oath that they won't be trying to uphold unconstitutional

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1 things? Unless you believe judicial supremacy is so vast,  
2 and a branch isn't even allowed to have its own opinion at  
3 all.  
4 MR. LETTER: Good point, Your Honor. But --  
5 JUDGE ELROD: Do you agree with what I just said,  
6 or do you disagree?  
7 MR. LETTER: I -- I am going to -- I am going to  
8 agree and point out the Justice Department has for many,  
9 many decades had the position that it will defend acts of  
10 Congress if there is a reasonable defense for them.  
11 And here the Justice Department -- there clearly  
12 is a reasonable argument to be made. I assume, Your Honors,  
13 whether you agree or disagree ultimately with what we say,  
14 we have made a reasonable argument, the Justice Department  
15 has said, "Yeah, but we wish it were otherwise."  
16 So -- but fine, fine, they have done that. But  
17 Chadha says -- and there are a batch of cases -- this  
18 circuit, for instance, this circuit, the Third Circuit, the  
19 Tenth Circuit, have cases where you have had situations  
20 where the House and the Senate or the House alone has  
21 intervened and defended constitutionality with the --  
22 JUDGE ENGELHARDT: I was going to ask you about  
23 that. I assume, since you are here on behalf of the House,  
24 you are speaking on behalf of the House of the 111th  
25 Congress, the 115th Congress, and the 116th Congress?

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1 MR. LETTER: Only the 116th, Your Honor.  
2 JUDGE ENGELHARDT: Okay. All right. But we are  
3 talking about the intent. We spent a considerable amount of  
4 time in briefing and here today talking about the intent of  
5 the 110th Congress, and we spent even more time talking  
6 about the intent of the 115th Congress, the tax of 2017.  
7 Shouldn't we also question why the Senate isn't  
8 here to talk about the intent? The will of Congress would  
9 necessarily implicate the Senate, wouldn't it? Why would  
10 they not be here to make the arguments you are making?  
11 MR. LETTER: Your Honor, the -- fair point. And  
12 the answer is, remember that what we say is the answer that  
13 Mr. Siegel gave. We are pointing you to the text of what  
14 Congress passed in 2017. We also like the --  
15 JUDGE ENGELHARDT: You pointed us also to some  
16 quotes from --  
17 MR. LETTER: Absolutely.  
18 JUDGE ENGELHARDT: -- members of different  
19 parties of the Congress in 2017. So, don't -- so, don't --  
20 it seems like we are back to the text, which I am very happy  
21 to hear.  
22 MR. LETTER: I am very happy with the text, but  
23 all I am saying is you should take comfort from the fact  
24 that the Speaker of the House and the Senate Majority Leader  
25 agreed on this.

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1 But -- but let's just go to the text. I am very  
2 happy to do that, as is Mr. Siegel. The text is we got rid  
3 of the -- the penalty. We put it at zero. And we left the  
4 entire rest of the statute intact.  
5 JUDGE ENGELHARDT: So, why would not the Senate  
6 also, upon being notified, as you suggest, by the -- by the  
7 executive, why would the Senate not also be here to say,  
8 "Oh, this is -- this is what we meant when we wrote this"?  
9 There is sort of the -- the 800-pound gorilla that is not in  
10 the room.  
11 MR. LETTER: Your Honor, the Senate operates  
12 differently from the House. Obviously, I can't speak for  
13 the Senate. But it doesn't matter whether the Senate is  
14 here or not. I am giving you arguments. I am not telling  
15 you you should rule this way because this is the position of  
16 the House.  
17 What I am doing, I think, is saying, with -- and  
18 with the proper respect here, you must rule this way because  
19 the Supreme Court told us in NFIB what the statute means,  
20 and in 2017 Congress said what it meant in the text, and we  
21 know what your responsibilities are in upholding any  
22 statutory language you can, particularly in the severability  
23 area.  
24 Again, it has to be evident that Congress would  
25 have preferred to have no statute at all. There is no

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1 evidence, not just little or the minority, there is no  
2 evidence of that.  
3 If the Court has no further questions, I will  
4 save the rest of my time for rebuttal. Thank you, Your  
5 Honors.  
6 MR. HAWKINS: Thank you, Your Honor. May it  
7 please the Court. Kyle Hawkins for the State plaintiffs.  
8 As it stands today, the Affordable Care Act  
9 presents a stand-alone command to buy an insurance product  
10 that the federal government deems suitable. And it does so  
11 without raising a single dime of revenue.  
12 The text of the Affordable Care Act declares that  
13 mandate essential to the law and the goals that Congress  
14 wanted to achieve. The Obama administration thought of that  
15 as an inseverability clause.  
16 The District Court correctly synthesized those  
17 considerations with the Supreme Court's holding in NFIB, and  
18 it reached the correct conclusion. The individual mandate  
19 is unconstitutional, and it is inseverable from the  
20 remainder of the law.  
21 JUDGE ELROD: Can we talk about that essential  
22 term? Because that's also used in reference to ERISA and  
23 other -- and other law in the -- in the statute. And you  
24 don't -- you are not here trying to strike down ERISA, are  
25 you, by saying it is inseverable from ERISA?

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1 MR. HAWKINS: Your Honor, I am not. I am saying  
2 the Affordable Care Act includes what amounts to an  
3 inseverability clause. It is in Section 180-91 that says  
4 that the individual mandate itself, not the penalty, but the  
5 individual mandate, is essential to driving people to sign  
6 up for health insurance, which itself is necessary for  
7 achieving the marketplace reforms that Congress wanted.  
8 Congress was after universal health insurance, and Congress  
9 declared the mandate essential to achieving that goal.  
10 JUDGE ENGELHARDT: There is some mention in the  
11 briefs about provisions in the ACA that amended certain  
12 criminal statutes relating to healthcare fraud, and things  
13 of that sort. Are you -- is it your position that Congress  
14 would not have made those changes either, but for the -- the  
15 monolith of the ACA?  
16 MR. HAWKINS: Well, Your Honor, my position is  
17 that the best evidence of what Congress wanted to do is in  
18 the text. And the text includes this inseverability clause.  
19 And, so, I think it falls from that, that the ACA's minor  
20 provisions and major provisions all are inseverable from  
21 that clause.  
22 And, indeed, that is not just my conclusion.  
23 Every Supreme Court justice who has looked at this question  
24 has concluded that the individual mandate is not severable  
25 from any other portion of the Affordable Care Act, and they

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1 did so in reliance in that clause.  
2 All four justices who looked at that question,  
3 NFIB, reached the same conclusion. And, of course, the  
4 seven Justice majority -- or, excuse me, the six Justice  
5 majority in King v. Burwell discussed the mandate as  
6 operating as part of a three-legged stool, to use the term  
7 of the D.C. circuit in the lower case the Supreme Court was  
8 reviewing.  
9 JUDGE ELROD: What do you say to those who would  
10 say it is absurd to say that it is not severable from a  
11 restaurant calorie guidelines? What do you say to someone  
12 who says that?  
13 MR. HAWKINS: Well, I would say that I am not in  
14 a position to psychoanalyze Congress. And, indeed, the  
15 courts are not to do -- are not to engage in  
16 psychoanalytical tasks. I am not in a position to guess  
17 what Congress would have intended.  
18 What I am in a position to do is to look at the  
19 plain text of the statute that is before the Court today.  
20 If the Court were to go back to the law library and pull out  
21 a current copy of the U.S. Code as it stands today, this  
22 Court would see a command to the American people to maintain  
23 minimum essential coverage. It would see no revenue-raising  
24 capability of that law. And it would see an inseverability  
25 clause saying that this mandate is essential.

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1 Now, Congress has had multiple opportunities to  
2 excise that inseverability clause from the language of the  
3 statute. And I think if we are going to go about looking at  
4 what various congresspeople might have wanted or might have  
5 been thinking or did vote on or didn't vote on, I think we  
6 should take into account the fact that Judge O'Connor's  
7 decision has been on the books now for seven months  
8 declaring the unconstitutional mandate inseverable from the  
9 rest of the law.  
10 Congress has done nothing about that. If  
11 Congress thought that conclusion was wrong, it could have  
12 gone back and it could have excised the individual mandate  
13 from the law. It could have excised the inseverability  
14 clause from the law.  
15 It hasn't done any of that. And I think that  
16 that just demonstrates that congressional intent is not  
17 monolithic, as Your Honors correctly observed during my  
18 colleague on the other side's presentation. It is a very  
19 difficult and dangerous game to try to determine what  
20 different congresspeople were thinking about when they voted  
21 for various statutory provisions.  
22 The best evidence is the text itself. And I  
23 would further submit that if Congress believed that it  
24 didn't -- that the inseverability clause was no longer  
25 appropriate, if it believed that the mandate was no longer

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1 necessary to the law, it had a duty to excise that statute  
2 from the law, or that section from the law.  
3 But it didn't do that. And it is not this  
4 Court's role to act as a legislature and cut sections out of  
5 the statute that Congress has had the opportunity to amend  
6 but has not done so, simply because the Court thinks, as my  
7 friends on the other side suggest, that it can guess as to  
8 what various congresspeople were actually thinking about.  
9 JUDGE ELROD: Can you comment on Justice Thomas'  
10 opinion in Murphy that we don't have our blue pencils in any  
11 regard, and we just should say as applied to these parties  
12 we are not going to -- we are not going to apply this law?  
13 MR. HAWKINS: Yes, Your Honor. I think the  
14 important consideration in Murphy is that that case, we  
15 don't have a severability clause or an inseverability  
16 clause.  
17 At issue there is whether the Professional and  
18 Amateur Sports Protection Act must be struck down in its  
19 entirety, including the advertising provisions of that law,  
20 notwithstanding the unconstitutional portion of that -- that  
21 commandeered the states in violation of the 10th Amendment.  
22 I think that our view today is entirely  
23 consistent with Justice Thomas' opinion in Murphy, because  
24 what separates this from Murphy is that here we have an  
25 inseverability clause.

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1 Now, Courts traditionally treat severability  
2 clauses almost as dispositive. And, in fact, we saw that in  
3 NFIB itself as to the Medicaid expansion. Seven Justices on  
4 the Court voted to hold the Medicaid expansion  
5 unconstitutional, and they decided to sever that portion  
6 from the remainder of the ECA, and they did so because the  
7 Medicaid Act contains a severability clause.  
8 That was almost dispositive for the Supreme  
9 Court. And I would submit that if Courts treat severability  
10 clauses as almost dispositive, they should do the same for  
11 inseverability clauses.  
12 So, in that sense, I think we are quite different  
13 from the statute at issue in Murphy, the PASPA, which didn't  
14 speak to that issue nearly as clearly as the Affordable Care  
15 Act speaks to the issue of severability before the Court  
16 today.  
17 JUDGE ELROD: Counsel, could you speak to whether  
18 or not we should be treating this as an injunction, as  
19 opposing counsel argued?  
20 MR. HAWKINS: Well, Judge Elrod, we think that is  
21 what we got in the District Court, at least effectively.  
22 JUDGE ELROD: That's what I thought you -- I  
23 thought you agreed with them, even though it says this is  
24 not in a -- not granting an injunction. Instead, granting  
25 partial summary judgment on this declaratory judgment.

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1 MR. HAWKINS: Right. So, in -- in District  
2 Court, we, of course, asked for a nationwide injunction  
3 enjoining the enforcement of the ACA, and we asked for a  
4 declaration that the individual mandate was unconstitutional  
5 and inseverable from the rest of the ACA.  
6 Now, at oral argument Judge O'Connor asked about  
7 the relief that we were seeking, and we represented that we  
8 would like a nationwide injunction, as well as a  
9 declaration.  
10 The federal government's position before the  
11 District Court was that an injunction was not necessary.  
12 The -- the government asked the District Court not to enter  
13 an injunction. They said, "We don't need one. We are going  
14 to treat the declaration as -- as it were an injunction. We  
15 are going to comply" --  
16 JUDGE ENGELHARDT: You agree with -- I think on  
17 page 6 and 10 of the latest submission from the government,  
18 that this relief, the ruling from Judge O'Connor doesn't  
19 extend beyond the plaintiff states in this case.  
20 Do you agree with that, or -- where would we go  
21 if we were to affirm Judge O'Connor and send the case -- I  
22 am assuming it, obviously, would go higher. If the case  
23 went back to Judge O'Connor, what would he do -- what would  
24 you expect him to do if you are seeking injunctive relief  
25 and the federal government is now saying that, "Well, no

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1 worries, this ruling only applies to the plaintiff states"?  
2 Would that be satisfactory?  
3 MR. HAWKINS: Well, Your Honor, I think it would  
4 depend on what the federal government does. They  
5 represented in different --  
6 JUDGE ENGELHARDT: They have already said that  
7 they don't think the ruling applies elsewhere.  
8 MR. HAWKINS: And that's a disappointment to us,  
9 because we think that's inconsistent with what they  
10 represented to Judge O'Connor in the District Court. Now,  
11 if they were to -- following the conclusion of this case,  
12 assuming it is affirmed, if they were to not apply the  
13 Affordable Care Act, I think we would then have to evaluate  
14 whether we had been the victim of a bait and switch, and we  
15 might have to go back to District Court and seek the  
16 injunction that we didn't get initially, and we didn't --  
17 JUDGE ELROD: You didn't get the injunction if  
18 the Court determined -- if you were entitled to it legally.  
19 If the Court ruled on the -- on the partial summary  
20 judgment, and then you have to go back for further -- the  
21 relief, the remedy, hasn't been spoke of yet.  
22 MR. HAWKINS: I think that's right, Your Honor,  
23 that we -- we will go back to District Court. Whether or  
24 not we need to seek an injunction, I think, I am not  
25 prepared to make a representation on that today. I think it

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1 will depend on what the federal government does going  
2 forward.  
3 JUDGE ELROD: I am not saying you are entitled to  
4 any injunction. I am just saying that to the extent that  
5 you say, "Well, we thought we already had one," or something  
6 like that, you are not to that process yet, is the way that  
7 the -- that -- it is a partial summary judgment.  
8 MR. HAWKINS: Well, we are just taking the -- I'm  
9 sorry, Your Honor.  
10 JUDGE ELROD: Go ahead.  
11 MR. HAWKINS: We are just taking the federal  
12 government at their word. I think now they are briefing the  
13 supplemental briefing to suggest that it only applies in the  
14 18 plaintiff states. I don't think that's the message that  
15 we heard from them in the District Court.  
16 And, so, we will be evaluating our options moving  
17 forward as to what further relief we may need to seek.  
18 JUDGE ELROD: Do you want to address your  
19 client's standing?  
20 MR. HAWKINS: Yes, Your Honor, I would be happy  
21 to do that. A couple of points on standing. I think,  
22 first, there should be no doubt that this Court has Article  
23 3 jurisdiction for the reasons that Mr. Henneke will present  
24 shortly, the individual plaintiffs are plainly injured.  
25 They clearly have an Article 3 injury. In fact,

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1 that's enough for this Court to proceed to the merits. But  
2 if I were wrong about that, it is important to note that the  
3 states have standing in their own right, because the  
4 Affordable Care Act causes the states a classic pocketbook  
5 injury.  
6 We, of course, have evidence in the record below,  
7 including the CBO reports, which looked at the mandate and  
8 said that this is going to encourage people and, indeed,  
9 cause people to sign up for health insurance.  
10 And it will do that regardless of whether or not  
11 there is a penalty attached to it, because people feel a  
12 duty to comply with the law, even if there is no penalty  
13 attached to it.  
14 Now, just a few days ago, all nine Justices in  
15 the U.S. Supreme Court agreed that a state has standing to  
16 challenge federal action that might have the predictable  
17 effect of causing third parties to act in ways that injure  
18 the state. That was --  
19 JUDGE ENGELHARDT: Do you -- do you agree that  
20 Mr. Siegel's clients also have standing?  
21 MR. HAWKINS: Well, we do, Your Honor. We agree  
22 on the basis of our understanding that the District Court's  
23 declaration is meant to apply nationwide, and would have the  
24 effect of an injunction. And we don't doubt that if it were  
25 applied nationwide, it would cause a classic pocketbook

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1 injury to states --  
2 JUDGE ENGELHARDT: All?  
3 MR. HAWKINS: Right. All states. And they  
4 wouldn't get certain funding that the Affordable Care Act  
5 makes available.  
6 JUDGE ELROD: Do we have to get into that  
7 third-party census issue if -- can you -- can you address  
8 whether or not this printing of this form in Missouri is  
9 \$50,000 worth of standing, so to speak?  
10 MR. HAWKINS: Well, yes. I think that's an  
11 independent basis for --  
12 JUDGE ELROD: Or is it not, because they say it  
13 is not really pursuant to that part of the -- it is not  
14 5000A?  
15 MR. HAWKINS: Well, it is not in the text of  
16 5000A, that's true, but it is part of the implementing regs.  
17 We have all seen these 1095-B and C forms where they have  
18 got, you know, the months January through December laid out,  
19 and as employers, we have to go through and check boxes to  
20 say which months our employees had health insurance. And I  
21 think it is fair to say that that is traceable to the  
22 individual mandate, which requires continuous coverage,  
23 except for short gaps.  
24 JUDGE ELROD: Is there anything in the record  
25 whatsoever that indicates that any of these requirements

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1 checking off the box for -- I guess I will ask the  
2 individual plaintiff's attorney -- but checking off the  
3 individual box, or sending out these forms, is no longer  
4 required or will no longer take place? Is there anything in  
5 the record that indicates that?  
6 MR. HAWKINS: There is not, that we are aware of.  
7 As far as we know, we haven't heard from the IRS that they  
8 are going to do anything differently for next year's tax  
9 forms. We haven't seen those yet. But what we do have is  
10 evidence in the record that the forms injure us, and there  
11 is nothing in the record that I am aware of that that is  
12 going away in light of the TCJA.  
13 So, that is -- I think Your Honor is quite  
14 correct. That's an independent basis for our injury, in  
15 addition --  
16 JUDGE ELROD: It is a question, not a statement.  
17 But okay.  
18 MR. HAWKINS: Understood, Your Honor. But I  
19 think -- I think that is a basis for our injury, as is the  
20 CBO reports. The ACA causes a classic pocketbook injury to  
21 the states, and that should be the end of the standing  
22 analysis. If the Court even gets that far, if it were to  
23 have doubts about the individual plaintiff's standing.  
24 I would like to address a few points that the  
25 other side has raised in their presentation. First and

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1 foremost, I think that the other side, particularly my  
2 friend Mr. Letter, is seriously misreading the Supreme  
3 Court's decision in NFIB.  
4 NFIB holds that the individual mandate is  
5 unlawful. It holds that 5000AA is best read as a command to  
6 buy insurance. And it held that that command, despite being  
7 unlawful, can only be saved if it is fairly possible to read  
8 the law as a tax. It follows if the law cannot fairly be  
9 read as a tax, then the original holding stands, and the  
10 mandate is unlawful.  
11 Now, I think it is crucial to understand the  
12 structure of Chief Justice Roberts' opinion to see how he  
13 gets there. In part 3(a) of Chief Justice Roberts' opinion,  
14 he looks at the mandate. Only the mandate. Not the  
15 penalty.  
16 And he says the best way to read that is as a  
17 command to buy insurance. And then he says two things about  
18 it. That command -- excuse me. He says two things. One,  
19 that's a command to buy insurance. And, two, that command  
20 cannot be justified by the Commerce Clause or by the  
21 Necessary and Proper Clause.  
22 That's the end of 3(a). He then shifts gears in  
23 parts 3(b) and 3(c) of his opinion where he says, "Given our  
24 holding in part 3(a), we need to determine whether there is  
25 some way to save the individual mandate."

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1 And that's -- what he finds out in 3(b) and 3(c),  
2 is that given the fact that there is a penalty provision,  
3 and given that the penalty is raising revenue for the  
4 government, he says that we can glue the individual mandate  
5 provision to the penalty provision, and once they are glued  
6 together, then they function as a tax such that the law can  
7 be saved by construing this as a tax, and that tax is  
8 available under the federal government's taxing power.  
9 Now, what happened in 2017 is Congress took away  
10 everything that supported parts 3(b) and 3(c) of Chief  
11 Justice Roberts' opinion. This is no longer raising any  
12 revenue for the federal government. It no longer can be  
13 fairly characterized as a tax.  
14 So, in light of the TCJ, parts 3(b) and 3(c) of  
15 Chief Justice Roberts' opinion are irrelevant. The only  
16 thing we are left with, then, is part 3(a) of Chief Justice  
17 Roberts' opinion where he holds that this is a command to  
18 buy insurance --  
19 JUDGE ELROD: We don't sever from the Supreme  
20 Court opinion, now, do we?  
21 MR. HAWKINS: Your Honor, I think -- I think we  
22 read the Supreme Court opinion fairly in light of subsequent  
23 events, and I think that's -- I think it is crucial to do so  
24 here, because the entire basis for 3(b) and 3(c) is now off  
25 the table.

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1 Now, Chief Justice Roberts, again, in 3(a) holds,  
2 this is a command, and it is not justifiable, that is fully  
3 supported by the four dissenting justices. There is no  
4 doubt there were five votes on the Supreme Court that it is  
5 a command not justifiable under the Congress power or the  
6 Necessary and Proper Clause.

7 And the best evidence that I am right about this  
8 is Justice Ginsburg's dissent. In dissent, Justice Ginsburg  
9 faults Chief Justice Roberts for discussing the Commerce  
10 Clause, for reaching the Commerce Clause holding.

11 Justice Ginsburg said, "Look, this is obviously a  
12 tax. We should just say it is a tax and be done with it.  
13 We don't have to say anything about the Commerce Clause."  
14 But Chief Justice Roberts rejected that, and this is in part  
15 3(d) of his opinion.

16 He responds to Justice Ginsburg in 3(d), and he  
17 says, "No, I have to reach a Commerce Clause holding because  
18 this is best read as a command to buy insurance. So, I have  
19 to read it in its -- in the -- I have to give it the best  
20 reading possible, and then I have to assess whether that  
21 best reading is constitutional or not. And only after doing  
22 that analysis, then do I get to the taxing issue."

23 So, I think that interplay between Chief Justice  
24 Roberts and Justice Ginsburg shows that our reading of NFIB  
25 is correct, and the other side's reading of NFIB is

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1 incorrect, because it elides the differences between those  
2 four different parts of Section 3 of Chief Justice Roberts'  
3 opinion.

4 JUDGE ELROD: Do you really mean it when you say  
5 the "shall" is enough? What if it said "You shall buy" --  
6 "buy insurance, but if you don't, you get an ice cream  
7 cone?" You actually get something if you don't buy the  
8 insurance.

9 What is the answer then?

10 MR. HAWKINS: Well, Your Honor, I am not sure how  
11 Congress would justify that under its enumerated powers.

12 JUDGE ELROD: The question, though, is about is  
13 the -- does the "shall" matter even if you are given  
14 positive incentives to not do it?

15 MR. HAWKINS: Well, I am not sure how that would  
16 be fairly read as a tax in a case like that. It sounds like  
17 it is not raising revenue for the federal government. So, I  
18 think, again, you would have a command to buy insurance, and  
19 I am not sure what the permissible instruction would be.

20 JUDGE ELROD: Is it a command? Is it still a  
21 command?

22 MR. HAWKINS: It is still a command, Your Honor.

23 JUDGE ELROD: Do you get a -- what if you get a  
24 house instead of an ice cream cone?

25 MR. HAWKINS: Yes. That -- that is a command.

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1 It is still a command to buy insurance. That's the holding  
2 in part 3(a) of Chief Justice Roberts' opinion.

3 JUDGE ELROD: It is not an economics analysis at  
4 all?

5 MR. HAWKINS: No, I don't -- I don't think it is.  
6 The -- it is a command to buy insurance. And -- and the  
7 federal government cannot do that under the Commerce Clause  
8 or the Necessary and Proper Clause.

9 So, the question, then, is when -- whether that  
10 command in Your Honor's hypothetical can be glued to  
11 something somewhere else in the statute that would say that.  
12 That's what the chief did in 3(b) and 3(c).

13 Now, in the house-buying hypothetical, that  
14 would be the question. If you get -- if you get a house  
15 out of it, does that somehow save it? I can't think of how  
16 it would. But -- but that is how the analysis should play  
17 out.

18 JUDGE ELROD: Counsel, could -- could you address  
19 the writ-of-erasure fallacy? Why isn't striking the word  
20 "shall" a textbook example of the writ-of-erasure fallacy if  
21 there is no government official enforcing the word "shall"?

22 MR. HAWKINS: Well, Your Honor, the -- the -- I  
23 think it is important to tie it back to the relief that we  
24 are seeking. We are asking for a declaration that this law  
25 is unconstitutional, the mandate is unconstitutional, and we

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1 are asking for an injunction against the enforcement of the  
2 individual mandate and against the Affordable Care Act.

3 JUDGE ELROD: Not just the striking out of a  
4 word?

5 MR. HAWKINS: No. That's -- that's right. We  
6 are not asking this Court to get out an eraser. We are not  
7 asking the Court to tear pages out of the U.S. Code. We are  
8 asking the Court for specific forms of relief. A  
9 declaration and an injunction.

10 That is what we sought below. That is what we  
11 were seeking all along. So, I don't think there is any  
12 writ-of-erasure fallacy. We are not asking the Court to  
13 erase anything.

14 One or two --

15 JUDGE ENGELHARDT: Do you have any citation? I  
16 don't believe, and correct -- I know one of you or many of  
17 you will correct me if I am wrong, but I don't believe  
18 Justice Roberts in the NFIB opinion opines at all on  
19 severability, because he doesn't reach that issue having  
20 found as he did in the prior sections.

21 Is there anything that you can cite us to, like a  
22 best case, that might suggest how severability would be  
23 viewed by Justice Roberts or any -- I have read the dissent,  
24 of course. We know how they feel about it, at least in the  
25 context of that case.

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1 Is there anything that you can point to that  
2 would suggest severability in this case for Justice Roberts,  
3 in particular?  
4 MR. HAWKINS: I think the best ways to that,  
5 Judge Engelhardt, would be King v. Burwell. When -- in that  
6 case, that is about the various federal subsidies that go  
7 along for the exchanges.  
8 Chief Justice Roberts, in describing how all of  
9 this works, talks about the individual mandate as being  
10 essential to the functioning of the other healthcare market  
11 reforms that the ACA sought to achieve. He particularly  
12 calls out the guaranteed issue and community rating  
13 provisions. Indeed, it has always been understood by the  
14 Obama administration and the Trump administration that that  
15 three-legged stool all fits together.  
16 So, Chief Justice Roberts does speak to that in  
17 King v. Burwell, and I think that's the clearest statement  
18 that we have seen that the chief would agree that there is  
19 a -- that this is not --  
20 JUDGE ENGELHARDT: Is the language that he used  
21 broad enough for us to consider? I mean, you are asking for  
22 the entirety. As I mentioned, when one of your colleagues  
23 was arguing earlier, I think they mentioned a guarantee  
24 issue, certainly in the community rating, among some other  
25 specific provisions that are intertwined.

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1 Is there -- is there -- you believe that his  
2 statements in King v. Burwell are so broad as to include the  
3 entirety of the statute?  
4 MR. HAWKINS: I think they are, Your Honor, when  
5 combined with -- Your Honor is asking about Chief Justice  
6 Roberts specifically. Chief Justice Roberts has indicated  
7 on numerous occasions that text controls. That we start  
8 with the text, and when the text is clear and dispositive,  
9 we don't look further than that. So, I think that he would  
10 agree that when you have an inseverability clause, it should  
11 be respected.  
12 Other cases, just off the top of my head, we  
13 talked earlier about Murphy v. NCAA. There, I believe, the  
14 Chief Justice is in the majority declaring the PASPA, the  
15 Professional Amateur Sports Protection Act, unlawful in its  
16 entirety. Of course, the Court reached that conclusion  
17 without the benefit of an inseverability clause that we have  
18 here today.  
19 So, I think to answer Your Honor's question,  
20 there is ample jurisprudence to suggest that if one is  
21 committed to the text, as Chief Justice Roberts is, then it  
22 follows that the entire Affordable Care Act is inseverable  
23 from the unconstitutional mandate.  
24 JUDGE ENGELHARDT: To be clear, my question  
25 wasn't limited to the Chief Justice, but he is the author of

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1 the two opinions that we have been talking about a great  
2 deal here today.  
3 MR. HAWKINS: That's correct, Your Honor. What  
4 we know, Judge Engelhardt, is that every judge who has  
5 looked at this specific question now before the Court has  
6 said that it is -- the mandate is inseverable from the rest  
7 of the law. Four for four in NFIB.  
8 You combine that with the opinion in  
9 King v. Burwell, which, again, was a six-judge --  
10 six-justice opinion. That is good evidence that our  
11 arguments are correct, that the mandate is not severable  
12 from the rest of the law.  
13 JUDGE ELROD: Counsel, do you have a Skelly Oil  
14 problem?  
15 MR. HAWKINS: No, Your Honor. I don't think we  
16 have a Skelly Oil problem at all. Skelly Oil is a case  
17 about federal question jurisdiction. So, what Skelly Oil is  
18 saying is that even though there is a federal statute called  
19 the Declaratory Judgment Act Statute, that doesn't get you  
20 into federal court automatically just by invoking that  
21 statute.  
22 Instead, what the Court needs to ask is under the  
23 inverse hypothetical course of suit, would that belong in  
24 state court, or would that belong in federal court? If the  
25 answer is federal court, well then there is no problem.

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1 Then Skelly Oil says, yes, there is federal -- federal  
2 question jurisdiction.  
3 But if that sort of inverse hypothetical course  
4 is sued, would actually belong in state court, then you  
5 don't get into federal court just by virtue of the  
6 Declaratory Judgment Act. I think that's what Skelly Oil is  
7 saying. That is no problem here.  
8 Of course, the hypothetical inverse course of  
9 suit to enforce the ACA, of course, would be brought by the  
10 federal government; would arise under federal law. So,  
11 there is certainly no Skelly Oil problem here. And I  
12 believe the federal government agrees with us on that. They  
13 have got a footnote in their brief to that effect.  
14 I see I am just about out of time. I am happy to  
15 answer any additional questions. Otherwise, we would ask  
16 the Court to affirm the judgment below in its entirety.  
17 JUDGE ELROD: Thank you.  
18 MR. HAWKINS: Thank you, Your Honor.  
19 MR. FLENTJE: Hi. I am August Flentje with the  
20 Justice Department here on behalf of the federal government  
21 defendants.  
22 I plan to go through three points. I will go  
23 quickly through the ones the Court has already addressed in  
24 detail.  
25 First, why this Court has jurisdiction to address

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1 the merits.  
2 Second, why the plaintiffs' claims succeed on the  
3 merits.  
4 And, third, why the District Court's judgment  
5 should be limited to injuries that the plaintiffs have  
6 standing to pursue here.  
7 First, in the Court's supplemental briefing  
8 order, there were several questions. Some of them are  
9 complicated. But there is a simple answer that gets us  
10 through them, and I think all the parties agree, which is  
11 that this case follows the Windsor model.  
12 Critically to that, the United States continues  
13 to enforce the ACA, and it will do so pending a final  
14 resolution of this case. Given that enforcement, that is  
15 sufficient to have an Article 3 controversy between the  
16 plaintiffs and the United States.  
17 And, of course, the participation of the  
18 intervenors is helpful to ensure a vigorous adversary  
19 presentation of the issues. And that's basically exactly  
20 what happened in Windsor.  
21 In both cases the executive branch made a  
22 judgment that a statutory scheme it was administering was  
23 not constitutional, and the Supreme Court, you know,  
24 discussed the conundrum faced by the executive branch, and  
25 decided this was a reasonable way to allow the judicial

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1 branch to have the final say.  
2 JUDGE ELROD: You don't believe that the -- that  
3 the -- the executive branch is required to continue to  
4 enforce? It is a choice, right?  
5 MR. FLENTJE: I think if -- I think there are --  
6 I mean, there is -- there is enactments that might be  
7 unconstitutional that the executive branch handles by just  
8 not enforcing them. Say a criminal law that is -- is -- is  
9 on the books but not constitutional, the executive branch  
10 can simply not enforce it, and it would never -- never get  
11 to court.  
12 But in a case --  
13 JUDGE ELROD: You are not subject to -- it is not  
14 because of -- it may be prudential for you to wait for  
15 judicial supremacy, but it is not required?  
16 MR. FLENTJE: I think that's correct. But --  
17 JUDGE ELROD: You are choosing to here?  
18 MR. FLENTJE: Yes. The executive branch is  
19 continuing to enforce the ACA pending the outcome --  
20 JUDGE ELROD: Even though it believes it is  
21 unconstitutional?  
22 MR. FLENTJE: And, again, the Supreme Court  
23 discussed this conundrum in Windsor. There were some  
24 varying views on the court, but the majority accepted this  
25 as a reasonable way to manage, especially when you have a

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1 complicated statute that -- that covers a lot of what --  
2 that covers a lot of ground. And that's what is happening  
3 here.  
4 The second point on jurisdiction is we think the  
5 individual plaintiffs have standing here based on the  
6 combined impact of the mandate which requires them to buy  
7 insurance and the insurance reforms which insure that that  
8 insurance they must buy is unsatisfactory. That is an  
9 injury that is sufficient for the District Court  
10 jurisdiction, of course, for this Court's jurisdiction, to  
11 evaluate the merits of the case.  
12 JUDGE ELROD: This -- does the government take  
13 the position on the states and any special solicited under  
14 the Massachusetts case?  
15 MR. FLENTJE: We -- we don't have a position on  
16 the -- on the state standing. Of course, the District Court  
17 didn't address the state standing, and it raises a variety  
18 of issues. And our position is because the individual  
19 plaintiffs have standing, it was simple at the adjudication  
20 stage, to -- and the District Court probably didn't --  
21 handled things correctly in saying given that they have  
22 established standing, we -- the Court can go ahead and  
23 address the merits and not get into those other issues.  
24 So --  
25 JUDGE ENGELHARDT: By adopting the position that

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1 the District Court's ruling applies only to the plaintiff  
2 states and the plaintiffs -- the individual plaintiffs, is  
3 that not designed to reflect on the lack of standing of the  
4 intervenor states?  
5 MR. FLENTJE: Yes. This is -- the question with  
6 the intervenor states is do they have standing to appeal the  
7 District Court judgment? And there you look at the  
8 judgment. It is a declaratory judgment. Under the  
9 declaratory judgment statute, the -- the declaration is  
10 between the plaintiffs seeking the declaration and the  
11 defendant, the United States.  
12 So, it declares the rights of the plaintiffs  
13 vis-à-vis the United States. It does not say anything about  
14 the rights of the intervenor states or the House, although  
15 they are not talking about that.  
16 So, I think the way to handle that issue, and  
17 to -- and probably not fully satisfy the intervenor states,  
18 would be to make clear that they would not be bound as an  
19 estoppel matter because they are -- are not participating as  
20 parties with standing.  
21 JUDGE ELROD: They would bring their own case  
22 somewhere else, or here, too, if they want it, if they were  
23 eligible?  
24 MR. FLENTJE: I guess. I don't want to -- I  
25 don't want to suggest anything. So --

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1 JUDGE ELROD: Can you help, though? Because  
2 everybody else here says the -- even though the District  
3 Court's opinion says what it says, says that this was in  
4 lieu of injunctive relief, and that the government said that  
5 they wouldn't -- has the government smack-dab in the middle  
6 of all of this understanding, and you are saying something  
7 different.

8 MR. FLENTJE: The District Court issued a  
9 declaratory judgment. Now, a final declaratory judgment  
10 declaring the rights between us and the plaintiffs, the  
11 federal government will follow that judgment as to what the  
12 law means between the parties.

13 Texas had talked about, well, we are only going  
14 to do it in their states. Actually, we are going to do it  
15 with respect to the plaintiffs. So, if that means action --  
16 additional actions would need to be taken that had impact  
17 beyond those states, that would be part of following the law  
18 as declared by the District Court.

19 So, it is a declaratory judgment. It -- I don't  
20 know that there is a big daylight between what an injunction  
21 would mean and what a declaratory judgment would mean at the  
22 end of the day. Once there is a final ruling, and, you  
23 know -- and, so, that gets me to the point, you know, a lot  
24 of these technical issues are, like, important when you are  
25 talking about District Court judgments, but, you know, a

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1 case like this likely would end up with a precedential  
2 decision of this Court or the Supreme Court, and as a  
3 precedential matter, then it binds as a -- as precedent, and  
4 that sort of might obviate some of the technical issues on  
5 the scope of the judgment, how that would work in different  
6 contexts.

7 JUDGE ELROD: Counsel, the District Court was  
8 modest in the extent that it granted a stay of its own order  
9 pending all of this going on, so that no one had to go --

10 MR. FLENTJE: Yeah.

11 JUDGE ELROD: What if that stay were not in  
12 place? Then what would happen? What is the government  
13 planning to do?

14 MR. FLENTJE: Well, again, we -- we think it is  
15 great that the stay is in place. This is a very complicated  
16 program. It is multifaceted, obviously. It is a  
17 significant part of the economy. And that was -- that was  
18 important to the United States.

19 As far as a -- how compliance with a declaratory  
20 judgment that is final but on appeal, I mean, I think that  
21 raises complicated issues, and I think we are appreciative  
22 of the existence of the stay so those things don't need to  
23 get sorted out until there is a final ruling and the case is  
24 fully resolved and the appeals are exhausted.

25 JUDGE ELROD: The government believes or

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1 anticipates that it could find the act to be inseverable and  
2 do so only in certain states and strike it down only in  
3 certain states in its entirety? Is that -- the government  
4 believes that is a possibility?

5 MR. FLENTJE: The -- again, I think a lot of this  
6 stuff would have to get sorted out. And it is complicated.  
7 So, I think that's -- that's one reason the stay was  
8 granted. I think how it applies in the states, which parts  
9 can't be applied at all because they would injure the  
10 states, and they are part of the declaratory judgment, I  
11 think those -- that raises a lot of complicated issues,  
12 which I think militated in favor of the stay. Militated in  
13 favor of getting a final resolution with all appeals  
14 exhausted before that step is taken. And then -- and  
15 then -- and then go from there. So --

16 JUDGE ELROD: Your position is we are not nearly  
17 there? We are not even to remedy at all?

18 MR. FLENTJE: No. I mean, the District Court  
19 issued a final remedy. So, there is a final remedy. The  
20 ACA is declared invalid.

21 JUDGE ELROD: Right. But it is not a --

22 MR. FLENTJE: I think that's a little overbroad.

23 Sorry.

24 JUDGE ELROD: Right. It doesn't say where it  
25 applies, or whether it applies beyond these parties to this

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1 suit?

2 MR. FLENTJE: I think that's right. That comes  
3 from the Declaratory Judgment Act. It says that we cannot  
4 apply the ACA to these plaintiffs. If that means we can't  
5 apply it at all, that is what it means. We just don't -- we  
6 haven't gone down that road yet. And, again, I think --

7 JUDGE ENGELHARDT: Well, the intervening states  
8 have intervened, I believe, before even the motions were  
9 pending in the case. They intervened, if I recall  
10 correctly, from the briefs, prior to the amended complaint.

11 So, early on in the District Court's judgment  
12 doesn't make a distinction between -- and I realize that  
13 issue wasn't before it so that it could clarify, but it  
14 doesn't make a distinction between the plaintiff states and  
15 the intervenor states.

16 So, we have what we have here --

17 MR. FLENTJE: Yeah, but --

18 JUDGE ENGELHARDT: -- in this court.

19 MR. FLENTJE: But the plaintiffs were seeking the  
20 declaration, and they were seeking a declaration of the  
21 rights between the plaintiffs and the United States. They  
22 weren't seeking a declaration of their rights amongst each  
23 other.

24 JUDGE ELROD: But doesn't the District Court use  
25 the word "parties"?

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1 MR. FLENTJE: Excuse me?  
2 JUDGE ELROD: I thought the District Court used  
3 the word "parties." I could stand to be corrected. There  
4 was so much --  
5 MR. FLENTJE: Yeah, I would have to check that,  
6 but just I don't think that would be --  
7 JUDGE ELROD: If they used the word "parties,"  
8 then does that mean the intervenors who are already at the  
9 party, so to speak? And I don't --  
10 MR. FLENTJE: We think that would be a misuse of  
11 the Declaratory Judgment Act, given that they are not --  
12 they -- I don't think they have a basis of seeking a  
13 declaratory judgment against the states. We are the ones  
14 that enforce the ACA.  
15 So, I just don't think that would work. So, I  
16 think reading "parties" in that manner is reasonable, is  
17 probably the way to go there. And I think it is a simple  
18 solution.  
19 Again, I think the states could get some comfort  
20 if -- if this Court made clear that they would not be  
21 estopped or bound by -- because of their status, their  
22 special status as kind of aiding -- aiding the Court in an  
23 adversary position presentation.  
24 JUDGE ELROD: That is an interesting statement  
25 for you to make.

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1 MR. FLENTJE: Well, I -- it is -- I just -- we  
2 think that's how the law would work. We think that's the  
3 operation of this -- of an opinion of this Court and of the  
4 District Court would work that way, given the scope of the  
5 Declaratory Judgment Act, given the standing issues, and  
6 given the fact that the Declaratory Judgment Act can really  
7 only declare the rights between these -- the people --  
8 actually on the same side of the bench here, but that's --  
9 those are the rights that could be declared under that  
10 statute.  
11 The only other thing I would say on remedy is  
12 that a point we made in our brief where we differ with the  
13 plaintiffs somewhat is that the remedy should also -- the  
14 declaratory remedy should also be limited to the injuries  
15 that are established by the plaintiffs.  
16 Again, we think this is more of a technical  
17 point. We -- it is a very important institutional point for  
18 the government. The District Court judgments should be  
19 limited to the dispute between the parties and the injuries  
20 that establish standing for the plaintiffs.  
21 Again, we don't think that needs to be sorted out  
22 which provisions the ACA would -- would be covered and not  
23 covered, because that was not addressed in the District  
24 Court. It would require an assessment of injuries to Texas,  
25 which the District Court didn't conduct.

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1 And, again, it might all be obviated if there is  
2 a precedential ruling from a higher court that resolves  
3 this -- these kinds of issues as a matter of precedent.  
4 JUDGE ELROD: Could you help a bit with that?  
5 That's a little bit vague. Because it seems there is an  
6 argument that it was inseverable all the way, that the  
7 government was making, but then the government says that  
8 only a couple of the other provisions would be wrapped up  
9 in it. And, for example, the restaurant provision wouldn't  
10 be wrapped up in it, or these other -- or these criminal  
11 laws.  
12 What is the government's position? It is  
13 inseverable from the other two parts that I can't think of  
14 the names of right this second. You could help me with  
15 that.  
16 MR. FLENTJE: The guaranteed issue, community  
17 rating, and the mandate.  
18 JUDGE ELROD: Thank you.  
19 MR. FLENTJE: And also the insurance reforms as  
20 they said in King.  
21 JUDGE ELROD: So, it is inseverable from those,  
22 but not from the rest. And, so, you would leave in place  
23 the calorie guide; is that right?  
24 MR. FLENTJE: It is really important -- our  
25 argument on the scope of the judgment is totally separate

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1 from our argument on severability. Severability, as this  
2 Court said in the National Federation of the Blind, you look  
3 at what -- the unconstitutional provision in light of the  
4 statute as a whole.  
5 And as the dissenters in NFIB looked at the --  
6 you can't really assess it without analyzing the whole  
7 statute, because it was all enacted together. It all worked  
8 together.  
9 JUDGE ELROD: Okay. Are you saying it is  
10 entirely inseverable now? I -- whereas, before you argued  
11 perhaps that some parts of it could be taken -- kept -- are  
12 you saying the whole thing must go now?  
13 MR. FLENTJE: Our position is the entire act is  
14 not severable; however, the judgment might still be limited.  
15 The judgment of the District Court should still assess the  
16 injury that these various provisions caused the plaintiffs,  
17 and should not declare a provision that has no impact on the  
18 plaintiffs to be unlawful based on applying severability.  
19 So, the Court might say -- the reason this is  
20 inseverable is because the whole statute rises or falls  
21 together. We have the -- the findings that work as a  
22 nonseverability clause. We have nine justices who said this  
23 all works together. We have all of this assessment of  
24 severability that looks at the statute as a whole.  
25 So, as far as the District Court's or this

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1 Court's legal reasoning, it could say the statute rises and  
2 falls together. However, the judgment needs to be narrowed  
3 a little bit. You need to narrow the judgment, the actual  
4 declaratory judgment, to those provisions that injure and  
5 impact the plaintiffs, and send the case back to look at  
6 that.

7 JUDGE ELROD: You didn't litigate that already?  
8 You didn't litigate that in the District Court when the  
9 District Court was writing the -- the partial declaratory  
10 judgment?

11 MR. FLENTJE: I think -- I mean, I think --  
12 JUDGE ELROD: I mean, to the extent --  
13 MR. FLENTJE: Again, we think it is an Article 3  
14 issue. So, yes, we did raise it in our brief in this Court  
15 for the first time. And, you know, we -- we do think, you  
16 know, given that, it would be appropriate to remand to  
17 consider the -- the scope of the judgment on that point.  
18 But, again, we think it is more of a technical point,  
19 because -- because, again, the severability analysis  
20 requires looking into the statute altogether.

21 And, obviously, there is the precedential impact  
22 of this Court decision or a higher court's decision that  
23 could make a lot of -- sorting out a lot of those details  
24 unnecessary down the road.

25 JUDGE ELROD: Thank you. I think we have your

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1 argument.

2 MR. FLENTJE: Thank you.

3 MR. HENNEKE: Good afternoon, Your Honors. May  
4 it please the Court. My name is Robert Henneke with the  
5 Texas Appellate Policy Foundation here on behalf of the  
6 individual plaintiff appellees Neil Hurley and John Nantz.  
7 Mr. Hurley and Nantz have standing to bring this  
8 action because they are directly injured by the Affordable  
9 Care Act. And the relief they seek would redress that  
10 injury.

11 My clients clearly have an injury. In fact  
12 pocketbook injury. It is the law of the land that they have  
13 to purchase a product that they don't want. And to your  
14 point during the appellant's time, Your Honor, the record is  
15 undisputed on that, citing to Record on Appeal 641 where  
16 Mr. Hurley states, "I continued to maintain minimum  
17 essential health coverage because I am obligated."  
18 Mr. Nantz at 637 states, "I am obligated to  
19 comply with the Affordable Care Act's individual mandate."  
20 Furthermore, at Record on Appeal 636 and 640, my  
21 clients are additionally injured by expensive coverage, loss  
22 of doctor choice, decreased quality of care, and rationing  
23 of care. They also must incur the cost of IRS reporting  
24 requirements related to the filing of their taxes and  
25 compliance with the individual mandate.

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1 In response to the appellant's claim that my  
2 client's injury is self-inflicted, again, one only needs to  
3 look at the texts of 5000A, subsection A, which mandates  
4 that certain individuals, quote, "shall ensure that they  
5 are," quote, "covered under minimum essential coverage."  
6 Noteworthy also are the exceptions which provide  
7 that certain other individuals remain subject to the mandate  
8 but are exempt from the then penalty for noncompliance. The  
9 ACA contemplates the individual mandate carries the force of  
10 the command because categories of persons are subject to it  
11 without the penalty.

12 The individual mandate -- yes, ma'am.

13 JUDGE ELROD: So, it is your position that those  
14 people would have standing if they -- even if they weren't  
15 buying insurance? If they were in one of those exempted  
16 categories?

17 MR. HENNEKE: They are still --

18 JUDGE ELROD: Before -- you know, like back at  
19 the time of the original argument, I believe Justice Kagan  
20 asked a question about that, whether or not people who don't  
21 have to pay the -- pay the penalty automatically who are  
22 exempt, are they -- would they have standing?

23 MR. HENNEKE: Well, there is still a command  
24 there. And it is a great point that you bring up, Your  
25 Honor, because I want to go back to the history of NFIB and

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1 address the appellant's argument that my clients' harm was  
2 self-inflicted.

3 This was resolved in the case history of NFIB.  
4 And if Your Honor will recall that in NFIB, the shared  
5 responsibility payment, the choices alleged by appellants  
6 was not effective until 2014. And NFIB was 2012 and before.

7 The sole basis for the NFIB individual plaintiffs  
8 as set forth in their declarations was the individual  
9 mandate, not the penalty. And in denying the government's  
10 motion to dismiss on standing, the NFIB Trial Court as did  
11 Judge O'Connor correctly held that the individuals had an  
12 injury.

13 This argument was carried through the Eleventh  
14 Circuit and all the way to the Supreme Court where it was  
15 addressed during the first day of argument in questions from  
16 both the Chief Justice and Justice Kagan.

17 Justice Kagan was questioning the attorney for  
18 NFIB, now Judge Katsas, and Justice Kagan asked Mr. Katsas,  
19 "Do you think a person who is subject to the mandate but not  
20 subject to the penalty would have standing?"

21 Mr. Katsas responded, "Yes, I think that person  
22 would, because that person is injured by compliance with the  
23 mandate."

24 Justice Kagan asked, "Well, what would that look  
25 like? What would the argument be as to what the injury

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1 was?"

2 Mr. Katsas replied, "The injury, when that person

3 is subject to the mandate, that person is required to

4 purchase health insurance that is a forced acquisition of an

5 unwanted good. It is a classic pocketbook injury."

6 JUDGE ELROD: Counsel, what do you say to those

7 who might say, "Well, they argued that, but the Court didn't

8 actually make a standing and could be considered maybe

9 drive-by standing?" Some people use that colloquial term.

10 So, what do you say to that? While there might

11 be questions on a topic, if, indeed, we may ask in our court

12 questions today, but it doesn't mean today that we have

13 answered a question a certain way.

14 MR. HENNEKE: Well, we can say for certainty that

15 the Supreme Court NFIB did proceed forward to resolve the

16 merits of the case. I believe it is implicit that it was

17 resolving this question of the individual plaintiff's

18 standing in the affirmative by reaching the merits after

19 addressing this during oral argument.

20 And I think the Trial Court again correctly did

21 so here. So, I say if you look at the case history of NFIB,

22 that this is ground that has been well covered, that

23 individual plaintiff's standing has been addressed and

24 resolved.

25 And, again, going back to the text of the -- of

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1 the ACA, the other side's choice argument is wrong, because

2 the choice language only arises in the context of the

3 savings (phonetic) construction, agreeing with Mr. Hawkins.

4 The mandate was recognized as not being a choice

5 in Section 3(a) when Chief Justice Roberts found the mandate

6 was best construed as, quote, "A command to purchase

7 insurance" -- I'm sorry -- "command to buy insurance."

8 I would also like Your Honor to address a second

9 path of traceability. And that was addressed in the notice

10 of supplemental authority that we filed last week with

11 regard to the Supreme Court case, Department of Commerce of

12 New York.

13 First, of course, we have already argued how my

14 clients' injury is directly traceable to the individual

15 mandate. Point the Court to Record on Appeal 2770. Without

16 the individual mandate, Mr. Hurley and Nantz would not be

17 required in violation of the constitution to maintain

18 specific health insurance coverage, nor would they be

19 subject to an increased regulatory burden.

20 But the Supreme Court and Department of Commerce

21 also recently upheld standing as a result of, quote, "the

22 predictable effect of government action." And that's the

23 slip opinion, page 11.

24 Traceability and Department of Commerce was met

25 when third parties reacted in predictable ways to the

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1 citizenship question, even when they did so unlawfully.

2 Here, the predictable reaction is lawful. Individual

3 plaintiff's purchase of minimum essential coverage is likely

4 a predictable reaction to the 5000A, Subsection A,

5 individual mandate legal command.

6 New York relied on historical data to show

7 predictable effect. In this situation, both the 2008 and

8 2017 congressional budget office reports conclude that some

9 individuals will comply with the mandate absent penalties.

10 JUDGE ELROD: If we were inclined, assuming

11 arguendo, to take that argument, would that mean that we

12 would have to overrule our other opinions, which might say

13 that third-party causation is not enough to generate

14 standing?

15 MR. HENNEKE: Well, here what we have is even

16 better, though, is you have the direct evidence of the

17 individual plaintiffs that is greater evidence to establish

18 standing.

19 JUDGE ELROD: So, you don't need that -- that

20 census argument?

21 MR. HENNEKE: We don't need the census argument,

22 but it, I think, bolsters the traceability argument in

23 explaining how it is fairly predictable and supports the

24 testimony of my clients that the command in the statute is

25 then what they have done.

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1 It is not just a predicted effect. It is what

2 happened. And the result of that is that they continue to

3 maintain minimum essential coverage because the law says

4 that they have to.

5 Again, going back to the record, which was not

6 disputed, and that's at 637 and 641.

7 And with that, Your Honors, unless there is any

8 additional questions, we also request that you affirm the

9 Trial Court's judgment below in its entirety.

10 JUDGE ELROD: Thank you.

11 MR. HENNEKE: Thank you. Are y'all going in a

12 different order?

13 MR. LETTER: Yes, we are, Your Honor. I am

14 arguing first in rebuttal for seven minutes.

15 JUDGE ELROD: Okay. Thank you.

16 MR. LETTER: Thank you. And if I could just

17 pause for one second. This is why I became a lawyer. I

18 hope you are enjoying yourselves as much as I am.

19 Also, I -- I apologize. I was remiss before. I

20 would like to introduce who is sitting with me at counsel

21 table. Mr. Jeremy Kreisberg and Ms. Rachel Miller-Ziegler,

22 who are also representing the House here.

23 I have several points in response to these

24 arguments that have been made. The first is, Judge Elrod,

25 you asked a key question about -- I think you mentioned the

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1 menus that would be struck down.  
2 Remember that the kinds of provisions here that  
3 would be struck down if there is no severability are, for  
4 example, the -- the provision about when you can be denied  
5 or charged more insurance for preexisting conditions.  
6 The provision about children can be kept on  
7 parents' insurance until they are 26. These are all kinds  
8 of things that would be struck down if there is no  
9 severability. And --  
10 JUDGE ENGELHARDT: Let me ask you about that.  
11 Isn't the House the best entity to remedy -- I mean, can't  
12 they put together sort of a cafeteria-style package of all  
13 of these individual features that are so attractive, the  
14 ones that you are talking about, and popular in various  
15 quarters? Can't they -- they could do this tomorrow.  
16 Couldn't they put them together and vote on them like that,  
17 and pass all of the things, and moot out the issue of  
18 severability here?  
19 MR. LETTER: Well, I am sure Your Honor meant  
20 when you said "the House," it is both the Congress and the  
21 President.  
22 JUDGE ENGELHARDT: Sure. But it would start with  
23 the House. And the reason I am asking about the House is  
24 because that's who you represent.  
25 MR. LETTER: Start with us, right. And,

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1 obviously, the President would sign that, right. No,  
2 obviously not.  
3 JUDGE ENGELHARDT: And that's exactly the point.  
4 And that's exactly the point. Because there is a political  
5 solution here that you -- various parties are asking this  
6 Court to roll up its sleeves and get involved. Isn't that  
7 exactly the point? Isn't that why the Senate isn't here?  
8 MR. LETTER: No, Your Honor.  
9 JUDGE ENGELHARDT: Truthfully. Truthfully.  
10 MR. LETTER: Truthfully, no, Your Honor. That's  
11 not the point. Let me -- I hear what you are --  
12 JUDGE ENGELHARDT: Why -- why is it the -- why  
13 does Congress want the Article 3 judiciary to become the  
14 taxidermist for every legislative big-game accomplishment  
15 that Congress achieves?  
16 MR. LETTER: Your Honor --  
17 JUDGE ENGELHARDT: Congress can fix this. It can  
18 fix -- it could have fixed it after NFIB.  
19 MR. LETTER: Yes, Your Honor. That very same  
20 statement would be true in every severability case, and yet  
21 we know the Supreme Court has said to you, "No, Congress  
22 doesn't have to fix this. You can fix it."  
23 And the Supreme Court has told you how to do it.  
24 Maintain everything you can that can stand on its own and be  
25 constitutional. The Supreme Court has ordered you to do

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1 that.  
2 Now, there is another option. Another option is  
3 the political process. But every single severability case  
4 is going to -- the very same question could come up. And,  
5 indeed, if I might add one more thing. Their Supreme Court  
6 cases are legion that what -- my friend Mr. Hawkins was  
7 saying here is wrong.  
8 He said, "You should draw importance from the  
9 fact that Congress has not passed a new statute." The  
10 Supreme Court has said over and over again, that is wrong.  
11 You cannot and should not draw any meaning from that,  
12 because the members of Congress and the President might feel  
13 that the law is actually absolutely clear; and, therefore,  
14 there is no need for further legislation right now, because  
15 if this Court does what the Supreme Court has instructed,  
16 you will keep in place the overwhelming percentage of the  
17 (inaudible).  
18 But I take your point, Your Honor, and I can -- I  
19 take it that this can sometimes be frustrating. But,  
20 remember, every severability case has that same issue. The  
21 attorney for the Department of Justice, Mr. Flentje, and I  
22 have been friends for many, many years, but there is -- what  
23 he is arguing here, the DOJ position makes no sense.  
24 For example, there are a batch of -- there are a  
25 batch of provisions in the Affordable Care Act that you

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1 can't divide up by state.  
2 For example, the -- the Affordable Care Act  
3 provided for a system of biosimilar drug approvals. So, the  
4 FDA would approve certain drugs that otherwise it might not  
5 have. The FDA is going to approve drugs for sale in Texas  
6 and Arizona but not -- I'm sorry, the opposite. It is going  
7 to approve drugs for California and other states, but not  
8 for sale in Arizona?  
9 JUDGE ELROD: What do you do with this argument  
10 that we are not to that point yet? Right now it is just  
11 partial summary judgment, and so we are not to the point for  
12 the federal government to have to parse all of that out.  
13 MR. LETTER: Well, we are to that point, because  
14 the Court issued an order. The Court did not issue an  
15 injunction because the Justice Department said, "Please  
16 don't. We don't like injunctions in situations like this.  
17 And don't worry. We will apply the statute as Your Honor  
18 rules."  
19 That's a -- I argued that for 40 years when I was  
20 with the Justice Department. That is our -- the standard  
21 position there.  
22 You can't then turn around and say, "Oh, so you  
23 didn't do an injunction, and now we are going to say it has  
24 got to go back to the District Court."  
25 The problem is -- and Texas, remember, is --

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1 JUDGE ELROD: Do you want to go back to District  
2 Court for the Court to parse through all of those --  
3 MR. LETTER: Absolutely not.  
4 JUDGE ELROD: They may not want to -- worst-case  
5 scenario, do you want to go back for the Court to parse  
6 through all of those provisions you were just listing?  
7 MR. LETTER: No, Your Honor. Because there is no  
8 way the District Court could do that. And, remember, the  
9 District Court has already said the whole statute is  
10 unconstitutional.  
11 And Texas and the Justice Department have said  
12 that. That is absolutely wrong. That is so inconsistent  
13 with severability doctrine.  
14 JUDGE ENGELHARDT: Perhaps I misunderstood. The  
15 District Court can't do that, but I thought I understood you  
16 in response to my question to say that we are charged  
17 with -- at least in terms of severability, we are charged  
18 with that responsibility.  
19 MR. LETTER: I am -- sorry. I think I misspoke.  
20 When I said the District Court can't do that, I meant it  
21 can't do what the Justice Department wants you to do to say  
22 this provision will be applied in California, but not Texas.  
23 There are whole parts of the Affordable Care Act that, as a  
24 practical matter --  
25 JUDGE ELROD: So, it is not administratable from

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1 the federal government?  
2 MR. LETTER: Absolutely cannot happen.  
3 JUDGE ELROD: California would like that.  
4 That -- California would like to go back to the District  
5 Court and say that it is not -- it doesn't apply in  
6 California. And that's what I was trying to say all along.  
7 MR. LETTER: I will let Mr. Siegel speak for  
8 that, but I believe we are in total agreement that we think  
9 this Court has an obligation to now -- the District Court  
10 has set it up and said this all falls, and now you have the  
11 obligation to look at that and say, that's not what the law  
12 says. That's not what the Supreme Court has instructed.  
13 And, so, no, we do not want this to go back to  
14 the District Court. The District Court has already ruled --  
15 JUDGE ELROD: It has to go back to the District  
16 Court if -- if it doesn't get -- if some other thing doesn't  
17 happen in some appellant proceeding along the way, it  
18 wouldn't automatically have to go back to the District  
19 Court, would it?  
20 MR. LETTER: But -- but what I think we believe  
21 you should do, this Court should do, is you would say the  
22 District Court erred -- either you could say the plaintiff  
23 states have no standing, but the main thing that we think  
24 you would do is, even if you would either uphold what  
25 Congress did, or at a minimum, again, we say the law

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1 requires this, you would say the individual mandate is  
2 struck down, but that is so clearly severable, because the  
3 text of the 2017 act made clear the rest of the statute  
4 remains in effect throughout the --  
5 JUDGE ELROD: I would still go back to the  
6 District Court, wouldn't it?  
7 MR. LETTER: No. Because you would order that.  
8 JUDGE ELROD: That would be only partial summary  
9 judgment, and then you would have to go back to the District  
10 Court and have all of your wrap-up proceedings, and all of  
11 the things that would normally happen if you were to win on  
12 that point, and that is assuming arguendo.  
13 MR. LETTER: I don't think so. You are right, it  
14 is partial summary judgment, but it is partial because all  
15 the -- I believe all the rest of it depends on that. If you  
16 say -- well, if you hold there is no standing, then the case  
17 ends, but if you hold that the rest of the -- the statute is  
18 actually severable, I am not sure what else the District  
19 Court would have to do at that point, because that would be  
20 the judgment of this Court.  
21 Now, I am guessing that Texas or the Justice  
22 Department would take that to the Supreme Court, but  
23 ultimately I don't believe this must go back to the -- the  
24 District Court, depending upon what you hold.  
25 JUDGE ELROD: If we held, hypothetically, that it

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1 was severable, we would say, "District Court, do your best  
2 severability in the first instance. Take out your blue  
3 pencil."  
4 MR. LETTER: No. You would do that. You would  
5 say --  
6 JUDGE ELROD: Why? Why do we have to do that?  
7 In any other normal case, you would send it back to the  
8 District Court in the first instance to make its best stab  
9 at trying to implement the ruling that we made. That would  
10 be the normal proceeding in 100 cases that we have this  
11 month.  
12 MR. LETTER: But it is also normal for the  
13 Court -- the Appellate Court to say the law directs that all  
14 the rest of this statute, based on the -- and, again, I want  
15 to emphasize, we are talking about the text, the 2017  
16 statute, that all the rest is severable.  
17 That's -- that's what we think. If you are going  
18 to find there is standing, and if you are going to strike  
19 down the individual mandate, that is what you would do.  
20 And, again, we think you have to do that. And,  
21 so, there wouldn't be any reason to send that back to the  
22 District Court to say, now go line by line and figure out  
23 which part is severable. You would have ruled that the  
24 Supreme Court doctrine says, no, it has to be evident that  
25 Congress would not have wanted it under the 2017 act that --

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1 that clearly can't be done. What is --  
2 JUDGE ELROD: You need to wrap it up.  
3 MR. LETTER: I'm sorry. The last thing I wanted  
4 to say, then, is Mr. Hawkins is talking about the  
5 inseverability clause. There is no inseverability clause.  
6 He is just referring to findings in the original 2010 act.  
7 There is no inseverability clause.  
8 And in 2017, Congress made clear that it was  
9 getting rid of the mandate, and yet leaving the entire rest  
10 of the statute in place.  
11 JUDGE ELROD: Including the findings, right?  
12 MR. LETTER: The -- the findings applied to a  
13 different statute.  
14 JUDGE ELROD: The findings were still there,  
15 right?  
16 MR. LETTER: They have not been repealed. There  
17 is no need -- there is no reason to repeal the findings.  
18 Facts, life has changed, and it is a different statute. It  
19 is a 2017 statute that we are asking you to rule on.  
20 JUDGE ELROD: Thank you.  
21 MR. LETTER: Thank you very much, Your Honors.  
22 MR. SIEGEL: Thank you, Your Honors. And I will  
23 try to be brief here. There are just three points I want to  
24 address on rebuttal.  
25 The first is about our state standing. So --

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1 as I understood the federal government's supplemental brief,  
2 they didn't say that the remedy that they were proposing  
3 wouldn't harm us. They just said that we hadn't shown it.  
4 And with respect, we can't show that without  
5 knowing the scope of the remedy that they are proposing  
6 here. They say, "The remedy below should only apply to the  
7 provisions of the ACA that actually injure the plaintiffs,"  
8 and they haven't explained how they would administer the  
9 Affordable Care Act in some parts of the country but not  
10 others.  
11 The second point, picking up where Mr. Letter  
12 left off, the findings are not an inseverability clause.  
13 They expressed Congress' views about a different law, and  
14 ACA with an enforceable individual mandate that had a  
15 several-hundred-dollar tax and were adopted for a different  
16 purpose. It memorialized the 2010 Congress' views that an  
17 enforceable individual mandate was a proper exercise of the  
18 Commerce Clause.  
19 Now, that may have also reflected the 2010  
20 Congress' views that an enforceable individual mandate was  
21 an important, and even perhaps necessary to the proper  
22 functioning of the individual markets. But in 2017,  
23 Congress drew a different conclusion.  
24 And we know that by looking to the text of the  
25 TCJA, and what they did in that act was to make the

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1 minimum -- excuse me, the individual mandate unenforceable  
2 by zeroing out that tax.  
3 So, Congress had no need to repeal the  
4 severability -- excuse me, to repeal the findings in order  
5 to express its intent on that point. It just had to act.  
6 My final point, Your Honor, the Court can hold  
7 that the individual mandate is valid, or you can hold that  
8 it is unenforceable. At the end of the day, it doesn't  
9 matter, because that is exactly what Congress did in 2017.  
10 It made the mandate unenforceable.  
11 What is not clearly open to this Court is for it  
12 to use that action as a basis for ordering what the 27th  
13 Congress repeatedly refused to do. And that's repeal the  
14 Affordable Care Act.  
15 JUDGE ELROD: California is not harmed if the  
16 Court were to say the mandate is stricken, is it?  
17 MR. SIEGEL: We are -- if the only ruling that  
18 comes from this Court is a declaration that -- that the  
19 individual mandate is unconstitutional and unenforceable,  
20 and it is severed from the rest of the Affordable Care Act,  
21 we are not harmed by that ruling at all.  
22 And if there are no further questions, Your  
23 Honor, we respectfully ask that you reverse the District  
24 Court's judgment. Thank you very much.  
25 JUDGE ELROD: Counsel, we appreciate your

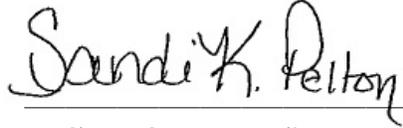
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1 arguments in this very complex case. We appreciate all of  
2 your preparedness today. Thank you. The Court will stand  
3 in recess until tomorrow morning at 9:00 a.m.  
4 \* \* \* \* \*  
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TRANSCRIBER'S CERTIFICATE

I, Sandi K. Pelton, RPR, RMR, CRR, hereby certify that the foregoing pages numbered 1 through 90 are a true, accurate, and complete transcript of the proceedings in Case No. 19-10011, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.



Date Sandi K. Pelton, Transcriber

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