SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA, ET AL.,)

Petitioners,)

v.) No. 19-840

TEXAS, ET AL.,)

Respondents.)

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Petitioners,)

v.) No. 19-1019

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6 TEXAS, ET AL.,)

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13 Respondents.)

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15 Washington, D.C.

16 Tuesday, November 10, 2020

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18 The above-entitled matter came on

19 for oral argument before the Supreme Court of

20 the United States at 10:00 a.m.

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22

23

24

25

1 APPEARANCES:

2

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11 Department of Justice, Washington, D.C.;

12 on behalf of the United States, et al.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument this morning in Case 19-840, California

5 versus Texas, and the consolidated case.

6 General Mongan.

7 ORAL ARGUMENT OF MICHAEL J. MONGAN

8 ON BEHALF OF CALIFORNIA, ET AL.

9 MR. MONGAN: Mr. Chief Justice, and

10 may it please the Court:

11 In NFIB, this Court construed Section

12 5000A of the Affordable Care Act to create a

13 choice: either obtain the health insurance

14 addressed in sub (a) or pay the tax described in

15 sub (b).

16 In 2017, Congress didn't change sub

17 (a) or sub (b); it just reduced the amount of

18 the tax to zero. 5000A still presents a choice:

19 either buy insurance or do nothing. That

20 inoperative provision doesn't harm anyone, and

21 it doesn't violate the Constitution.

22 Now Respondents insist that the 2017

23 amendment requires the Court to tear down the

24 entire ACA. But that theory rests on two

25 untenable arguments.

1 First, Respondents contend that
2 Congress transformed sub (a) into a command when
3 it zeroed out the tax. That reading is contrary
4 to this Court's construction of the same text,
5 it's at odds with how Congress and the President
6 understood the amendment, and it would attribute
7 to Congress an intent to do exactly what this
8 Court said would be unconstitutional.
9 Second, Respondents argue that if this
10 single provision is now unconstitutional, then
11 every other provision of the Act must also fall.
12 But the starting point of any remedial analysis
13 would be the strong presumption in favor of
14 severability, and, here, the text and statutory
15 structure powerfully confirm that presumption.
16 After a year of debate about the future of the
17 ACA, Congress made a single surgical change. It
18 made 5000A unenforceable by eliminating the only
19 legal consequence for not buying insurance, and
20 it kept every other provision in place.
21 So we know the rest of the Act should
22 remain in effect if 5000A is held to be
23 unenforceable because that's the very framework
24 Congress itself has already created.
25 Mr. Chief Justice, I welcome the

1 Court's questions.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 General Mongan.

4 If -- I -- I'd like to begin with the

5 standing issues. Is someone who does not follow

6 the mandate and purchase insurance violating the

7 law?

8 MR. MONGAN: Not on our view, Your

9 Honor. We -- we think that this is a

10 inoperative provision and there is no legal

11 command. But even -- even if the Court were to

12 accept the Plaintiffs' theory that it is a

13 command, at the standing stage, they still can't

14 establish standing because there's no threat or

15 even any possibility that that command would be

16 enforced against them.

17 CHIEF JUSTICE ROBERTS: Well, so, if

18 someone who doesn't purchase insurance pursuant

19 to the mandate applies for a job down the road

20 and has to fill out a questionnaire asking

21 whether you've ever violated a law, which --

22 which box should he check, yes or no?

23 MR. MONGAN: Well, I think if their

24 view, Your Honor, is that this is a command, I

25 suppose they'd have to say that they violated

1 the law. And if they had alleged that they were
2 applying for such a job and that the employer
3 was going to use such a form, then that might be
4 a viable theory of standing.
5 But, of course, there's no such
6 allegation before us here today.
7 CHIEF JUSTICE ROBERTS: Well, let's
8 say Congress passes a law saying everybody has
9 to mow their lawn once a week, and they even
10 make a lot of findings about why that's a good
11 thing. You know, it makes the country look
12 neater, you get fresh air if you have to do
13 that, it supports the lawn mower business, and
14 -- but the fine for violating it is zero -- zero
15 dollars.
16 Do they have standing? I mean, the --
17 the neighbors will see that they're not obeying
18 the law. The objectives of Congress will not be
19 fulfilled. In other words, there will certainly
20 be injury to that person, and I wonder why -- I
21 wonder if, under your theory, that person would
22 not be able to challenge the law.
23 MR. MONGAN: I don't think that they
24 would be on the theory that they've altered
25 their conduct to comply with the law, and

1 they've suffered some -- some injury. I think
2 that follows from this Court's cases in Poe and
3 Holder and American Book Sellers that it's not
4 enough to say that I'm injured by complying with
5 the law. You also have to show some real threat
6 of enforcement.
7 And, here, of course, Congress
8 eliminated the only enforcement mechanism in
9 5000A.
10 CHIEF JUSTICE ROBERTS: Thank you,
11 General.
12 Justice Thomas.
13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.
15 General Mongan, if -- putting the
16 Chief Justice's question in today's terms, I
17 assume that in most places there is no penalty
18 for wearing a face mask or a mask during COVID,
19 but there is some degree of opprobrium if one
20 does not wear it in certain settings.
21 What if someone violates that command?
22 Let's say it's in similar terms to the mandate
23 here but no penalty. Would they have standing
24 to challenge the mandate to wear a mask?
25 MR. MONGAN: Well, Your Honor, I

1 think, under this Court's cases, the question
2 comes down to whether there is a real threat of
3 enforcement. If it's just a bare command, I
4 don't see how that would be consistent with
5 cases like Poe and -- and Holder that have
6 looked not just to the question of whether it's
7 a command but to whether there is a threat or
8 possibility of enforcement.
9 JUSTICE THOMAS: Is that --
10 MR. MONGAN: Now perhaps --
11 JUSTICE THOMAS: -- is that consistent
12 with some of our -- for example, our First
13 Amendment jurisprudence where, without -- even
14 without a penalty, you can have a chilling
15 effect?
16 MR. MONGAN: Your Honor, I think that
17 there may be other legally cognizable theories
18 of injury beyond the type articulated by the
19 plaintiffs here, which is strictly focused on
20 I'm complying with this command in a way that
21 harms me.
22 And in this case, you know, we're not
23 in the First Amendment realm, but the states
24 have suggested that there might be some theory
25 of harm from the effects of third-party conduct

1 that might have been a viable theory, but their
2 problem is that they have not established with
3 evidence that's required on summary judgment
4 that the amended 5000A, which is entirely
5 toothless, actually does inflict such a harm on
6 them.
7 JUSTICE THOMAS: The -- the parties
8 here, the Respondents here, really, they're
9 arguing that -- as we had in the first ACA case,
10 they're arguing that this -- the mandate, in
11 combination with the other provisions, really
12 caused their injuries.
13 The -- what is curious here is we have
14 become accustomed to deciding this at the
15 standing stage, and this looks somewhat like a
16 -- a -- a -- a statutory -- the severability
17 issue looks like a statutory construction
18 matter.
19 So could you explain to me why we
20 would determine severability at the standing
21 stage?
22 MR. MONGAN: Well, Your Honor, I -- I
23 don't know that the Court normally does
24 determine severability at the standing stage. I
25 suppose it could do that in the process of

1 evaluating the federal government's theory of
2 standing by severability.
3 We don't think that that's a theory
4 that's ever been endorsed by this Court. And it
5 seems like it would create some serious tension
6 with this Court's Article III precedent.
7 But, typically, severability would be
8 analyzed after a ruling on the legality of the
9 provision.
10 JUSTICE THOMAS: So the -- how would
11 you say -- you would argue -- I see my time's
12 up. Thank you.
13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.
15 JUSTICE BREYER: Well, I'll follow up
16 on Justice Thomas's question. What -- what do
17 you -- what -- how do you respond to the United
18 States' theory of standing?
19 MR. MONGAN: So it's a novel theory.
20 It's never been endorsed by this Court. It
21 would create a fairly massive loophole in
22 Article III because, in the ACA context, for
23 example, any American who's regulated by any
24 provision of the ACA, biosimilars or the menu
25 calorie count provision would be able to

1 challenge 5000A without showing that that
2 provision actually harmed them.
3 And I do think it's in tension with
4 this Court Article III precedent in several
5 respects. First, what the Court has indicated
6 in cases like DaimlerChrysler is that a
7 plaintiff needs to establish standing for each
8 claim and they need to show that they are
9 injured by the allegedly unlawful conduct or
10 provision. And, here, we'd be allowing, on the
11 government's theory, plaintiffs to proceed
12 without doing that.
13 And, second, I think it would create a
14 real concern about advisory opinions because, as
15 I understand their theory, you'd have to accept
16 that the provision is inseverable at the
17 standing stage, then you'd proceed to adjudicate
18 the legality of the provision, and then, after
19 that, you'd get to severability, but, as we know
20 from AAPC, most provisions are severable, so it
21 would lead to a situation where courts are
22 adjudicating the legality of provisions that
23 don't actually harm the plaintiffs before them.
24 JUSTICE BREYER: Thank you.
25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: Texas has offered
2 evidence that the Affordable Care Act requires
3 it to calculate Medicaid eligibility using
4 modified adjusted gross income and that this
5 method of calculation has greatly increased the
6 number of persons on Medicaid in Texas, I think
7 by about 100,000 persons.
8 Why can't Texas seek a declaratory
9 judgment that it is not required to calculate
10 eligibility using that method?
11 MR. MONGAN: Well, I think that the --
12 the problem is that they need to show that
13 they're injured by the provision that they
14 actually allege is unconstitutional. And that
15 provision that Your Honor referenced is separate
16 from 5000A. It would remain on the books even
17 if 5000A were wiped away.
18 So, unless the Court were willing to
19 accept the -- the novel theory of standing by
20 inseverability advanced by the federal
21 government, I don't see how Texas's theories
22 about many other provisions of the ACA can
23 establish a case or controversy with respect to
24 this claim challenging amended 5000A.
25 JUSTICE ALITO: Well, there is logic

1 to that theory of standing. Why is it
2 conceptually -- conceptually unsound?
3 MR. MONGAN: Well, we -- we think it's
4 unsound because it -- it then would allow the
5 court -- allow a party to come in to -- to court
6 and challenge, you know, any aspect of a large
7 statutory scheme by just asserting a theory that
8 it's inseverable from one provision that harms
9 them.
10 But -- but, Your Honor, if the Court
11 wanted to -- to create that type of rule in its
12 standing jurisprudence, that would just bring us
13 to the merits. And the problem with the merits
14 theory is that the plaintiffs here are positing
15 that Congress created the very command that this
16 Court held in NFIB was constitutionally
17 impermissible, and that's just not a plausible
18 construction when you consider that Congress was
19 well aware of this Court's statutory
20 construction. It relied on that choice creating
21 construction and -- and used it to just render
22 the provision inoperative.
23 JUSTICE ALITO: Well, let me -- let me
24 ask this related question. If Texas were to
25 fail to use that method, what consequences would

1 follow?

2 MR. MONGAN: If Texas were to fail to

3 use the method for calculating Medicaid

4 eligibility, Your Honor?

5 JUSTICE ALITO: Yes.

6 MR. MONGAN: I -- I -- I don't know.

7 I suppose it's possible that the federal

8 government could bring some sort of enforcement

9 proceeding against them or that an individual

10 could -- could sue on the theory that they

11 should be eligible for Medicaid.

12 JUSTICE ALITO: Well, I would ask a

13 related question about what would happen if the

14 IRS attempted to assess penalties on state

15 employers for failing to comply with the

16 reporting requirements in sections 6055 and

17 6056? In -- in a collection proceeding, could

18 the state argue that it has no obligation to

19 follow that because they can't be severed from

20 the individual mandate?

21 MR. MONGAN: Well, those are separate

22 provisions. I suppose it's possible that a

23 defendant could try and advance that as a

24 defense in response to such a claim.

25 But that doesn't mean that as a

1 plaintiff they can go into court and establish
2 an Article III injury tied to 5000A that's
3 sufficient to exercise the Court's jurisdiction.
4 JUSTICE ALITO: All right. Thank you.
5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.
7 JUSTICE SOTOMAYOR: Counsel, if I
8 understand, and please tell me if I understand
9 your point correctly, which is, if they have
10 claims challenging the provisions that Justice
11 Alito asked about, they should have brought that
12 challenge, not a challenge based on the
13 individual mandate, correct?
14 MR. MONGAN: That's exactly right,
15 Your Honor. And although they have discussed a
16 lot of -- of the costs that flow from other
17 provisions of the ACA, they haven't directly
18 challenged those provisions, and they haven't
19 advanced any theory as to why those provisions
20 are unconstitutional.
21 JUSTICE SOTOMAYOR: Second, Counsel,
22 give me your best argument why it would be
23 unreasonable or not legally enforceable for
24 plaintiffs to read the -- the individual mandate
25 as a legal command. You -- you answered Justice

1 Roberts' questions in a hypothetical, but I'm
2 asking, are -- are you accepting that
3 hypothetical or -- or that assumption -- not
4 hypothetical, I -- I used the wrong word --
5 assumption, or do you have -- what's your best
6 argument that it's not a command?
7 MR. MONGAN: No, we're not, Your
8 Honor. This Court authoritatively construed
9 5000A in NFIB as not a command. It said it was
10 a choice between buying minimum coverage, as set
11 out in sub (a), or making the alternative tax
12 payment in sub (b). That's an authoritative
13 construction that Congress relied on when it
14 amended the provision in 5000A.
15 Congress did not clearly indicate that
16 it wanted to depart from that choice
17 construction. Rather, it relied on the choice
18 construction, zeroed out the tax as a means of
19 making the provision inoperative.
20 And I think this is a critical point,
21 Your Honor. Congress was entitled to rely on
22 this Court's authoritative construction, and we
23 ought to give Congress the benefit of the doubt
24 that it was doing what it said it was doing,
25 preserving a lawful choice, rather than imposing

1 the same command --

2 JUSTICE SOTOMAYOR: But, Counsel, I --

3 that I have no quarrel with, but why should we

4 presume that a common citizen who wants to

5 comply with the law would make that assumption?

6 MR. MONGAN: Well, I think that --

7 JUSTICE SOTOMAYOR: Or should make

8 that assumption legally?

9 MR. MONGAN: Well, Your Honor, I think

10 that, to the extent that a common citizen is

11 considering the intricacies of federal law, they

12 would consider this Court's authoritative and

13 very prominent holding about this provision in

14 NFIB. And, of course, they would also consider

15 the very public and repeated pronouncements of

16 the President and members of Congress, who said

17 we've gotten rid of the individual mandate and

18 now you're allowed to freely choose what to --

19 to do with whether to buy insurance.

20 JUSTICE SOTOMAYOR: One last question.

21 If -- I understand your standing argument within

22 the -- involving the states, but are you arguing

23 that the states are not harmed by the cost of

24 more people enrolling in insurance as a legal

25 matter, or is it that as a factual matter, you

1 think they have not yet demonstrated that they
2 were harmed?
3 MR. MONGAN: As a factual matter, Your
4 Honor, we're on summary judgment. It was their
5 burden to introduce specific facts showing that
6 amended 5000A actually drives up their costs.
7 They put in 21 declarations, but they didn't
8 actually address that point.
9 JUSTICE SOTOMAYOR: So how do you deal
10 with their argument that you had the burden of
11 coming forth with evidence?
12 MR. MONGAN: Well, I just don't think
13 that that's consistent with precedent. It's the
14 plaintiff's burden at summary judgment to
15 establish that they have satisfied the
16 requirements of standing.
17 CHIEF JUSTICE ROBERTS: Justice Kagan.
18 JUSTICE KAGAN: General, just going --
19 continuing on this point of the states'
20 standing, I mean, why wouldn't it be right to
21 say something like, look, you can expect that,
22 as a result of this law, more people will buy
23 insurance, even when there's no enforcement
24 mechanism, just the force of law itself will
25 encourage people to buy insurance, and Texas is

1 now saying, well, that costs us money, it costs
2 us money because of its effect on programs like
3 Medicaid, and it costs us money because we have
4 to send out these forms saying that you bought
5 insurance? I think that those are Texas's two
6 arguments.
7 MR. MONGAN: Well, Your Honor, we
8 think, under this Court's precedent in cases
9 like Lujan, that might be enough at the pleading
10 stage but that it wouldn't be sufficient at the
11 summary judgment stage.
12 But, frankly, Your Honor, if we're
13 misreading those cases, we'd be happy to lose on
14 the issue of state standing and litigate this
15 case on the merits and then have Texas's rather
16 minimal showing here set the bar for state
17 plaintiff standing theories going forward. We
18 just don't think that your cases allow it.
19 JUSTICE KAGAN: And -- and why is
20 that? What case doesn't allow it?
21 MR. MONGAN: Well, I think it's just
22 the general principle that a plaintiff must
23 adduce specific facts to establish injury in
24 causation, as the Court indicated in Lujan. And
25 -- and that, we would think, would -- would

1 require something more than speculation or -- or
2 supposition.
3 JUSTICE KAGAN: And how about on the
4 individual plaintiffs' side? This is going back
5 to the Chief Justice's questions. I mean, why
6 isn't -- or why shouldn't the -- the force of
7 law itself -- you know, a person can say, if the
8 law says I need to do something, then I have to
9 do something. And we -- we want citizens to be
10 law-abiding. Why isn't that enough to create
11 standing?
12 MR. MONGAN: Well, I understand that
13 point, Your Honor, but I think that that's
14 contrary to what this Court has said in cases
15 like Poe. I mean, there, the doctor plaintiff
16 said, I'm looking at this law, it says that I
17 can't give advice to my patient, and I think the
18 law is unconstitutional and -- and it harms me
19 because I'm not able to give this advice.
20 And the Court said, well, that's not
21 enough. You also have to show a real threat of
22 enforcement. So I think that would be a
23 departure from what this Court has indicated
24 before, and it might open the door to quite a
25 number of additional pre-enforcement challenges.

1 JUSTICE KAGAN: Thank you, General.
2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.
4 JUSTICE GORSUCH: Good morning,
5 counsel. Let me pick up where Justice Kagan
6 left off.
7 As I understand it, the United States
8 could still bring a civil action to enforce the
9 mandate under 26 U.S.C. 7402(a). Is that your
10 understanding as well?
11 MR. MONGAN: That's not my
12 understanding, Your Honor. I think that this
13 Court made clear in NFIB that the only legal
14 consequence of not purchasing insurance is the
15 requirement to pay a tax, and Congress has
16 repealed or -- or zeroed out, rather, the tax.
17 So there are no remaining legal consequences --
18 JUSTICE GORSUCH: Well --
19 MR. MONGAN: -- and I don't --
20 JUSTICE GORSUCH: -- let -- let --
21 let's just suppose for the moment that you're --
22 you're -- you're mistaken and -- and 7402(a)
23 would allow a civil enforcement action.
24 Would that change your view about the
25 individual standing?

1 MR. MONGAN: Potentially, although I
2 think what this Court has looked to is not just
3 the possibility of an enforcement action but
4 whether there is a -- a real threat of
5 enforcement.
6 And, here, I don't see how they'd
7 establish that because, of course, the federal
8 government has indicated that -- that there's no
9 further requirement for individuals to purchase
10 health insurance, at least at the highest levels
11 of the executive branch. That's the signal
12 that's sent out to the country.
13 JUSTICE GORSUCH: So individual
14 Americans would have to await an enforcement
15 action before bringing a lawsuit challenging a
16 federal statutory command?
17 MR. MONGAN: Well, that's our
18 understanding of your cases, Your Honor, but --
19 but, again, if we're -- if we're misreading the
20 standing cases, we're very happy to litigate
21 this question on the merits because we don't
22 think that they have any plausible basis for
23 reading this as a -- as a command. And we'd be
24 happy to have the Court reach that question
25 either at standing or on the merits.

1 JUSTICE GORSUCH: And then, with
2 respect to the states, again, picking up on
3 Justice Kagan's point, I -- I -- I thought I
4 heard you -- you agree that the theory of
5 standing that -- that there's -- raised costs on
6 enrollment-based injuries or compliance-based
7 injuries could be enough to secure standing;
8 it's just a failure of proof at the summary
9 judgment stage. Is -- is that -- is that a fair
10 summary of your position?
11 MR. MONGAN: Yes, that follows from
12 Department of Commerce. States can establish
13 standing if the predictable -- if they -- if
14 they actually identify specific facts showing
15 that predictable choices by third parties are
16 going to drive up state costs.
17 But, unlike the Census case, where we
18 had lots of expert declarations and specific
19 facts and detailed government memoranda showing
20 that connection, Texas here has just not
21 introduced any specific facts indicating that
22 amended 5000A would inflict a concrete harm on
23 the plaintiff states.
24 JUSTICE GORSUCH: So, if all we need
25 is a substantial risk of a predictable effect of

1 government action on the decisions of
2 individuals, why isn't the Congressional Budget
3 Office report stating that even after the
4 penalty is removed, a small number of people
5 will enroll because of a willingness to comply
6 with the law? And it follows from that that
7 there will be increased costs to the states.
8 MR. MONGAN: Your Honor, I think that
9 maybe a report from 2017 is probably the best
10 thing they have going for them on state
11 standing. We don't think it's sufficiently
12 specific. It's a -- it's a single sentence.
13 And CBO didn't offer any data backing it up
14 and --
15 JUSTICE GORSUCH: Do you disagree with
16 it?
17 MR. MONGAN: I -- I don't think that
18 we have any basis to -- to agree or disagree
19 with it.
20 JUSTICE GORSUCH: So it's an
21 uncontested fact --
22 MR. MONGAN: No --
23 JUSTICE GORSUCH: -- in the record?
24 MR. MONGAN: No, I -- I don't -- I
25 don't believe that's right, Your Honor. It

1 doesn't say anything specific to the plaintiff
2 states, and it doesn't say anything specific to
3 plaintiffs who are eligible for state health
4 plans. So we wouldn't think that that's enough
5 at the summary judgment phase.
6 But, again --
7 JUSTICE GORSUCH: Thank you.
8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.
10 JUSTICE KAVANAUGH: Thank you,
11 Mr. Chief Justice.
12 And good morning, General Mongan. To
13 pick up on individual standing questions of the
14 Chief Justice and Justices Kagan and Gorsuch,
15 suppose Congress passed a law requiring every
16 American who lives in a house to fly an American
17 flag in front of the house. There's no penalty,
18 and the question then is individual standing.
19 Under Lujan, you're the object of the regulation
20 as a homeowner. It's a forced acquisition of an
21 unwanted good or service.
22 Why isn't that enough to give you
23 standing, knowing that some people are going to
24 do that, buy the flags and fly them, simply
25 because Congress requires that?

1 MR. MONGAN: Well, Your Honor, I
2 think, if their theory was identical to what the
3 individual plaintiffs advanced here, simply that
4 we are actively complying with this and it is
5 causing us harm, that would run into a similar
6 problem with the Poe line of precedent. But
7 there may be some other legally cognizable
8 injury, especially in the First Amendment
9 context.
10 And we're not disputing that
11 plaintiffs can try and advance those types of
12 theories of injury. We just don't think that
13 they are substantiated under the circumstances
14 of this case.
15 JUSTICE KAVANAUGH: And on the CBO
16 report that Justice Gorsuch mentioned, do you
17 disagree that some people will follow the
18 mandate and purchase insurance solely because of
19 their willingness to comply with the law?
20 MR. MONGAN: Well, I don't have a
21 basis for disagreeing with it or agreeing with
22 it, Your Honor. I think it is unlikely, as the
23 dissenting judge below noted, that individuals
24 who wouldn't already take advantage of the very
25 generous Medicaid programs or state employer

1 health plans would do it solely because of an
2 unenforceable command.
3 But, again, if we're wrong on that, it
4 just brings us to their untenable merits theory
5 that Congress has created a command that this
6 Court said was constitutionally impermissible,
7 even as it was telling the American people that
8 it was trying to get rid of or make inoperative
9 this provision.
10 JUSTICE KAVANAUGH: On -- on the point
11 that you mentioned that allowing standing,
12 individual standing, here might open the door,
13 are you aware of any other examples in the U.S.
14 Code at least where Congress has enacted a true
15 mandate, not something hortatory, but a true
16 mandate with no penalties?
17 MR. MONGAN: Your Honor, I'm not aware
18 of that, and we don't think that's what Congress
19 did here. We think that they -- they just
20 created --
21 JUSTICE KAVANAUGH: No, I take that
22 point. I was just wondering if you were aware
23 of an example.
24 On the merits of the -- of the claim,
25 under NFIB, obviously, it was justified under

1 the taxing clause, but it now doesn't raise
2 revenue. How do you respond to that point?
3 MR. MONGAN: So, in light of the NFIB
4 construction, what Congress did here was to
5 create a -- a -- an inoperative provision. It
6 doesn't require anybody to do anything.
7 And Congress has routinely created
8 inoperative provisions. It's done so since the
9 founding. And they haven't been viewed as
10 constitutionally problematic because they don't
11 alter legal rights or responsibilities or bind
12 anyone.
13 JUSTICE KAVANAUGH: Thank you.
14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett.
16 JUSTICE BARRETT: What should we make
17 of the fact that Congress didn't repeal the
18 provision? I mean, you said earlier repeal, and
19 then you corrected yourself and said zeroed out.
20 I mean, you're asking us to fun --
21 treat it as if it functionally has been
22 repealed, but that's not what Congress did.
23 Does that matter?
24 MR. MONGAN: Your Honor, I think
25 Congress understood how this Court had construed

1 5000A as a choice, and it understood that it
2 would make the provision effectively inoperative
3 to zero out the tax. And that was a reasonable
4 thing for it to do.
5 Obviously, it was operating under
6 reconciliation procedures that allowed it to
7 make the change compliant with the Byrd Rule,
8 and CBO had told it that there was no material
9 difference between repealing the provision and
10 zeroing out the tax.
11 JUSTICE BARRETT: Let me ask you
12 another question that's related to some of the
13 hypotheticals you've heard some far -- so far.
14 You know, the Chief asked you about a mandate to
15 mow the lawn, and, you know, Justice Thomas
16 asked you one about forcing people to wear a
17 mask.
18 What if, in this case, you know, and
19 as I understand it to be the case, you have to
20 certify whether you've complied or not and then
21 the government keeps track of that? So the
22 government keeps track of whether you wore a
23 mask or whether you purchased health insurance.
24 Does that change your view of whether
25 there's an injury?

1 MR. MONGAN: Well, I'm not sure that
2 there is an ongoing certification requirement at
3 least in the tax forums, Your Honor. Perhaps
4 that would change the analysis.
5 But, if we get to the -- the merits,
6 then I think that it -- it's plain that this is
7 not an operative provision and there is no
8 ongoing command, so even if that would establish
9 standing, it wouldn't be enough to allow the
10 individuals to prevail on -- on the merits.
11 And, Your Honor, I would like to just
12 make the point that, if the Court were to
13 disagree with us on the merits and hold that
14 this is a naked command, then the only proper
15 remedy for that would be an order making the
16 provision unenforceable and holding that it's
17 invalid. That would completely address the --
18 the -- the problem.
19 What would be deeply problematic for
20 the plaintiff -- for the Petitioner states and
21 for the rest of the nation is if plaintiffs were
22 allowed to leverage this single inoperative
23 provision to tear down hundreds of other
24 provisions that Congress --
25 JUSTICE BARRETT: Okay, counsel, let

1 me -- let me just return to the question on the
2 merits. So the states have said these Forms
3 1095B and C do require as part of taxes for one
4 to certify whether or not one has maintained the
5 minimum coverage necessary. Is that incorrect?
6 MR. MONGAN: Well, Your Honor, the
7 states do have to send out the forms. Those are
8 required by separate provisions, and they serve
9 continuing purposes related to the premium tax
10 credit and the employer mandate that have
11 nothing to do with 5000A. So those are costs
12 that they would continue to have regardless of
13 whether 5000A were on the books or not.
14 JUSTICE BARRETT: And individuals
15 don't have to certify whether or not they've
16 maintained coverage?
17 MR. MONGAN: Well, the IRS website
18 makes clear now that there's no longer an
19 obligation on the annual tax forms to check the
20 box regarding coverage. They've gotten rid of
21 that requirement.
22 JUSTICE BARRETT: Okay. Thank you,
23 counsel.
24 CHIEF JUSTICE ROBERTS: A minute to
25 wrap up, General.

1 MR. MONGAN: Thank you.
2 The plain intent of the 2017 amendment
3 was to make 5000A inoperative and unenforceable,
4 not to impose the very commands this Court said
5 would be unconstitutional.
6 And the current statutory framework
7 makes clear that Congress wanted every other ACA
8 provision to remain in effect if 5000A were
9 unenforceable because that's the precise
10 situation Congress created.
11 Respondents' inseverability theory
12 would do violence to Congress's intent,
13 invalidating hundreds of provisions that
14 Congress chose to leave in place and that are
15 functioning perfectly well without an
16 enforceable 5000A. It would cause enormous
17 regulatory disruption, upend the markets, cast
18 20 million Americans off health insurance during
19 a pandemic, and cost the states tens of billions
20 of dollars during a fiscal crisis.
21 There's no basis for that result in
22 text, intent, or precedent.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 General.
25 Mr. Verrilli.

1 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.
2 ON BEHALF OF THE U.S. HOUSE OF REPRESENTATIVES
3 MR. VERRILLI: Thank you, Mr. Chief
4 Justice, and may it please the Court:
5 Respondents are asking this Court to
6 do what Congress refused to do when it voted
7 down repeal of the ACA in 2017, but their
8 argument is untenable.
9 The 2017 Congress did not convert
10 Section 5000A from a choice to a command. The
11 amended statute doesn't require anything of
12 anyone. And even if one misconstrues 5000A as a
13 mandate, it's not plausible that the same
14 Congress that had just eliminated any economic
15 pressure to purchase insurance nevertheless
16 thought that an unenforceable mandate was so
17 vital that its invalidation should doom the
18 remainder of the ACA.
19 There is just no way that Congress
20 would have preferred an outcome that throws 23
21 million people off their insurance, ends
22 protections for people with preexisting
23 conditions, and creates chaos in the healthcare
24 sector.
25 Respondents' arguments take

1 constitutional adjudication as a game of gotcha
2 to a whole new level, but this is not a game.
3 This Court's precedents require respect for the
4 constitutional role of Congress, and those
5 precedents emphatically foreclose the outcome
6 Respondents seek.
7 CHIEF JUSTICE ROBERTS: Mr. Verrilli,
8 eight years ago, those defending the -- the
9 mandate emphasized that it was the key to the
10 whole Act. Everything turned on getting money
11 from people forced to buy insurance to cover all
12 the other shortfalls in the expansion of -- of
13 -- of healthcare. And the briefs here on the
14 other side go over all that.
15 But -- but now the representation is
16 that, oh, no, everything's fine without it.
17 Why -- why the bait and switch? Was
18 -- was Congress wrong when it said that the
19 mandate was the key to the whole thing, that --
20 that we spent -- spent all that time talking
21 about broccoli for nothing?
22 MR. VERRILLI: So, Mr. Chief Justice,
23 in 2010, I don't think there's any doubt that
24 Congress made a predictive judgment about what
25 would be needed to create an effective market.

1 And they adopted a carrot-and-stick approach.
2 There were a lot of carrots. You
3 know, the policies were attractive, limited
4 co-pays, no annual or lifetime caps. There were
5 generous subsidies to draw people into the
6 market, and it was easy to enroll because of the
7 exchanges.
8 But there was also a stick, the tax
9 payment if you didn't enroll. And I don't think
10 there's any doubt that the 2010 Congress thought
11 that stick was important.
12 But it's turned out that the carrots
13 work without the stick. That's the judgment
14 that the Congress made in 2017. That's what CBS
15 told Congress -- what the CBO, rather, told
16 Congress, that Congress asked the CBO, what'll
17 happen if we repeal the mandate outright?
18 What'll happen if we zero out the tax? And CBO
19 came back and said, whether you zero out the tax
20 or you repeal the mandate, the effects on the
21 market will be the same, the market will remain
22 stable over the coming decade.
23 And if one looks at the amicus briefs
24 filed by the health insurance industry, the Blue
25 Cross brief, the AHIP brief, if one looks at the

1 AMA brief, all those briefs are confirming that
2 that judgment was correct, that it turns out
3 that the carrots worked without the stick and
4 brought enough people in the market to allow it
5 to sustain itself.
6 And, you know, Congress is allowed to
7 learn from experience, empirical experience in
8 the world, and adjust its policy choices. And
9 that is what happened here.
10 CHIEF JUSTICE ROBERTS: General Mongan
11 was asked about whether the burden on the state
12 was enough to support standing, and, of course,
13 he had a little bit of a conflict representing
14 the state, but -- but you don't.
15 Do you think that that burden is
16 sufficient? The paperwork burden essentially.
17 MR. VERRILLI: No, Your Honor, I
18 don't, because the paperwork burden flows from
19 provisions other than Section 5000A. And so,
20 unless the Court were to accept the -- the
21 standing through inseverability theory, the -- I
22 -- I don't think there's a basis for finding --
23 CHIEF JUSTICE ROBERTS: Thank you --
24 MR. VERRILLI: -- finding standing on
25 the basis of that injury.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General.
3 Justice Thomas.
4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.
6 Counsel, the -- Justice Barrett asked
7 whether or not the -- just eliminating the
8 penalty -- the Act wasn't changed, the mandate
9 provisions weren't changed. Just the penalty
10 was eliminated.
11 So was that all that was necessary to
12 eliminate the centrality of this -- and
13 importance of this provision? Because, when you
14 argued the -- when this case came up, as the
15 Chief Justice said, some years ago, this
16 provision was the heart and soul of -- of the
17 Affordable Care Act. And I know the assessment
18 has changed, but the provision hasn't changed,
19 with the exception of the penalty.
20 Could you explain why that penalty
21 provision was so critical to the centrality of
22 this provision?
23 MR. VERRILLI: Well, I -- I think,
24 Your Honor, this does go to the heart of the
25 severability question. And I -- I guess the

1 argument that my friends on the other side are
2 making is that the continued existence of 5000A
3 sub (a), even though it's unenforceable and
4 there's no tax anymore, is still central to the
5 operation of the Act such that, under the
6 Court's inseverability precedents, Congress
7 would have preferred that the entire Act come
8 down if that provision were struck down.
9 And I think there are four reasons why
10 that can't be right.
11 First, you'd have to accept that the
12 2017 Congress said we're going to eliminate any
13 financial pressure to stay in the market, but
14 the moral suasion is still so important that the
15 entire law has to fall. And I just don't think
16 that's a plausible account of what happened in
17 2017.
18 Second, Congress asked the CBO
19 whether -- what would happen if they repealed,
20 what would happen if they zeroed out the tax.
21 And the CBO came back and told Congress the
22 effect on the market will be the same either
23 way. In other words, there will be no material
24 difference between zeroing out the tax and
25 flatly repealing Section 5000A sub (a). And

1 that's the context in which Congress acted here.
2 Third, the -- the contemporaneous
3 history is quite clear. The President, the
4 congressional leadership, the bill sponsors, the
5 committee chairmen, they all were shouting from
6 the rooftops that they were repealing the
7 mandate and giving citizens complete flexibility
8 about whether to purchase insurance. That is
9 not what you would be saying to the world if you
10 thought that moral suasion was essential to keep
11 the system going.
12 And, finally, even if you thought that
13 Congress really did have an interest in
14 continuing moral suasion, that doesn't mean that
15 they would have preferred to bring the whole ACA
16 crashing down if 5000A were declared
17 unconstitutional.
18 In that respect, I think it's a lot
19 like Seila Law. There, in contrast to here, you
20 had actual evidence that Congress wanted the --
21 the CFPB director to be independent of the
22 President, and that was -- here, it was just a
23 hypothesis. There, there was evidence.
24 But the Court made a judgment there
25 that -- that Congress would not have preferred

1 to see the entire CFPB come crashing down if
2 that independence were eliminated. And I think
3 that same kind of reasoning applies very
4 strongly here.
5 JUSTICE THOMAS: Thank you.
6 JUSTICE BREYER: I -- Justice Breyer.
7 Can you hear me?
8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer.
10 JUSTICE BREYER: Yes, you can. Yeah.
11 CHIEF JUSTICE ROBERTS: Yeah, I --
12 thank you, Justice Breyer.
13 JUSTICE BREYER: I -- I'm connected, I
14 think.
15 A question about severability. Since
16 the time we heard, when this was first passed,
17 that the mandate was absolutely crucial, as you
18 pointed out, because, unless people buy
19 insurance under this mandate, the other
20 provisions, such as no -- you -- you don't have
21 to worry about preexisting conditions, et
22 cetera, won't work.
23 All right. Why isn't that fact --
24 CHIEF JUSTICE ROBERTS: I'm sorry.
25 Justice Alito.

1 JUSTICE BREYER: Something happened.
2 I'm sorry. My machine didn't work.
3 JUSTICE ALITO: Yeah, I thought
4 Justice Breyer was still on his time.
5 CHIEF JUSTICE ROBERTS: No. Justice
6 Alito.
7 JUSTICE ALITO: Oh, all right. Well,
8 thank you.
9 Mr. Verrilli, this does seem like deja
10 vu all over again, but let me ask you this
11 question about the theory of standing by
12 severability. Suppose there's a very simple
13 statute. It has two provisions, (a) and (b).
14 I'm hurt by (b); I am not hurt by (a). (a) is
15 unconstitutional. The statute has a clause that
16 says if (a) falls, (b) falls too.
17 Under those circumstances, would I
18 lack standing to challenge (a)?
19 MR. VERRILLI: Well, that -- that
20 hypothetical definitely tests the limits of our
21 objection to standing through inseverability,
22 and -- and I think it would be hard to maintain
23 that position in the face of a statute like
24 that.
25 But what I will say, Your Honor, is

1 this: That what it does point up, I think, is
2 that, if the Court is going to validate the
3 theory of standing through inseverability for
4 the first time, that it ought not to do so
5 combined with a presumption of inseverability at
6 the standing stage, because even there -- the
7 situations like the one Your Honor's
8 hypothetical describes are going to be very
9 rare.
10 Most of the time, as the plurality
11 opinion in AAPC acknowledged, severability will
12 be the outcome. And so, if one presumes
13 inseverability, even in cases like this one
14 without an inseverability clause, then -- then I
15 think that is, as General Mongan identified, an
16 open invitation to advisory opinions, because
17 you're going to grant standing on the basis of
18 the injury caused by provision (b), hold
19 provision (a) unconstitutional, and then say but
20 it's severable and, therefore, the challenger
21 doesn't get any relief.
22 And so I think that's the problem. So
23 I do think, if the Court really thinks that
24 standing through inseverability is a valid
25 theory of establishing Article III injury, that

1 that ought to come with an analysis at the
2 standing stage of the severability issue.
3 JUSTICE ALITO: What you have said
4 about what Congress thought in 2017 perhaps
5 illustrates the difficulty of trying to identify
6 anything that was thought by the majority of
7 Congress other than what it says in a law.
8 A lot of people, a lot of members, in
9 2017 may well have thought that eliminating the
10 penalty or the tax would not cause any harm and
11 the whole Act could continue to function well
12 without it, but others who voted for it may have
13 done so precisely because they wanted the whole
14 thing to fall.
15 So I don't know what we can make of
16 what was done in 2017 along the lines that
17 you've said.
18 MR. VERRILLI: So, Your Honor, I think
19 that question points up the wisdom of the
20 analysis in the AAPC plurality to focus on
21 objective indications, statutory text and
22 context.
23 And -- and beyond that, I would say I
24 don't think it would be an appropriate thing for
25 the Court to do to assume that there were

1 members of Congress who were actually acting in
2 violation of their oath to uphold the
3 Constitution by voting for a provision they knew
4 to be unconstitutional in the hope it would
5 bring the law down. I just don't think that's a
6 premise the Court ought to indulge in any case
7 and certainly not in this one.
8 And applying the objective factors,
9 what we know is that Congress zeroed out the tax
10 penalty, which is a very strong textual signal
11 that Congress did not think that -- that -- that
12 5000A sub (a) needed to -- was necessary to play
13 any significant role in maintaining these
14 markets.
15 And, of course, the context here --
16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.
18 Justice -- Justice Breyer, we
19 apologize for the audio difficulties and we'll
20 go back to you.
21 JUSTICE BREYER: Oh, that -- that's
22 all right. It's not a problem. Go ahead. I'm
23 good.
24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Counsel, am I
2 assuming your answer to be that, given a choice
3 between or among -- because there could have
4 been many choices -- between invalidating and --
5 the entire ACA and just zeroing out the tax,
6 that the 2017 Congress's choice was just zero
7 out the tax, correct?
8 MR. VERRILLI: Yes, that's manifest on
9 the record, Your Honor. The -- there were
10 efforts to repeal the entire ACA. Those efforts
11 failed in the Senate. They were voted down. So
12 we -- we know that that effort to repeal the
13 entire ACA was voted down, and the only change
14 made was this -- the zeroing out the tax in
15 5000A.
16 JUSTICE SOTOMAYOR: And so, if a
17 choice is yet again after NFIB declaring the
18 individual mandate unconstitutional if one sees
19 it as a command, the 2017 Congress has already
20 told us that it doesn't want the rest of the Act
21 to fall, correct?
22 MR. VERRILLI: That's certainly our
23 position, Your Honor, and that -- and it just
24 would be utterly inconsistent with everything
25 Congress had before it, with the judgment

1 Congress made, and -- and with the -- the wide
2 announcement to the public that this amendment
3 effectively repealed the mandate.
4 JUSTICE SOTOMAYOR: Counsel, there's
5 an intuitive feeling that if the individual
6 mandate is struck down with respect to standing
7 in the states, that they would have less
8 reporting cost because -- or -- or less
9 enrollees in their Medicaid and CHIPs program.
10 That's their argument about standing, correct?
11 That --
12 MR. VERRILLI: That's their
13 argument that -- aside from inseverability,
14 that's the only direct injury they claim --
15 JUSTICE SOTOMAYOR: All right. Would
16 you --
17 MR. VERRILLI: -- flows from 5000A.
18 JUSTICE SOTOMAYOR: -- would you
19 address that argument? Your co-counsel for the
20 -- for the State seems to say there's no
21 evidence that that's true or false. But I
22 thought many of the briefs showed that that --
23 that it -- it was a faulty premise for other
24 reasons.
25 Do you agree with that?

1 MR. VERRILLI: Yeah. I mean, there --
2 there's definitely no evidence General Mongan
3 went through that, that's correct. It was
4 summary judgment. And under Lujan, they had a
5 burden and they didn't meet it.
6 But apart from that, basically, their
7 argument, I think, boils down to what they claim
8 is common sense, which is, you know, look,
9 people are going to read this mandate and
10 they're going to enroll and -- and that in
11 Medicaid to satisfy it.
12 But, you know, I -- I really think
13 it's the opposite of common sense. I mean, the
14 theory here is there were people out there who
15 weren't enrolled in Medicaid before when the
16 mandate was accompanied by a tax consequence and
17 therefore were subjecting themselves to the tax
18 consequence.
19 Congress amends it, gets rid of the
20 tax consequence, and those people say, oh, well,
21 Congress got rid of the tax consequence, but,
22 look, there still seems to be a mandate, so I'm
23 going to go enroll in Medicaid now --
24 CHIEF JUSTICE ROBERTS: Justice Kagan.
25 MR. VERRILLI: -- and --

1 JUSTICE KAGAN: Mr. Verrilli, I -- I
2 understand your view that the appearance of how
3 this law works have changed since 2010 or 2012,
4 but we're -- we still have some relics of the
5 old view, which is that the individual mandate
6 was the key to everything, some relics of that
7 in the law.
8 And I'm pointing specifically at what
9 the plaintiffs in this case sometimes call the
10 inseverability provision, which is a finding,
11 basically, that the mandate was essential to
12 creating effective health insurance markets.
13 And I guess I'm wondering, what do we
14 do about that, the fact that that finding still
15 exists in the law? Does that constrain us in
16 any way?
17 MR. VERRILLI: Well, it's clear that
18 the -- I think that it doesn't overcome the
19 strong presumption of severability because it's
20 not an inseverability clause.
21 Now, if Section 18091 had said, if
22 Section 5000A is declared unconstitutional, then
23 42 U.S.C. 300gg shall be deemed inseverable --
24 those are the -- the insurance protection
25 provisions -- we'd have to make an applied

1 repeal argument. I think we'd have a strong
2 one.
3 But we don't need to make that because
4 the finding is not an operative provision of
5 law. It's just a finding. And I think what's
6 key is that what it expresses is the 2010
7 Congress's view about the state of affairs that
8 existed in 2010.
9 As a textual matter, the provision is
10 addressing Section 5000A as it was originally
11 enacted in 2010, that is, the insurance the --
12 the mandate to purchase insurance backed by the
13 tax.
14 Now the argument that my friends on
15 the other side are making is that the 2017
16 Congress must have continued to agree with that
17 finding because it didn't repeal the finding.
18 But the 2017 Congress couldn't
19 possibly have agreed that a requirement backed
20 by a tax consequence was essential to an
21 effective market because the 2017 Congress
22 eliminated the tax consequence.
23 And so I think that's very direct
24 textual proof that the 2017 Congress did not
25 share the view of the 2010 Congress expressed in

1 the finding. And then it comes down to the
2 question of, well, whether -- whether you're
3 going to strike this entire law down because the
4 Congress didn't go back and clean up that
5 finding. But there was no need to clean up that
6 finding because, as I said, it's not an
7 operative provision of law and it expresses a
8 predictive judgment about the circumstances that
9 existed in 2010 and what the 2010 Congress
10 thought would be necessary to create the market.
11 And textually, of course, the finding
12 talks about the -- the requirement being
13 essential to creating the market. And -- and by
14 2017, the market had been created. It was up
15 and running. CBO -- CBO told Congress it could
16 continue to run in a perfectly reasonable way if
17 you eliminated this penalty. So I think that
18 remnant from the -- from the finding --
19 CHIEF JUSTICE ROBERTS: Thank you.
20 Justice Gorsuch.
21 JUSTICE GORSUCH: Good morning, Mr.
22 Verrilli. I'd like if we could just for a
23 moment put aside standing and put aside your
24 remedial arguments and just focus on the merits.
25 This Court held that the mandate was a

1 permissible exercise of the taxing authority
2 because it produced revenue, at least some.
3 That seems to have withered away, and we're left
4 with the Commerce Clause and the Necessary and
5 Proper Clause, which the Court foreclosed last
6 time around. Can you help me with that?
7 MR. VERRILLI: Sure. I think it might
8 help to -- for me to walk through how we see
9 this, Your Honor. The Congress started with the
10 Court's definitive construction of the law in
11 NFIB that the Court presumes Congress takes this
12 Court's definitive construction as a given,
13 unless it clearly indicates a desire to change
14 it, and we don't think it did that.
15 And so it starts on the premise that
16 this is a lawful choice. It was a lawful choice
17 between obtaining -- maintaining insurance or
18 paying the tax prescribed in subsection (c).
19 And Congress -- I don't think there's
20 any doubt that Congress was acting within its
21 powers when it amended subsection (c) to reduce
22 the tax to zero. You can either think of that
23 as inherent in the tax power or necessary and
24 proper to it, but it has to have the ability to
25 take that step.

1 And so what remains is a statute that
2 isn't operative and doesn't have any
3 consequences for anyone. So it's effectively
4 like a statute that's been repealed, and that's,
5 I think, why so many in -- in Congress and the
6 President described it effectively as a repeal.
7 JUSTICE GORSUCH: Let -- let -- let --
8 MR. VERRILLI: Now our sense --
9 JUSTICE GORSUCH: -- let's -- let's
10 just put that aside for the moment, okay, and --
11 and if -- if we're focusing on the merits and
12 assume the mandate is still something, it's on
13 the books, what are the merits of that under the
14 Commerce Clause? Why aren't you clearly
15 foreclosed by NFIB?
16 MR. VERRILLI: Well, we're not making
17 an argument under the Commerce Clause because of
18 NFIB, of course. You know, our -- our view is
19 that because it's an inoperative provision at
20 this point, that it really doesn't have any more
21 need for an enumerated power than when Congress
22 enacts a hortatory statute. I -- I understand
23 the premise of Your Honor's question is to
24 disagree with that.
25 I think that, to the extent the Court

1 thinks an enumerated power is necessary, we --
2 we think it could be justified as necessary and
3 proper to the taxing power because it leaves the
4 framework of the -- of the taxing mechanism in
5 place in case Congress wants to do it in the
6 future.
7 JUSTICE GORSUCH: Thank you.
8 MR. VERRILLI: But, you know --
9 JUSTICE GORSUCH: Thank you, counsel.
10 CHIEF JUSTICE ROBERTS: Justice --
11 Justice Kavanaugh.
12 JUSTICE KAVANAUGH: Good morning, Mr.
13 Verrilli. Assume standing for purposes of these
14 questions and, on the merits, the mandate as
15 currently structured seems difficult to justify
16 under the taxing clause for the simple reason
17 that it does not raise revenue among others, so
18 it's hard to call it a tax now. And as I think
19 you were just indicating, you can't justify it
20 under the Commerce Clause because five justices
21 in NFIB said you -- you couldn't.
22 Can you explain your necessary and
23 proper argument just so I have that? You were
24 -- you were on that.
25 MR. VERRILLI: Yeah. It's -- it's the

1 one we -- it's the one we made in our brief,
2 Your Honor. It's that the -- the Congress has
3 -- the -- the way the -- the law exists now,
4 Congress has maintained the structure that
5 existed before the zeroing out of the tax in
6 2017 such that should Congress decide in the
7 future that it needs to reimpose a tax, that it
8 doesn't need to engage in a wholesale reworking
9 of the law, it can just step back in and change
10 the number again.
11 And in -- in that respect, it's not
12 entirely different. It's not the same. I'm not
13 saying it's the same. It's not entirely
14 different from a -- a tax law that Congress
15 enacts where the tax is suspended for a number
16 of years. And -- and we think that suffices.
17 But I -- I do think, Your Honor, that
18 what this points up, even if the Court disagrees
19 with us here and even the Court --
20 JUSTICE KAVANAUGH: Can I --
21 MR. VERRILLI: -- thinks that --
22 JUSTICE KAVANAUGH: I'm sorry to
23 interrupt, Mr. Verrilli, but let's assume --
24 just for the sake of argument, assume I don't
25 agree with that and then we get to severability.

1 I tend to agree with you that it's a
2 very straightforward case for severability under
3 our precedents, meaning that we would excise the
4 mandate and leave the rest of the Act in place,
5 reading our severability precedents.
6 One of my questions is, do you think
7 that would have been the right result under the
8 2010 Act, or did that change in 2017, or -- or
9 how would you assess that?
10 MR. VERRILLI: Well, I thought the
11 amicus in 2010 made very strong arguments in
12 favor of that result. But I -- I do think the
13 relevant -- the relevant point of inquiry was
14 what did the 2017 Congress think.
15 And I do think with respect -- what
16 would the 2017 Congress have preferred in the
17 language of Seila Law and the AAPC opinion, and
18 I -- I think the -- the answer, the -- the
19 objective answer to that is quite clear that if
20 -- that the very same Congress had zeroed out
21 the tax and therefore removed any economic
22 incentive, any economic suasion to get insurance
23 couldn't possibly have thought that the
24 provision was -- continued to be essential to
25 the operation of the overall system.

1 JUSTICE KAVANAUGH: Thank you.
2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.
4 JUSTICE BARRETT: Mr. Verrilli, if the
5 Court construes a statute in a particular way in
6 order to avoid a constitutional question,
7 wouldn't Congress be free to come back and say:
8 No, no, no, that is what we meant, and in this
9 case, for example, we did want to rely on the
10 commerce power? In other words, why would a --
11 a -- an avoidance construction of a statute lock
12 Congress in?
13 MR. VERRILLI: Neither an avoidance
14 construction nor a -- a straightforward
15 construction would lock Congress in, Your Honor,
16 I agree with that. But, here, I think that the
17 -- but -- but I do think the presumption applies
18 either way.
19 Once this Court has definitively
20 construed a statute, that is what the statute
21 means. And the Court assumes that Congress
22 takes that meaning as a given and that -- and
23 can rely on that construction by the Court when
24 it amends the statute.
25 And absent clear evidence that

1 Congress wanted to depart from the Court's
2 definitive construction, the Court -- the
3 presumption is that the definitive construction
4 stays in place.
5 And I do think that that has to be the
6 case here, because the only way to make sense of
7 what Congress was doing and what, as I said,
8 everybody involved in this process said Congress
9 was doing was that they assumed that the
10 choice-creating structure that was the
11 definitive construction of the Act after NFIB
12 remained, and that by zeroing out the tax, they
13 relieved any perceived need by anyone to
14 purchase insurance if they didn't want it.
15 That's what everybody involved in this
16 process said they were doing.
17 JUSTICE BARRETT: But why can't we say
18 that when Congress zeroed out the tax, it was no
19 longer a tax because it generated no revenue,
20 and, therefore, it could no longer be justified
21 as a taxing power, so Congress was presenting it
22 as a mandate which would have to be justified by
23 the Commerce Clause?
24 MR. VERRILLI: Well, I think for the
25 reasons I said, Your Honor. And I do think that

1 the statements by the legislature -- by the
2 legislators and the President and everyone else,
3 I know that that's legislative history in a
4 sense, but I do think there's wide agreement
5 that those kinds of statements can be looked to
6 as evidence of what -- of the meaning that a
7 provision is capable of bearing.
8 The meaning -- it's clearly capable of
9 bearing the meaning that we've identified. And
10 it seems like the only explanation for what
11 Congress did here is that they assumed that that
12 was its meaning.
13 If they had assumed the opposite and
14 wanted to impose a command, I presume they would
15 have -- somebody would have said that. And --
16 and everybody said the opposite. And, of
17 course, we all --
18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, Mr. Verrilli.
20 MR. VERRILLI: Thank you.
21 The Affordable Care Act has been the
22 law of the land for 10 years. The healthcare
23 sector has reshaped itself in reliance on the
24 law. Tens of millions of Americans rely on it
25 for health insurance that they previously

1 couldn't afford. Millions more rely on the
2 Act's other protections and benefits.
3 To assume that Congress put all of
4 that at risk when it amended the law in 2017 is
5 to attribute to Congress a recklessness that is
6 both without foundation in reality and
7 jurisprudentially inappropriate.
8 In view of all that has transpired in
9 the past decade, the litigation before this
10 Court, the battles in Congress, the profound
11 changes in our healthcare system, only an
12 extraordinarily compelling reason could justify
13 judicial invalidation of this law at this late
14 date.
15 Respondents' arguments in this case
16 are anything but. They should be rejected.
17 Thank you.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 General Hawkins.
21 ORAL ARGUMENT OF KYLE D. HAWKINS
22 ON BEHALF OF TEXAS, ET AL.
23 MR. HAWKINS: Thank you, Mr. Chief
24 Justice, and may it please the Court:
25 This case should be resolved on the

1 basis of three operative provisions that appear
2 in the U.S. Code today. The first is the
3 individual mandate, which is a command to the
4 American people to purchase health insurance
5 that the federal government deems suitable. The
6 second is a penalty provision that ensures that
7 the mandate raises no revenue for the federal
8 government. The third is a legislative finding
9 enshrined in the text of the law itself
10 declaring the mandate essential to the operation
11 of the marketplace reforms that the ACA set out
12 to achieve. The Obama administration's
13 Department of Justice described that finding as
14 a functional inseverability clause.
15 Under NFIB versus Sebelius, the
16 mandate as it exists today is unconstitutional.
17 It is a naked command to purchase health
18 insurance, and, as such, it falls outside
19 Congress's enumerated powers. And the
20 legislative findings declaring the mandate
21 essential require this Court to conclude, as did
22 the district court below and the joint dissent
23 in NFIB, that the mandate is inseverable from
24 the remainder of the law.
25 In asking the Court to hold otherwise,

1 Petitioners are really asking this Court to
2 ignore statutory provisions in the U.S. Code.
3 Petitioners instead prefer to hypothesize about
4 what various legislators might have been
5 thinking when they voted to eliminate the
6 penalty provision yet retain the mandate and the
7 legislative findings.
8 But that's just an argument that this
9 Court should set aside the text of the law in
10 favor of non-textual considerations. That gets
11 things exactly backwards, as this Court has
12 confirmed time and again in recent years.
13 There is no basis to ignore the words
14 that Congress enacted and that remain operative
15 today. The proper course is to take Congress at
16 its word and declare the mandate
17 unconstitutional and inseverable from the
18 remainder of the ACA.
19 CHIEF JUSTICE ROBERTS: General
20 Hawkins, on the severance question, I think it's
21 hard for you to argue that Congress intended the
22 entire Act to fall if the mandate were struck
23 down when the same Congress that lowered the
24 penalty to zero did not even try to repeal the
25 rest of the Act. I think, frankly, that they

1 wanted the Court to do that. But that's not our
2 job.
3 MR. HAWKINS: Well, Mr. Chief Justice,
4 I would respectfully submit that it is this
5 Court's job to follow the text of the law as
6 written. And I think it's critical that, in
7 2017, Congress could have excised the
8 legislative findings in 18091, but it chose not
9 to do so. It could have excised --
10 CHIEF JUSTICE ROBERTS: Well, but I
11 mean -- I -- I certainly agree with you about
12 our job in interpreting the statute, but, under
13 the severability question, where -- we ask
14 ourselves whether Congress would want the rest
15 of the law to survive if an unconstitutional
16 provision were severed.
17 And, here, Congress left the rest of
18 the law intact when it lowered the penalty to
19 zero. That seems to be compelling evidence on
20 the question.
21 MR. HAWKINS: I don't think so,
22 Mr. Chief Justice. I think what that
23 establishes, or at least one reasonable reading
24 of what happened, is that Congress wanted to
25 give the American people a tax cut, and it went

1 through lots of provisions of the Internal
2 Revenue Code cutting taxes here and there, and
3 one place it found to give the people a tax cut
4 was in 5000A(c), but it wanted to keep that
5 mandate in place because the mandate would still
6 drive people to acquire insurance.
7 And, indeed, it would have been quite
8 reasonable for Congress to conclude that simply
9 having a mandate will lead people to sign up for
10 health insurance. As originally enacted, the
11 Affordable Care Act included groups of people
12 who were subject to the mandate but exempt from
13 the penalty, including the very poor and members
14 of Indian tribes.
15 And I think that's an indication that
16 Congress believed that simply ordering people to
17 do something would get them to do it,
18 notwithstanding any penalty that may be
19 attached.
20 CHIEF JUSTICE ROBERTS: General, you
21 talk about the findings in the legislation and
22 -- and treat them as if they were an
23 inseverability clause, but it doesn't look like
24 any severability clause anywhere else in the
25 rest of the U.S. Code to me.

1 MR. HAWKINS: Well, Your Honor,
2 there's certainly no magic words requirement for
3 a severability clause or an inseverability
4 clause. What we see in 18091 is a repeated
5 emphasis by Congress that the mandate is
6 essential to what they were seeking to
7 accomplish. This is not some fleeting reference
8 in -- in one provision. In subsections (h),
9 (i), and (j), we see over and over again this --
10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.
12 Justice Thomas.
13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.
15 General Hawkins, I think we're
16 shadowboxing a bit here. The -- the individual
17 mandate now has no enforcement mechanism, so
18 it's really hard to determine exactly what the
19 threat is of -- of an action against you.
20 Could you comment on that a bit and --
21 and just give us an understanding of what your
22 injury is?
23 MR. HAWKINS: Sure, Justice Thomas.
24 So we've offered seven different bases
25 to conclude that the standing requirement of

1 Article III is satisfied. I would submit that
2 the easiest path to confirm standing is through
3 the injury that the states have suffered. In --
4 in particular, the CBO confirmed in 2008 and
5 2017 that simply requiring people to sign up for
6 health insurance would lead people to do so.
7 And it's reasonably likely, based on that, that
8 people will sign up for Medicaid who otherwise
9 would not have done so because of the command to
10 do so.
11 Now General Mongan suggested that
12 we've not put on evidence of that, and I
13 respectfully disagree. We've put on the 2008
14 and 2017 CBO reports. The individual affidavits
15 themselves, at pages 73, 76, and 77, confirm
16 that individuals will sign up just based on a
17 command to do so. And there are numerous State
18 affidavits, including from Mississippi,
19 Missouri, and South Dakota, at 148, 154, 187,
20 talking about costs imposed by the mandate on
21 the states. And we see the increased Medicaid
22 enrollment set out in, for example, page 91 of
23 the Joint Appendix, which is a Wisconsin
24 affidavit.
25 Now we would submit that, under

1 Department of Commerce versus New York, that is
2 more than enough to conclude that there's a
3 substantial likelihood of at least one person
4 signing up for a state Medicaid program, which,
5 of course, would cause at least one dollar in
6 injury and satisfy the standing requirement.
7 And that's just our first of seven
8 theories. I'm -- I'm happy to go through more
9 if Your Honor would like.
10 JUSTICE THOMAS: No, that's fine.
11 The -- I'd like to move to, at what stage would
12 you determine inseverability? The -- you know,
13 there's a lot of talk that we should consider
14 this at the standing stage, but, when I look at
15 inseverability, I think of it as a statutory
16 construction and something more suitable for the
17 merits stage.
18 But I'd like your comment on that.
19 MR. HAWKINS: Well, Justice Thomas, we
20 think that this Court has described the
21 severability analysis as part of the remedial
22 analysis. And so we submit that the proper
23 course here is to conclude that at least one
24 plaintiff has standing for any of the reasons
25 we've put forward and then to conclude that the

1 mandate is unconstitutional. And upon doing so,
2 we would submit that that's when the
3 severability analysis comes into play.
4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.
6 JUSTICE THOMAS: Thank you.
7 JUSTICE BREYER: Turning to the
8 merits, are -- is your point -- what do you say
9 about many, many statutes, I suspect, that do
10 have or could have statements do this, don't do
11 that, or do this, and they aren't -- they do not
12 have any enforcement, they do not have any
13 effect.
14 World War I, defense statutes; buy war
15 bonds. An environmental statute; plant a tree.
16 A one of a thousand statutes commemorating
17 something, beautiful cities day, clean up the
18 yard. I mean, I can recall or I believe just
19 dozens and dozens of statutes where Congress
20 says something where normally we would say it's
21 precatory.
22 Now are all those statutes suddenly
23 open to challenge? I mean, are none of them?
24 If so, you lose. And if it's in between, which
25 ones are and which ones aren't?

1 MR. HAWKINS: So, Justice Breyer, you
2 asked whether they're open to challenge. I -- I
3 guess I'd want to know what the --
4 JUSTICE BREYER: We're talking on the
5 merits, on the merits. If you have a merits
6 claim, can you suddenly say, this is no good
7 because people will do it? They'll buy war
8 bonds. They will plant a tree. At least one of
9 them will clean up the front yard, okay? And
10 thereby, I don't know, you see the point. It's
11 a merits point.
12 MR. HAWKINS: So, Justice Breyer, I
13 guess I'd want to look at the particular
14 statute. We know from NFIB that the government
15 cannot order people to enter commerce, people
16 who are not already in commerce, and if another
17 statute is like that, then I think NFIB would
18 control.
19 JUSTICE BREYER: I'm sorry, you're
20 missing the point. You're missing the point.
21 On each of them, there is some constitutional
22 argument that if there were a penalty attached,
23 it would be unconstitutional. They take the
24 penalty out from all my examples. Now no
25 penalty.

1 And do you say that they are
2 nonetheless unconstitutional for whatever
3 reason? If so, I think there will be an awful
4 lot of language in an awful lot of statutes that
5 will suddenly be the subject of Court
6 constitutional challenge.
7 MR. HAWKINS: Justice Breyer, we don't
8 dispute that inherent in the nature of
9 sovereignty is the power for the government to
10 speak, And so we don't challenge the idea of
11 truly hortatory statements or Congress giving
12 suggestions or recommendations. And if those
13 statutes could be read that way, then that might
14 change my answer.
15 But what we have here -- and this is,
16 I think, the critical difference -- it is not
17 some suggestion, not some hortatory statement.
18 It is the law of the United States of America
19 today that you have to purchase health insurance
20 and not just any health insurance, health
21 insurance that the federal government has
22 decided would be best for you. And that is
23 certainly subject to challenge.
24 JUSTICE BREYER: All right. Thank
25 you.

1 CHIEF JUSTICE ROBERTS: Justice Alito.
2 JUSTICE ALITO: General Hawkins, can I
3 ask you, I hope, two quick questions about your
4 theories of standing.
5 First of all, as to increased Medicaid
6 costs because you are required to calculate
7 eligibility based on modified adjusted income,
8 what would happen if you didn't do that?
9 MR. HAWKINS: Well, we don't know for
10 certain because we haven't tried, but I believe
11 the federal government could bring some action
12 against us, or somebody who should be eligible
13 for Medicaid under the ACA but -- but isn't
14 because of the way we've done the regulations, I
15 suppose, would be able to sue us.
16 JUSTICE ALITO: Would there be
17 penalties? Does the statute -- does the
18 Affordable Care Act set out any penalties for --
19 for failing to do that?
20 MR. HAWKINS: I -- I don't know of a
21 specific penalty or fine that would be levied
22 against the state in connection with a failure
23 to comply with the Maiji requirements. Of
24 course, there are penalties that states can
25 suffer in connection with IRS reporting and --

1 and other things like that.

2 JUSTICE ALITO: Okay. As to the

3 reporting requirements in sections 6055 and

4 6056, the consequences for failure to comply

5 with those, I believe, would be a penalty under

6 the Internal Revenue Code, which this Court has

7 suggested is a tax for purposes of the

8 Anti-Injunction Act.

9 So how could that theory of standing

10 survive the limitations imposed by the

11 Anti-Injunction Act?

12 MR. HAWKINS: Well, the -- the

13 provisions in 6055 and 6056 are -- flow from the

14 mandate and are echoed in IRS regulations. The

15 2020 instructions, which were released recently,

16 say that the states have to provide this

17 information to the federal government about how

18 they are covering as employers their employees.

19 And that reporting requirement itself

20 inflicts a pocketbook injury on the states.

21 Those forms don't produce themselves.

22 And our theory is that that pocketbook

23 injury itself is enough to -- to satisfy Article

24 III. I don't think that poses an AIA problem.

25 And, indeed, those injuries, as the Fifth

1 Circuit correctly held, flow from the individual
2 mandate itself and are traceable back to the
3 mandate.
4 JUSTICE ALITO: Thank you.
5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.
7 JUSTICE SOTOMAYOR: Counsel, I -- I'd
8 like to understand that a little bit more, your
9 last statement. As I understood the theory you
10 explained earlier of your standing, you say that
11 you assume some people would comply voluntarily
12 with a -- the legal command at issue here, the
13 individual mandate.
14 As I understand it, the -- the CB --
15 the CBO report predicted that only a small
16 number of people would do that, the exact
17 opposite of what it said in 2009, because of a
18 willingness to comply with law.
19 But you have to take it a step
20 further. You have to prove that those -- that
21 small number would include people who didn't
22 enroll for Medicaid and didn't enroll for CHIPs
23 when it was a legal requirement as a tax, but
24 they would do so now after they're told there's
25 no penalty for it, there's no tax for it.

1 At some point, common sense seems to
2 me would say: Huh? There's only a small number
3 of people who would do it. That small number of
4 people have to include Medicaid and CHIP
5 recipients to affect you as the state at all.
6 And they would, once they're told
7 there's no tax, enroll now when they didn't
8 enroll when they thought there was a tax. Does
9 that make any sense to you?
10 MR. HAWKINS: It -- it does make sense
11 to me, Justice Sotomayor, under Department of
12 Commerce versus New York. I would note that in
13 that case as well, we were talking about a very
14 small number of people who would unlawfully
15 refuse to respond to the Census if it included a
16 citizenship question.
17 And the standing theory in that case
18 was premised on assumptions about people
19 breaking the law. Our theory in this case is at
20 least in part predicated on assumptions about
21 people following the law.
22 JUSTICE SOTOMAYOR: The problem is --
23 MR. HAWKINS: I think that --
24 JUSTICE SOTOMAYOR: -- that your
25 theory assumes that people are going to pay a

1 tax and break the law by not buying insurance,
2 but they wouldn't do it when the tax is zero.
3 That -- that makes less sense.
4 But moving on from that, on to the
5 substance, okay? In NFIB, we said at least four
6 times by my count that individuals cannot be
7 compelled to buy health insurance under the
8 Commerce Clause. They could only be asked to
9 make a choice under the tax clause.
10 Now the individual plaintiffs here
11 still believe that there's a command, contrary
12 to what NFIB said, that they must buy health
13 insurance. What -- your only remedy would be to
14 say that provision's unconstitutional under the
15 Commerce Clause and it's unconstitutional under
16 the tax clause.
17 But I don't understand why you're
18 entitled to greater relief when NFIB only says
19 -- it already says it's unconstitutional. We
20 could say it's unconstitutional now. But you're
21 arguing that somehow us saying it a second time
22 would convince Congress that it could command
23 you to do something we said it couldn't do.
24 Again, does that logic make sense?
25 MR. HAWKINS: It -- it does, Justice

1 Sotomayor, based on the text of the law. The
2 Court, of course, in 2012 upheld --
3 JUSTICE SOTOMAYOR: Well, we said --
4 we said in NFIB that we couldn't read the text
5 of the law the way your clients want us to
6 because it would be unconstitutional.
7 MR. HAWKINS: So, Justice Sotomayor,
8 in III-A of the Chief Justice's opinion in NFIB,
9 that -- that part of the opinion notes that the
10 best reading of the individual mandate is as a
11 commands to purchase health insurance. And then
12 in subsequent parts, III-B and III-C, the Chief
13 Justice explained that an alternative reading
14 was fairly possible.
15 That's what's missing today. There is
16 no fairly permissible alternative reading of the
17 law. And that leaves us with the conclusion in
18 III-A of the Chief Justice's opinion that the
19 mandate is best read as a command to purchase
20 health insurance, and that is unconstitutional.
21 And the text of the law says that the remainder
22 of the ACA cannot work without that individual
23 mandate.
24 CHIEF JUSTICE ROBERTS: Justice Kagan.
25 JUSTICE KAGAN: Yes, Mr. Hawkins,

1 continuing on, on the merits, I -- I'm not sure
2 I understand the position.
3 In NFIB, we held that the ACAA -- that
4 the ACA was not an unconstitutional command. So
5 I would think that that has to be the starting
6 point.
7 Now, since then, there has been the
8 change -- this change, and -- and -- and -- and
9 in this change where Congress reduces the
10 penalty to zero, Congress has made the law less
11 coercive. So how does it make sense to say that
12 what was not an unconstitutional command before
13 has become an unconstitutional command now,
14 given the far lesser degree of coercive force?
15 MR. HAWKINS: Well, Justice Kagan, I
16 -- I'd like to start with the premise of your
17 question about the holding of NFIB. That
18 holding is an alternative reading of the
19 statute, a savings construction, predicated on
20 the fact that at the time the individual mandate
21 could possibly be read as glued together with
22 the penalty provision to --
23 JUSTICE KAGAN: Well, I think you have
24 to -- excuse me, if I might interrupt, General.
25 I think you have to accept that holding, because

1 that holding is what allowed the ACA to remain
2 in existence all this time.
3 I mean, so, however it was, that it
4 was four plus one and what exactly that one
5 said, the holding of the Court was that the ACA
6 was not an unconstitutional command.
7 MR. HAWKINS: And -- and we would
8 submit this Court is not bound by that holding
9 today because the underlying predicate of that
10 holding is no longer in the United States Code
11 today.
12 JUSTICE KAGAN: Well --
13 MR. HAWKINS: When Congress --
14 JUSTICE KAGAN: -- the only thing
15 that's changed is something that made the law
16 less coercive, is what I'm suggesting.
17 MR. HAWKINS: Well, Your Honor,
18 what --
19 JUSTICE KAGAN: If you make a law less
20 coercive, how does it become more of a command?
21 MR. HAWKINS: Well, Your Honor, the
22 law was always best read as a command, as III-A
23 of the Chief Justice's --
24 JUSTICE KAGAN: So --
25 MR. HAWKINS: -- opinion makes clear.

1 JUSTICE KAGAN: -- you're just
2 disputing the premise of what we held in NFIB,
3 which has, you know -- which I -- I don't think
4 you can dispute, but let me go on.
5 So 5000A(e) says that a class of
6 people -- and these are mostly poor people who
7 are subject to the mandate, but have -- those
8 people are subject to the mandate but have never
9 had to pay anything.
10 So do you think that in NFIB what we
11 really should have concluded was that those
12 people were subject to a command whereas
13 everyone else had a lawful choice?
14 MR. HAWKINS: So I think that those
15 people, the very poor and members of Indian
16 tribes, I think that if at any point they had
17 brought an as-applied challenge, I think they
18 would have been entitled to prevail because Your
19 Honor is correct, from day one, Congress has
20 been ordering to do -- them to do something
21 which is beyond Congress's commerce power, and
22 if --
23 JUSTICE KAGAN: I mean, doesn't it
24 seem exactly backwards, General, to say that
25 those people who'd never had to pay a thing were

1 subject to a command, when people who did have
2 to pay, who felt the coercive power of
3 government, did not, were not subject to a
4 command?
5 MR. HAWKINS: Your Honor, that is Part
6 III-A of the Chief Justice's opinion in NFIB,
7 indicating that the mandate is best read as a
8 command.
9 Now, to some people, to many people, a
10 savings construction was available at the time,
11 but in 2017 Congress effectively took these
12 subsection (e) exemptions and expanded them to
13 everybody. And the result is that there is no
14 tax savings construction now available and we're
15 just left with the command.
16 JUSTICE KAGAN: Thank you, General.
17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.
19 JUSTICE GORSUCH: Well, I -- I'd like
20 to pick up on that, on the merits, Mr. Hawkins.
21 And good morning.
22 As I understood Mr. Verrilli, his
23 argument on the merits is that this is still
24 necessary and proper to the taxing power. And
25 that coercive authority is still in play; it's

1 just that Congress has chosen to set it at zero
2 and wants to -- the flexibility of retaining
3 that provision in law because it might choose
4 later to increase the tax again.
5 What do you -- what do you say to that
6 response?
7 MR. HAWKINS: I would say two things,
8 Justice Gorsuch. Number 1, this cannot be a tax
9 because it does not raise revenue for the
10 government and, indeed, cannot raise revenue for
11 the government. In NFIB, the Court noted,
12 citing cases going back to the 1950s, that the
13 essential feature of a tax is raising revenue.
14 My second response, though, is that if
15 the Necessary and Proper Clause were to somehow
16 save that, that would be giving Congress a
17 police power. Everything is potentially a tax.
18 And if Congress could justify any legislation on
19 the grounds that, well, maybe one day we'll
20 impose a tax, there would be no functional limit
21 on Article I power.
22 JUSTICE GORSUCH: Let -- let me turn
23 to the remedial question here. And if you could
24 address it with respect to the individual
25 Plaintiffs.

1 They've asked for declaratory and
2 injunctive relief. I guess I'm a little unclear
3 who exactly they want me to enjoin and what
4 exactly do they want me to enjoin them from
5 doing?
6 MR. HAWKINS: So the -- the
7 declaration, which was count 1 on which the
8 district court has entered partial final
9 judgment, was a declaration that the mandate is
10 unconstitutional and inseverable from the
11 remainder of the Act.
12 The Defendants include the United
13 States, HHS, the IRS, and their respective
14 commissioners. And so the judgment would be a
15 declaration that the -- that the Defendants
16 cannot -- or, excuse me, the -- would be a
17 declaration that the individual mandate is
18 unlawful and inseverable from the remainder of
19 the Act.
20 JUSTICE GORSUCH: What do we do about
21 the fact that usually declaratory judgments in
22 aid of preexisting remedial jurisdiction, we'd
23 normally require some proof that we can remedy a
24 -- a plaintiff's injury more concretely than
25 just a mere declaratory judgment?

1 MR. HAWKINS: Well, here I think --
2 JUSTICE GORSUCH: We -- you'd have to
3 show that there would be an injunction that
4 would be available and then this is essentially
5 an anticipatory action.
6 MR. HAWKINS: So two things, Justice
7 Gorsuch. Number 1, the United States in
8 district court insisted that an injunction would
9 not be necessary and that it would treat the
10 declaration as an injunction. And we took them
11 at their word.
12 Second, if that's not good enough,
13 count 5 in our complaint is still pending in
14 district court. And that is our request for
15 injunctive relief. And that -- that's still a
16 live issue before the district court. And we
17 can pursue that remedy, if necessary.
18 JUSTICE GORSUCH: Thank you, counsel.
19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.
21 JUSTICE KAVANAUGH: Good morning,
22 General Hawkins. Assume for purposes of my
23 questions that there is standing, just assume
24 that. On the merits of the mandate before we
25 get to severability, I want to follow up briefly

1 on Justice Breyer's questions because my
2 understanding might be a little different from
3 his about the existence of other laws.
4 I think when I asked General Mongan,
5 he agreed with me that there are no examples in
6 the U.S. Code that he's aware of where Congress
7 has enacted a true mandate to do something, to
8 purchase a good or service, not something
9 hortatory, but a true mandate with no penalties.
10 Are -- is that right?
11 MR. HAWKINS: I think it is, Justice
12 Kavanaugh. I can't think of anything. And it
13 would make sense that that were correct because
14 the Affordable Care Act, of course, was an
15 unprecedented statute. I believe that Congress
16 had never tried to do before what it did here.
17 JUSTICE KAVANAUGH: Right. With or
18 without penalties, right?
19 MR. HAWKINS: I believe that's
20 correct.
21 JUSTICE KAVANAUGH: Then on -- on
22 severability, if the mandate can't be justified
23 or the mandate as currently structured -- I'm
24 using that, the term "mandate" -- I understand
25 the arguments from the other side about that

1 term -- but the mandate as currently structured
2 can't be justified under the Commerce or Taxing
3 or Necessary and Proper Clauses, we get to
4 severability, and looking at our severability
5 precedents, it does seem fairly clear that the
6 proper remedy would be to sever the mandate
7 provision and leave the rest of the Act in
8 place, the provisions regarding preexisting
9 conditions and the rest.
10 So the question to you, obviously, is
11 how do you get around those precedents on
12 severability, which seem on point here?
13 MR. HAWKINS: Justice Kavanaugh, I get
14 around them by relying on the text of the
15 statute. AAPC, Your Honor's plurality opinion
16 for the Court, recognized that non-severability
17 clauses can be statements of congressional
18 intent. And -- and as I noted earlier, the
19 Obama administration's Department of Justice
20 referred to 18091 as a functional inseverability
21 clause.
22 In that statute, we've got multiple
23 instances of Congress insisting --
24 JUSTICE KAVANAUGH: What does this --
25 I'm sorry to interrupt, but inseverability

1 clauses usually are very clear. And we did
2 indicate what they look like in AAPC and we
3 cited an example of what they look like, and,
4 you know, Congress knows how to write an
5 inseverability clause. And that is not the
6 language that they chose here.
7 So I -- I agree with you about
8 focusing on the text, very much agree with that,
9 but I just am having trouble seeing that as the
10 equivalent of an inseverability clause.
11 MR. HAWKINS: Justice Kavanaugh, we
12 would respectfully submit that that would
13 elevate form over substance. In subpart (h) we
14 see the mandate as essential to the larger
15 regulation of economic activity. In subsection
16 (i), it's essential to creating effective health
17 insurance markets and the same thing again in
18 subsection (j).
19 This is Congress saying over and over
20 again that the mandate is essential to the
21 operation of the law. And I don't believe
22 there's any serious argument that Congress would
23 have enacted the ACA in 2010 but for the
24 individual mandate or without the individual
25 mandate.

1 JUSTICE KAVANAUGH: Well, they did
2 something to that effect in 2017, however.
3 MR. HAWKINS: Well, in 2017, they gave
4 the American people a tax cut, but they wanted,
5 evidently, to continue ordering people to
6 acquire health insurance and they left in place
7 the finding saying that that requirement is
8 essential.
9 And it's worth --
10 JUSTICE KAVANAUGH: Don't you think in
11 2017 -- in 2017, do you read Congress as having
12 wanted to preserve protection for coverage for
13 people with preexisting conditions? Because it
14 sure seems that way from the -- the record and
15 the text.
16 MR. HAWKINS: Well, Your Honor, we
17 would submit that the best approach is to just
18 look at what's in the United States Code rather
19 than get into the game of what different
20 legislators might have been thinking and -- and
21 saying in speeches and all that.
22 And -- and indeed, Congress certainly
23 could have excised these findings. We've seen
24 Congress amend legislative findings before in
25 cases like Lopez, where Congress amended its

1 findings in response to this Court's grant of
2 certiorari.
3 It's telling that Congress didn't do
4 that here. And it's telling --
5 JUSTICE KAVANAUGH: Thank you,
6 counsel. Thank you.
7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.
9 JUSTICE BARRETT: Good morning,
10 General Hawkins. I want to go back to Justice
11 Gorsuch's questions about standing for the
12 individual plaintiffs.
13 So let's say that we agree with you
14 that the mandate by making them feel a legal
15 compulsion to purchase insurance has caused them
16 a pocketbook injury.
17 Why is that traceable to the
18 defendants that the individuals have actually
19 sued here? I mean, I can see how it's caused by
20 or traceable to a mandate itself, but how is it
21 traceable, say, to the IRS or to HHS? Why is it
22 their action that's actually inflicting the
23 injury?
24 MR. HAWKINS: Well, so Justice
25 Barrett, we have sued five defendants, including

1 the United States. And this Court has applied a
2 long-standing presumption that the federal
3 government acts in good faith.
4 And by suing the five defendants who
5 we have sued here, I think that's the best way
6 of ensuring that the individual plaintiffs'
7 injuries from the individual mandate and the
8 other parts of the ACA that interact with the
9 individual mandate will be fully remedied.
10 JUSTICE BARRETT: But -- but doesn't
11 it really seem that Congress is the one who's
12 injured the individual plaintiffs here and you
13 can't sue Congress and say: Hey, you've put us
14 under this mandate that's forcing us to buy
15 insurance and that's harming us, right?
16 MR. HAWKINS: Well, we've sued the
17 United States. It is the United States' law
18 that the individual plaintiffs have to acquire
19 health insurance that the United States thinks
20 is good for them.
21 JUSTICE BARRETT: Let me switch gears
22 a minute and talk about state standing. There's
23 some confusion or, I mean, it's my confusion
24 based on differing positions taken in the briefs
25 about these 1095B and C statements.

1 So the House at page 31 of its brief
2 says that the states would have to issue them
3 regardless of whether the mandate is intact in
4 the statute or not, but the states point to the
5 cost of producing these -- you know, these forms
6 and mailing them out as part of what's created
7 their pocketbook injury.
8 Who's right?
9 MR. HAWKINS: So they are correct,
10 Justice Barrett, that 6055 and 6056 are
11 independently on the books. But if this Court
12 were to apply the long-standing presumption that
13 the federal government will operate in good
14 faith and respect this Court's judgments, then
15 it is reasonably likely that a declaration from
16 this Court that the mandate is unlawful would
17 prompt the federal government to in any way
18 reduce the administrative burden that that
19 paperwork causes, including going through and
20 saying who had what kind of coverage during
21 which month.
22 So I -- I think that's enough to
23 satisfy traceability and redressability as the
24 Fifth Circuit correctly concluded.
25 JUSTICE BARRETT: Okay, thank you,

1 counsel.

2 CHIEF JUSTICE ROBERTS: General

3 Hawkins, you can take a couple of minutes to

4 wrap up.

5 MR. HAWKINS: Thank you, Mr. Chief

6 Justice. Just a couple points. On standing the

7 regulatory burden that is imposed today by the

8 IRS forms is the most straightforward way to

9 conclude that the states have suffered a

10 pocketbook injury.

11 And, in any event, Department of

12 Commerce versus New York confirms that the

13 states suffer another pocketbook injury as a

14 predictable consequence of ordering people to

15 sign up for insurance.

16 Second, on severability, we submit

17 that even if this Court is disinclined to

18 invalidate every provision of the ACA, it should

19 at a minimum agree with the Obama administration

20 that under the text of the law, the mandate is

21 inseverable from the three-legged stool.

22 Third, on practical effects, I want to

23 emphasize that we recognize the reliance

24 interests at stake in this regulatory regime.

25 The district court has stayed its partial final

1 judgment.

2 If this Court were to agree with us

3 that the ACA's invalid, that stay could be

4 extended for an appropriate time to allow the

5 states and political branches of the federal

6 government an opportunity to accommodate those

7 reliance interests as we saw this Court do in

8 cases like Northern Pipeline versus Marathon

9 Oil. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,

11 counsel.

12 General Wall.

13 ORAL ARGUMENT OF JEFFREY B. WALL

14 ON BEHALF OF THE UNITED STATES, ET AL.

15 GENERAL WALL: Mr. Chief Justice and

16 may it please the Court:

17 This case pushes at the line between

18 faithfully following what Congress actually

19 does, rather than what it may have intended to

20 do.

21 When Congress eliminated the shared

22 responsibility payment, it left standing what is

23 now a naked command to obtain insurance and it

24 left standing the findings that that mandate is

25 essential to the operation of other parts of the

1 Act.
2 Those choices have legal consequences
3 whether or not the Members of Congress who voted
4 for the TCJA foresaw them. That's how this
5 Court normally approaches interpreting statutes
6 and it's how this Court should approach the ACA
7 here.
8 I welcome the Court's questions.
9 CHIEF JUSTICE ROBERTS: General, your
10 theory of standing is that a person who's not
11 actually injured by part of the law can
12 challenge that part of the law and, through
13 that, try to strike down other parts of the law
14 that do challenge him or that do injure him.
15 I -- I think that really expands
16 standing dramatically. I mean, just in this Act
17 alone, you're talking about almost a thousand
18 pages and you're letting somebody not injured by
19 the provision that needs challenging sort of
20 roam around through those thousand pages and
21 pick out whichever ones he wants to -- wants to
22 attack.
23 GENERAL WALL: I -- I think the reason
24 there isn't a floodgates problem or a sort of
25 massive loophole, Mr. Chief Justice, and the

1 reason we haven't seen claims like Alaska
2 Airlines is because on the merits it's just very
3 rare that you're going to have the sort of
4 textual evidence that overcomes the presumption
5 of inseverability.
6 And so these claims go out on a motion
7 to dismiss if they're ever brought at all. But
8 I -- the -- the theory, and -- and Justice Alito
9 was pressing this with Mr. Verrilli, I think, is
10 that, you know, if you imagine a statute that a
11 clearly racially discriminatory provision and an
12 express inseverability clause, I think the
13 theory of the other side is that plaintiffs
14 regulated by that statute couldn't challenge it.
15 And that doesn't seem right to us.
16 The plaintiffs here have an Article III injury.
17 They want certain kinds of insurance plans --
18 CHIEF JUSTICE ROBERTS: No, but it's a
19 common feature -- it's a common feature of
20 standing that the result is people can't
21 challenge provisions. I mean, it's -- it's an
22 important doctrine. It is the -- the only
23 reason we have the authority to interpret the
24 Constitution is because we have the
25 responsibility of deciding actual cases, and

1 that's what standing filters out.
2 GENERAL WALL: I agree with all of
3 that, Mr. Chief Justice. The plaintiffs here,
4 and this is in the amended complaint at
5 paragraph 46 and then in their declarations that
6 appear at pages 71 to 78 of the JA, they say
7 that they're injured because they want plans
8 that they had before the ACA and that they
9 cannot obtain now, but for the ACA's insurance
10 form provisions.
11 That's a straightforward Article III
12 injury under this Court's --
13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. Justice Thomas.
15 JUSTICE THOMAS: Yes. Thank you, Mr.
16 Chief Justice.
17 General Wall, I'd like you to discuss
18 at what stage we should confront the
19 inseverability issue. There's much talk that we
20 should do that at the standing stage, but,
21 again, I think, as I've said before, that this
22 -- it seems more like a statutory construction
23 issue that you consider at the merits stage.
24 Would you comment on that?
25 GENERAL WALL: The government's view

1 is yours, Justice Thomas. The other side, my
2 friends on the other side, keep referring to
3 standing through inseverability.
4 That's not right. Those two are
5 distinct things. The Plaintiffs here want
6 insurance plans that they cannot get, that they
7 used to have, but for the ACA. That's an
8 Article III injury. It is an injury in fact, in
9 the real world for them right now. They want
10 different kinds of insurance.
11 On the merits, they have arguments
12 about why those insurance reform provisions
13 can't be enforced against them. And their
14 argument on the merits is that the provisions
15 are tied, as a matter of statutory
16 interpretation, to the mandate and the mandate
17 is unconstitutional.
18 Now, that argument may be right or
19 wrong on -- on -- on the merits, Justice Thomas,
20 but it doesn't have anything to do with
21 standing. As you say, it's distinct from the
22 standing inquiry. They have an Article III
23 injury. Then we move to the merits and
24 severability.
25 And, as I was trying to explain to the

1 Chief Justice, the reason that doesn't open the
2 floodgates is because it's just rare that the
3 text of the statute, which we know has to be the
4 focus under AAPC and Seila Law, is going to
5 provide the kind of evidence that would allow a
6 plaintiff to overcome the presumption of
7 severability.
8 It's virtually always going to be true
9 the provisions are severable. It just doesn't
10 happen to be true here given the unique wording
11 of this statute.
12 JUSTICE THOMAS: Thank you.
13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.
15 JUSTICE BREYER: Yes, I'm going to the
16 merits. And I think I have a -- I do have a
17 very different understanding than Justice
18 Kavanaugh.
19 What I thought I heard said was that
20 someone in the Solicitor General's Office read
21 through the entire United States Code, which
22 must be quite a job, and discovered that there's
23 no precatory language in the Code. There is
24 nothing in the Code that says something like buy
25 war bonds or something like plant a tree or

1 something like clean your yard.
2 Is that right?
3 GENERAL WALL: Justice Breyer, there's
4 plenty of precatory language in the Code that --
5 JUSTICE BREYER: Fine. If you say
6 there is precatory language, "precatory" means,
7 in the dictionary, pertaining to entreaty or
8 supplication. Now, how is it that you know that
9 this mandate, just by itself, without any
10 penalty, is something more than a supplication
11 or an entreaty?
12 GENERAL WALL: A couple of reasons,
13 Justice Breyer. The first is that it says
14 "shall," you shall maintain minimum coverage,
15 not that you're encouraged to do so.
16 And the second is that when the
17 majority in NFIB in Part III-C turned to the
18 statute, it looked at not just subsections (a)
19 and (b), as my friends on the other side say,
20 but also (c), which is at page 562.
21 So when it's looking at the statute
22 and adopting the saving construction, it's
23 looking at all three provisions and saying it
24 has this essential feature of raising revenue.
25 That's what allows us to take something that's

1 more naturally construed as a command and read
2 it as a tax.
3 JUSTICE BREYER: All right. So you
4 had someone read through the entire United
5 States Code, and you discovered that there is no
6 precatory language in that code that uses the
7 word "shall." Is that right?
8 GENERAL WALL: Justice Breyer, I'm not
9 aware of any. And in all the briefs --
10 JUSTICE BREYER: I didn't say you
11 weren't aware of any. I might be -- have a
12 misplaced idea, but I remember when I used to
13 work there, we passed lots of things like
14 National Port Week and all kinds of stuff that
15 was precatory or said let's have a celebration
16 or "the nation shall," but -- "plant a tree," et
17 cetera.
18 But you have read through the U.S.
19 Code, or someone in your office, and have
20 learned that there is no word "shall" in a
21 precatory phrase?
22 GENERAL WALL: Justice Breyer, I
23 cannot vouch that I've read the entire United
24 States Code.
25 JUSTICE BREYER: I -- I haven't

1 either. I tell you, I haven't either.
2 GENERAL WALL: But I -- I -- we have
3 looked at this question. And we -- all of the
4 precatory provisions to which anyone has pointed
5 or of which we're aware say things like
6 "should," not you "shall" do these things. So
7 I'm not aware of statutes that say --
8 JUSTICE BREYER: All right.
9 GENERAL WALL: -- you "shall" buy --
10 JUSTICE BREYER: The difference
11 between "shall" and "should," okay. Thank you.
12 GENERAL WALL: I think that's one key
13 distinction, Justice Breyer. I would also point
14 to not just the -- the passage in NFIB, but the
15 exemptions. There are exemptions from the
16 mandate for people with religious exemptions and
17 prisoners and illegal aliens. And if it really
18 is just a choice-conferring provision, as the
19 other side says, a choice you have anyway just
20 by virtue of existing, it's hard then to explain
21 what the exemptions to that mandate do.
22 JUSTICE BREYER: Well, as you say
23 that, it reminds me in English, have I ever said
24 or have you ever said to someone in your family,
25 you "shall" do it but that is an entreaty, an

1 entreaty or a supplication, rather than
2 threatening a punishment? Have you ever heard
3 that or used "shall" in respect to a
4 supplication or an entreaty?
5 GENERAL WALL: No, Justice Breyer. In
6 my family, when I tell my kids that they shall
7 do things, they're -- that's a command backed by
8 a penalty.
9 JUSTICE BREYER: Well, that's a much
10 more organized family than mine.
11 CHIEF JUSTICE ROBERTS: Justice Alito.
12 JUSTICE ALITO: Perhaps there's a
13 difference between a supplication and a tax.
14 Are you aware of any provisions in the Code in
15 which Congress has purported to use its taxing
16 power to say you must do this, and we're going
17 to tax it and we're going to set the tax at
18 zero.
19 GENERAL WALL: No, Justice Alito.
20 JUSTICE ALITO: The -- the -- what --
21 what -- the feature of this case that has a -- a
22 strange aspect is the sea change that's occurred
23 in the understanding of the role of the
24 individual mandate between our first Affordable
25 Care Act case and today.

1 At the time of the first case, there
2 was strong reason to believe that the individual
3 mandate was like a part in an airplane that was
4 essential to keep the plane flying so that if
5 that part was taken out, the plane would crash.
6 But now the part has been taken out and the
7 plane has not crashed.
8 So if we were to decide this case the
9 way you advocate, how would we explain why the
10 individual mandate in its present form is
11 essential to the operation of the Act?
12 GENERAL WALL: Well, I think a couple
13 of things, Justice Alito. Yes, I -- our basic
14 position is that the finding and the findings
15 are the -- the functional equivalent of a
16 targeted inseverability clause. The government
17 said that back in NFIB. If the Court -- the
18 joint dissenters agreed with that, I think. If
19 the Court had invalidated the mandate, I think
20 there's good reason to believe that the Court
21 would have and should have also invalidated,
22 with it, guaranteed issue and community rating
23 because that was the most natural way to read
24 the finding.
25 And if that was the most natural way

1 read that finding, its text, before 2017, it's
2 still the most natural reading. Nothing about
3 the text in 2017 changed.
4 Congress did a very targeted thing in
5 2017. It said we don't want people to have to
6 make this payment anymore if they don't want to
7 get insurance. And, yes, that was less coercive
8 in a sense, as Justice Kagan pointed out, but
9 more coercive in another, which is now it's just
10 a naked command. And they didn't disturb the
11 finding.
12 And I take the point on the other side
13 that, if you look at all these things from CBO
14 reports to statement of legislators, that you
15 can divine in the collective consciousness of
16 Congress a -- a judgment that the finding is no
17 longer correct. But they didn't amend or alter
18 the text of the Act.
19 JUSTICE ALITO: Thank you, General.
20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor.
22 JUSTICE SOTOMAYOR: Counsel, do you
23 concede that Congress has the authority to enact
24 taxes with delayed start dates?
25 GENERAL WALL: Yes --

1 JUSTICE SOTOMAYOR: In other words, a
2 tax --
3 GENERAL WALL: -- Justice Sotomayor.
4 JUSTICE SOTOMAYOR: Okay. Can a
5 Congress also enact taxes that phase out some
6 years in the future, 10 percent this year,
7 8 percent next year, going down by two until
8 five years from now? Can Congress do that?
9 GENERAL WALL: Absolutely.
10 JUSTICE SOTOMAYOR: And -- okay. So
11 that -- you agree that if in 2020 Congress had
12 enacted the shared-responsibility payment, the
13 tax, to phase in in 2014 and phase out in 2009,
14 that would have been permissible, correct?
15 GENERAL WALL: Yes. I think it
16 would --
17 JUSTICE SOTOMAYOR: All right, then
18 let me finish, counsel.
19 If Congress had, in the TCJA, provided
20 that the shared-responsibility payment would be
21 zero in 2019 and 2020 and 2021, but would phase
22 back in as of 2022, would that be
23 constitutional?
24 GENERAL WALL: I want to say one
25 thing, Justice Sotomayor, which is I believe it

1 would, but I think all of that would have been
2 evidence before the Court in NFIB, why you
3 wouldn't read it as a tax, because if you were
4 sort of phasing it out, it would look more like
5 a penalty that you were graduating down.
6 JUSTICE SOTOMAYOR: But all -- but all
7 that Congress did -- answer the question to my
8 last hypothetical. If Congress had in the TCJA
9 provided that the shared responsibility would be
10 zero for the first three years but would start
11 up at a certain percentage in 2022, would that
12 be constitutional?
13 GENERAL WALL: If -- if they had just
14 delayed the payment of the shared responsibility
15 payment, Justice Sotomayor, yes, I believe that
16 would.
17 JUSTICE SOTOMAYOR: All right. So
18 what's the difference between that and a
19 decision often made by Congress that for a
20 certain number of years, whatever fines,
21 penalties, taxes were due from people, they're
22 not going to collect?
23 We've had cases with that where we've
24 -- I -- I think we had a case just last year
25 where Congress was going to pay a bonus to

1 soldiers and suspended that bonus for three
2 years and then reapplied it later.
3 What's the difference between that
4 constitutionally? If Congress has the power
5 constitutionally to delay, to extinguish, to
6 restart, why is this any different that at least
7 two Congresses have chosen to forego the tax,
8 but another Congress has the power not to?
9 GENERAL WALL: All of those other
10 provisions, Justice Sotomayor, are written
11 naturally like taxes. They say, if you do a
12 thing or you don't do a thing, you -- you -- you
13 make a -- a -- a payment.
14 The -- the reason this is different is
15 because, once you eliminate the revenue-raising
16 function, it -- it's not naturally written like
17 a tax, as the Chief Justice recognized. It was
18 never most naturally thought of as a -- as a
19 tax.
20 What allowed it to be reasonably
21 construed as a tax was the revenue-raising
22 function. Once you've cut that out of the
23 statute, it no longer reads like any of those
24 provisions that have suspended or delayed taxes.
25 It reads very differently if you set them side

1 by side.

2 JUSTICE SOTOMAYOR: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: General Wall, assume

5 for the moment that I don't really buy your

6 standing through inseverability theory. Could

7 you tell me what your view is about whether the

8 states or the individual plaintiffs have

9 standing here?

10 GENERAL WALL: We haven't taken a

11 position on that, Justice Kagan, because we

12 think the individual --

13 JUSTICE KAGAN: No, I know you

14 haven't. I know you haven't, General, but

15 I'm -- I'm asking you for one because we have to

16 take a position on it. And, you know, think of

17 this as a one-justice CBFG.

18 GENERAL WALL: Justice Kagan, I -- I

19 think Justice Barrett was asking some very

20 difficult questions about traceability with

21 respect to the individual Respondents.

22 With respect to the states, I -- I

23 think at page 22 of Texas's brief that's

24 reporting -- it's pointing to reporting and

25 administrative costs in its direct role as an

1 employer. And I -- I think that might be enough
2 to give the state standing, but, again, I want
3 to emphasize that the United States has not
4 taken a position on that.
5 JUSTICE KAGAN: Okay. I mean, the
6 United States is usually pretty stingy about
7 standing law, so it did surprise me, in much the
8 way that it surprised the Chief Justice, that
9 you're coming in here with a theory which, to my
10 mind, threatens to kind of explode standing
11 doctrine.
12 I mean -- and I -- I guess I want to
13 go back to that because I wasn't sure I
14 understood your answer to the Chief Justice.
15 You know, a lot of legislation now is in these
16 huge packages, I mean, even more than the ACA,
17 that -- that involve a thousand different
18 subjects, omnibus legislation where it's just
19 everybody pours everything in that they can
20 think of.
21 And it would seem a big deal to say
22 that if you can point to injury with respect to
23 one provision and you can concoct some kind of
24 inseverability argument, then it allows you to
25 challenge anything else in the statute.

1 Isn't that something that the United
2 States should be very worried about, and isn't
3 it something that really cuts against all of our
4 doctrine?
5 GENERAL WALL: We would be worried
6 about it, Justice Kagan, if we thought that the
7 floodgates were going to open, but, you know,
8 Alaska Airlines was more than 30 years ago.
9 People have been able to bring these claims for
10 a long time.
11 The reason they don't is that they
12 rarely are -- it's not a problem of Article III
13 standing. It's not that they're not injured by
14 these statutes. Plaintiffs here --
15 JUSTICE KAGAN: If I could just
16 interrupt for a second, General, I -- I just
17 don't think that that's right. I mean, I -- I
18 have to say for myself, I -- I was -- this --
19 this theory was new to me, and I think it would
20 be new to many people.
21 And it's not so hard to construct some
22 kind -- I mean, you're -- you're not -- all you
23 have to do is to present a theory of
24 severability. You don't have to win on your
25 theory and -- you know, in order to make this

1 under your view a proper Article III claim.
2 GENERAL WALL: Well, but, of course,
3 Justice Kagan, the Court as a matter of
4 avoidance can do severability before doing the
5 merits. We don't think it should here. But --
6 but normally a court would. And if the theory
7 of inseverability were weak, as it usually is,
8 it's very hard to overcome the presumption of --
9 of severability. The claim would go out on a
10 motion to dismiss stage, which is why you don't
11 see the claims.
12 I think the problem for the other
13 side, just to drive home Justice Alito's
14 hypothetical, is I think the other side is
15 saying that even if you had a statute with an
16 express inseverability provision and an obvious
17 constitutional problem, like racial
18 discrimination, so it was obvious that the
19 statute was a legal nullity, everyone regulated
20 by that statute couldn't challenge it until
21 somebody came along who was racially
22 discriminated against.
23 And as an Article III standing matter,
24 that doesn't seem right. All we're doing is --
25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Gorsuch.

2 JUSTICE GORSUCH: I'd like to just

3 pick up where we left off there and -- and

4 understand from you your response to Justice

5 Kagan and her -- and the concern about opening

6 the floodgates here.

7 GENERAL WALL: Justice Gorsuch, we

8 just don't see the problem because it's going to

9 be -- as I was trying to say, it's going to be

10 very hard to make out an inseverability claim

11 that's going to get you past the motion to

12 dismiss stage, which is why we just don't see

13 people walking in and challenging single

14 provisions of omnibus acts, because they don't

15 have something like the textual finding here.

16 This is -- it's rare to have an

17 inseverability clause. It's even rarer to have

18 a factual finding that goes to exactly the same

19 question as you're asking when you do

20 severability.

21 I mean, in all of the briefs in this

22 case, no one has pointed to any other statute

23 like this one. So I think -- I understand the

24 -- the -- the sort of reaction that we don't see

25 this sort of theory very often, but, again, I

1 don't think that's a function of Article III
2 standing.
3 The plaintiffs here are injured. They
4 want plans that they can't get. It's a function
5 of the fact that their argument on the merits is
6 not the type of argument that most plaintiffs or
7 hardly any plaintiffs, frankly, are going to be
8 able to make plausibly.
9 JUSTICE GORSUCH: Thank you.
10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.
12 JUSTICE KAVANAUGH: Good morning,
13 General Wall. Justice Breyer rightly points out
14 that the U.S. Code has a lot of precatory
15 language in it. My understanding matches his on
16 -- on that point.
17 And to the extent that the mandatory
18 language here might be different and unusual,
19 which was my question earlier, I think his
20 question suggests: Well, why not just construe
21 this language as being similar to those
22 precatory provisions that are strewn about the
23 U.S. Code, which probably is both a standing and
24 merits question as I understood him to be
25 asking.

1 Can you respond to that?
2 GENERAL WALL: Sure. A few brief
3 things, Justice Kavanaugh.
4 The first is, of course, the Court in
5 NFIB said that the essential feature that
6 allowed for the saving construction was that it
7 raised revenue.
8 Once Congress has eliminated that, I
9 think they cut out the basis for the saving
10 construction and then you have the word "shall,"
11 which, as the Chief Justice recognized in NFIB,
12 is most naturally read as a command. It's read
13 as a command in all of these other statutes.
14 So I think the Court would have to
15 extend or -- or -- or stretch NFIB further than
16 the Court went there. And it seems to me --
17 JUSTICE KAVANAUGH: With -- with
18 respect to the mandate as currently structured,
19 you make a forceful argument that it's not
20 justified under the Commerce or Taxing or
21 Necessary and Proper Clauses, at least as
22 construed in NFIB, but then we go to
23 severability, and I understood your opening
24 comments to say that the findings in the
25 original Act are, in essence, the equivalent of

1 an inseverability clause.

2 I just want to test that for a second.

3 I mean, as you know, we have a strong background

4 presumption of severability, which is --

5 reflects a longstanding understanding of how

6 Congress works and our respect for Congress's

7 legislative role under Article I. And it also

8 establishes a clear default rule or fairly clear

9 default rule against which Congress can

10 legislate.

11 Congress knows how to write an

12 inseverability clause, but this language is

13 different from how that usually looks. So I

14 just want to give you an opportunity to respond

15 to that.

16 GENERAL WALL: Sure. So everyone

17 agrees that there's no magic words requirement.

18 And at that point, the finding speaks directly

19 to the question here. It says the mandate, a

20 requirement that you get into the market, is

21 essential to guaranteed issue and community

22 rating.

23 And if, as the joint dissenters said

24 in NFIB, once that triad is down and as the

25 Court-appointed amicus said there, it's very

1 hard to limit it to the triad. It takes down
2 the other pieces of the Act.
3 So I take the point, Justice
4 Kavanaugh, that it's not written in the way one
5 normally sees an inseverability clause, but it
6 speaks directly to the question that the
7 inseverability clause is meant to address, which
8 is what is in the Act that the mandate is
9 essential to.
10 And by its very terms, it says, and
11 that's why I think the government argued
12 powerfully in NFIB, that it's the equivalent of
13 a targeted inseverability clause.
14 JUSTICE KAVANAUGH: Thank you.
15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett.
17 JUSTICE BARRETT: General Wall, the
18 Petitioners have pointed out that if, in fact,
19 Congress zeroed this out and -- and made it no
20 longer a tax, they've argued that Congress would
21 have deliberately done something
22 unconstitutional by grounding this language, if,
23 in fact, it has force, assume that, in its
24 commerce power.
25 Do you think that it's indisputable

1 that NFIB would render such an exercise of the
2 commerce power unconstitutional? And I -- I'm
3 asking because, you know, there were five
4 justices who thought that, but it wasn't a
5 majority opinion who said it. So do you think
6 there's room for doubt on that score?
7 GENERAL WALL: I do think there's --
8 there is a passage in Part III-C, which was
9 joined by five members of the Court that does
10 say it can't be upheld under the Commerce
11 Clause, Justice Barrett, but -- but even if it
12 weren't, yes. I think it is clear from NFIB
13 that if it is read as a command, that is not
14 permissible under the Commerce Clause.
15 And I don't even take any of the
16 parties -- I don't take House of -- the House or
17 California to be disagreeing with that. They're
18 just disagreeing on the statutory question of
19 how best to read it.
20 And one quick point on that, to finish
21 my answer to Justice Kavanaugh, you know, it
22 says "shall," but I think at that point it's
23 very difficult to make "shall" do the work of
24 "should." That's just more work than avoidance
25 can do. That move would be open to the Court in

1 every case, like Lopez and Morrison, and you
2 could say, well, it just says that you shouldn't
3 bring school -- guns into school zones, or you
4 shouldn't commit domestic abuse. But the Court
5 took those commands as what they were, commands
6 that people shall do or not do something.
7 And --
8 JUSTICE BARRETT: Well, General Wall,
9 let's assume that I agree with you and that I
10 think "shall" is "shall" and not "should" and so
11 it's a command, but don't -- don't you think
12 then the Petitioners have a point that if, you
13 know, as you say NFIB squarely would say that
14 the mandate would be unconstitutional as an
15 exercise of the commerce power, as opposed to
16 the taxing power, that it would be odd for us to
17 construe this statute as Congress saying, well,
18 we're going to change the statute in a way
19 that's going to render it constitutional or this
20 provision in a way that will render it
21 constitutional -- unconstitutional?
22 GENERAL WALL: I think they have a
23 fair point that if you were trying to define the
24 collective consciousness of Congress, it may be
25 that many or most of its members didn't

1 understand the legal consequences of what it was
2 doing because all they were doing was something
3 more targeted, and they weren't thinking about
4 the broader provisions or the findings or any of
5 the rest. So I think it's fair to say that they
6 didn't focus on this.
7 But I don't think it's fair, Justice
8 Barrett, to say that the Court shouldn't apply
9 the Act by its terms, just because that would
10 create a constitutional problem. That's exactly
11 what NFIB would say -- said would be the case,
12 and that's what Congress did, whatever it may
13 have been thinking or whatever it might have
14 intended to do.
15 JUSTICE BARRETT: Thank you.
16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, General.
18 GENERAL WALL: Thank you, Mr. Chief
19 Justice.
20 As -- as you wrote in NFIB, quoting
21 Chief Justice Marshall, "the peculiar
22 circumstances of the moment may render a measure
23 more or less wise, but cannot render it more or
24 less constitutional."
25 As it now stands, subsection (a)

1 requires every law-abiding American to obtain
2 health insurance, unless they fall within one of
3 three exemptions. That broad mandate, whatever
4 its wisdom or practical import, exceeds
5 Congress's enumerated powers, and the Court
6 should so hold.
7 As for what that defect means for the
8 ACA, Congress left standing the answer it gave
9 in enacting the ACA. And whatever one's view of
10 the wisdom of that answer in retrospect, the
11 Court should respect Congress's answer, adhere
12 to the text of the ACA, stay its mandate, and
13 allow the political branches to decide how to
14 proceed given the peculiar circumstances of this
15 moment.
16 Thank you.
17 CHIEF JUSTICE ROBERTS: Thank you,
18 General.
19 General Mongan, you have three minutes
20 for rebuttal.
21 REBUTTAL ARGUMENT OF MICHAEL J. MONGAN
22 ON BEHALF OF CALIFORNIA, ET AL.
23 MR. MONGAN: Thank you, Mr. Chief
24 Justice.
25 I have three points. First, if you

1 read the text Respondents' way, you have to
2 attribute to the 2017 Congress an intent to
3 impose the very command this Court said would be
4 unconstitutional.
5 The Court should avoid that result if
6 there's any other possible way to read the text.
7 And here there's an obvious alternative. If you
8 adhere to the choice construction the Court gave
9 to 5000A in NFIB, that just makes the statute
10 inoperative. A choice between buying insurance
11 or doing nothing.
12 Now, that's a somewhat unusual
13 statute, but it aligns with this Court's
14 authoritative construction. It's exactly how
15 Congress and the President understood the
16 amendment and what they told their constituents
17 they were doing. It allows Americans to freely
18 choose whether to buy health insurance. And I
19 think I heard at least one of my friends
20 acknowledge that, on that reading, it would be
21 constitutional.
22 Second, AAPC makes clear that there's
23 a strong presumption in favor of severability
24 that can only be overcome with some powerful
25 objective basis. Respondents cannot identify

1 one here.

2 Now, this morning they've pointed to

3 the 2010 Commerce Clause findings. But those

4 are not an inseverability clause, and they're

5 not relevant to the severability question that's

6 before the Court today, because they address the

7 significance of a different version of 5000A

8 backed by a multi-hundred-dollar tax consequence

9 in the initial creation of healthcare markets.

10 Congress zeroed out that tax long after the

11 markets were created and after CBO told it that

12 they would remain stable even if 5000A were

13 repealed or made unenforceable.

14 The text and structure that Congress

15 created when it enacted that amendment confirmed

16 the presumption of severability because Congress

17 made 5000A unenforceable and chose to leave

18 every other provision in place. And the

19 remaining provisions aren't just capable of

20 functioning independently; they have been

21 functioning perfectly well ever since.

22 Finally, whatever your approach to

23 severability, it's common ground that any remedy

24 should respect the separation of powers and

25 should not invalidate any more of Congress's

1 work than is absolutely necessary.

2 Now, what's before the Court today is

3 an enormously consequential statute. It

4 provides health insurance and other life-saving

5 benefits and protections to hundreds of millions

6 of Americans.

7 Now, there is no doubt that it has

8 been controversial, and in 2017, Congress

9 debated whether to keep it. But Congress

10 ultimately chose to preserve every provision

11 while zeroing out the tax in 5000A.

12 If that surgical amendment created a

13 constitutional problem, there's only one remedy

14 that would respect congressional intent, and

15 that's an order declaring that provision, and

16 only that provision, unenforceable.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,

19 General. The case is submitted.

20 (Whereupon, at 12:01 p.m., the case

21 was submitted.)

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