

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.)
- - - - -

TEXAS, ET AL.,)
) Petitioners,)
) v.) No. 19-1019
CALIFORNIA, ET AL.,)
) Respondents.)
- - - - -

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Washington, D.C.

Tuesday, November 10, 2020

The above-entitled matter came on
for oral argument before the Supreme Court of
the United States at 10:00 a.m.

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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 -- and

1 -- and they've suffered some -- some injury. I
2 think that follows from this Court's cases in
3 Poe and Holder and American Book Sellers that
4 it's not enough to say that I'm injured by
5 complying with the law. You also have to show
6 some real threat 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's 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.

20 But, as we know from AAPC, most
21 provisions are severable, so it would lead to a
22 situation where courts are adjudicating the
23 legality of provisions that don't actually harm
24 the plaintiffs before them.

25 JUSTICE BREYER: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: Texas has offered
3 evidence that the Affordable Care Act requires
4 it to calculate Medicaid eligibility using
5 modified adjusted gross income and that this
6 method of calculation has greatly increased the
7 number of persons on Medicaid in Texas, I think
8 by about 100,000 persons.

9 Why can't Texas seek a declaratory
10 judgment that it is not required to calculate
11 eligibility using that method?

12 MR. MONGAN: Well, I think that the --
13 the problem is that they need to show that
14 they're injured by the provision that they
15 actually allege is unconstitutional. And that
16 provision that Your Honor referenced is separate
17 from 5000A. It would remain on the books even
18 if 5000A were wiped away.

19 So, unless the Court were willing to
20 accept the -- the novel theory of standing by
21 inseverability advanced by the federal
22 government, I don't see how Texas's theories
23 about many other provisions of the ACA can
24 establish a case or controversy with respect to
25 this claim challenging amended 5000A.

1 JUSTICE ALITO: Well, there is logic
2 to that theory of standing. Why is it
3 conceptually -- conceptually unsound?

4 MR. MONGAN: Well, we -- we think it's
5 unsound because it -- it then would allow the
6 court -- allow a party to come in to -- to court
7 and challenge, you know, any aspect of a large
8 statutory scheme by just asserting a -- a theory
9 that it's inseverable from one provision that
10 harms them.

11 But -- but, Your Honor, if the Court
12 wanted to -- to create that type of rule in its
13 standing jurisprudence, that would just bring us
14 to the merits. And the problem with the merits
15 theory is that the plaintiffs here are positing
16 that Congress created the very command that this
17 Court held in NFIB was constitutionally
18 impermissible, and that's just not a plausible
19 construction when you consider that Congress was
20 well aware of this Court's statutory
21 construction. It relied on that choice creating
22 construction and -- and used it to just render
23 the provision inoperative.

24 JUSTICE ALITO: Well, let me -- let me
25 ask this related question. If Texas were to

1 fail to use that method, what consequences would
2 follow?

3 MR. MONGAN: If Texas were to fail to
4 use the method for calculating Medicaid
5 eligibility, Your Honor?

6 JUSTICE ALITO: Yes.

7 MR. MONGAN: I -- I -- I don't know.
8 I suppose it's possible that the federal
9 government could bring some sort of enforcement
10 proceeding against them or that an individual
11 could -- could sue on the theory that they
12 should be eligible for Medicaid.

13 JUSTICE ALITO: Well, I would ask a
14 related question about what would happen if the
15 IRS attempted to assess penalties on state
16 employers for failing to comply with the
17 reporting requirements in sections 6055 and
18 6056? In -- in a collection proceeding, could
19 the state argue that it has no obligation to
20 follow that because they can't be severed from
21 the individual mandate?

22 MR. MONGAN: Well, those are separate
23 provisions. I suppose it's possible that a
24 defendant could try and advance that as a
25 defense in response to such a claim.

1 But that doesn't mean that as a
2 plaintiff they can go into court and establish
3 an Article III injury tied to 5000A that's
4 sufficient to exercise the Court's jurisdiction.

5 JUSTICE ALITO: All right. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, if I
9 understand, and please tell me if I understand
10 your point correctly, which is, if they have
11 claims challenging the provisions that Justice
12 Alito asked about, they should have brought that
13 challenge, not a challenge based on the
14 individual mandate, correct?

15 MR. MONGAN: That's exactly right,
16 Your Honor. And although they have discussed a
17 lot of -- of the costs that flow from other
18 provisions of the ACA, they haven't directly
19 challenged those provisions, and they haven't
20 advanced any theory as to why those provisions
21 are unconstitutional.

22 JUSTICE SOTOMAYOR: Second, counsel,
23 give me your best argument why it would be
24 unreasonable or not legally enforceable for
25 plaintiffs to read the -- the individual mandate

1 as a legal command. You -- you answered Justice
2 Roberts' questions in a hypothetical, but I'm
3 asking, are -- are you accepting that
4 hypothetical or -- or that assumption -- not
5 hypothetical, I -- I used the wrong word --
6 assumption, or do you have -- what's your best
7 argument that it's not a command?

8 MR. MONGAN: No, we're not, Your
9 Honor. This Court authoritatively construed
10 5000A in NFIB as not a command. It said it was
11 a choice between buying minimum coverage, as set
12 out in sub (a), or making the alternative tax
13 payment in sub (b). That's an authoritative
14 construction that Congress relied on when it
15 amended the provision in 5000A.

16 Congress did not clearly indicate that
17 it wanted to depart from that choice
18 construction. Rather, it relied on the choice
19 construction, zeroed out the tax as a means of
20 making the provision inoperative.

21 And I think this is a critical point,
22 Your Honor. Congress was entitled to rely on
23 this Court's authoritative construction, and we
24 ought to give Congress the benefit of the doubt
25 that it was doing what it said it was doing,

1 preserving a lawful choice, rather than imposing
2 the same command --

3 JUSTICE SOTOMAYOR: But, counsel, I --
4 that I have no quarrel with, but why should we
5 presume that a common citizen who wants to
6 comply with the law would make that assumption?

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

8 JUSTICE SOTOMAYOR: Or should make
9 that assumption legally?

10 MR. MONGAN: Well, Your Honor, I think
11 that, to the extent that a common citizen is
12 considering the intricacies of federal law, they
13 would consider this Court's authoritative and
14 very prominent holding about this provision in
15 NFIB. And, of course, they would also consider
16 the very public and repeated pronouncements of
17 the President and members of Congress, who said
18 we've gotten rid of the individual mandate and
19 now you're allowed to freely choose what to --
20 to do with whether to buy insurance.

21 JUSTICE SOTOMAYOR: One last question.
22 If -- I understand your standing argument within
23 the -- involving the states, but are you arguing
24 that the states are not harmed by the cost of
25 more people enrolling in insurance as a legal

1 matter, or is it that as a factual matter, you
2 think they have not yet demonstrated that they
3 were harmed?

4 MR. MONGAN: As a factual matter, Your
5 Honor. We're on summary judgment. It was their
6 burden to introduce specific facts showing that
7 amended 5000A actually drives up their costs.
8 They put in 21 declarations, but they didn't
9 actually address that point.

10 JUSTICE SOTOMAYOR: So how do you deal
11 with their argument that you had the burden of
12 coming forth with evidence?

13 MR. MONGAN: Well, I just don't think
14 that that's consistent with precedent. It's the
15 plaintiff's burden at summary judgment to
16 establish that they have satisfied the
17 requirements of standing.

18 CHIEF JUSTICE ROBERTS: Justice Kagan.

19 JUSTICE KAGAN: General, just going --
20 continuing on this point of the states'
21 standing, I mean, why wouldn't it be right to
22 say something like, look, you can expect that,
23 as a result of this law, more people will buy
24 insurance, even when there's no enforcement
25 mechanism, just the force of law itself will

1 encourage people to buy insurance, and Texas is
2 now saying, well, that costs us money, it costs
3 us money because of its effect on programs like
4 Medicaid, and it costs us money because we have
5 to send out these forms saying that you bought
6 insurance? I think that those are Texas's two
7 arguments.

8 MR. MONGAN: Well, Your Honor, we
9 think, under this Court's precedent in cases
10 like Lujan, that might be enough at the pleading
11 stage but that it wouldn't be sufficient at the
12 summary judgment stage.

13 But, frankly, Your Honor, if we're
14 misreading those cases, we'd be happy to lose on
15 the issue of state standing and litigate this
16 case on the merits and then have Texas's rather
17 minimal showing here set the bar for state
18 plaintiff standing theories going forward. We
19 just don't think that your cases allow it.

20 JUSTICE KAGAN: And -- and why is
21 that? What case doesn't allow it?

22 MR. MONGAN: Well, I think it's just
23 the general principle that a plaintiff must
24 adduce specific facts to establish injury in
25 causation, as the Court indicated in Lujan. And

1 -- and that, we would think, would -- would
2 require something more than speculation or -- or
3 supposition.

4 JUSTICE KAGAN: And how about on the
5 individual plaintiffs' side? This is going back
6 to the Chief Justice's questions. I mean, why
7 isn't -- or why shouldn't the -- the force of
8 law itself -- you know, a person can say, if the
9 law says I need to do something, then I have to
10 do something. And we -- we want citizens to be
11 law-abiding. Why isn't that enough to create
12 standing?

13 MR. MONGAN: Well, I understand that
14 point, Your Honor, but I think that that's
15 contrary to what this Court has said in cases
16 like Poe. I mean, there, the doctor plaintiff
17 said, I'm looking at this law, it says that I
18 can't give advice to my patient, and I think the
19 law is unconstitutional and -- and it harms me
20 because I'm not able to give this advice.

21 And the Court said, well, that's not
22 enough. You also have to show a real threat of
23 enforcement. So I think that would be a
24 departure from what this Court has indicated
25 before, and it might open the door to quite a

1 number of additional pre-enforcement challenges.

2 JUSTICE KAGAN: Thank you, General.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning,
6 counsel. Let me pick up where Justice Kagan
7 left off. 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 the
9 CBO report from 2017 is probably the best thing
10 they have going for them on state standing. We
11 don't think it's sufficiently specific. It's a
12 -- it's a single sentence. And CBO didn't offer
13 any data backing it up and --

14 JUSTICE GORSUCH: Do you disagree with
15 it?

16 MR. MONGAN: I -- I don't think that
17 we have any basis to -- to agree or disagree
18 with it.

19 JUSTICE GORSUCH: So it's an
20 uncontested fact --

21 MR. MONGAN: No --

22 JUSTICE GORSUCH: -- in the record?

23 MR. MONGAN: No, I -- I don't -- I
24 don't believe that's right, Your Honor. It
25 doesn't say anything specific to the plaintiff

1 states, and it doesn't say anything specific to
2 plaintiffs who are eligible for state health
3 plans. So we wouldn't think that that's enough
4 at the summary judgment phase.

5 But, again --

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you,
10 Mr. Chief Justice.

11 And good morning, General Mongan. To
12 pick up on individual standing questions of the
13 Chief Justice and Justices Kagan and Gorsuch,
14 suppose Congress passed a law requiring every
15 American who lives in a house to fly an American
16 flag in front of the house. There's no penalty,
17 and the question then is individual standing.

18 Under Lujan, you're the object of the
19 regulation as a homeowner. It's a forced
20 acquisition of an unwanted good or service. Why
21 isn't that enough to give you standing, knowing
22 that some people are going to do that, buy the
23 flags and fly them, simply because Congress
24 requires that?

25 MR. MONGAN: Well, Your Honor, I

1 think, if their theory was identical to what the
2 individual plaintiffs advanced here, simply that
3 we are actively complying with this and it is
4 causing us harm, that would run into a similar
5 problem with the Poe line of precedent. But
6 there may be some other legally cognizable
7 injury, especially in the First Amendment
8 context.

9 And we're not disputing that
10 plaintiffs can try and advance those types of
11 theories of injury. We just don't think that
12 they are substantiated under the circumstances
13 of this case.

14 JUSTICE KAVANAUGH: And on the CBO
15 report that Justice Gorsuch mentioned, do you
16 disagree that some people will follow the
17 mandate and purchase insurance solely because of
18 their willingness to comply with the law?

19 MR. MONGAN: Well, I don't have a
20 basis for disagreeing with it or agreeing with
21 it, Your Honor. I think it is unlikely, as the
22 dissenting judge below noted, that individuals
23 who wouldn't already take advantage of the very
24 generous Medicaid programs or state employer
25 health plans, would do it solely because of an

1 unenforceable command.

2 But, again, if we're wrong on that, it
3 just brings us to their untenable merits theory
4 that Congress has created a command that this
5 Court said was constitutionally impermissible,
6 even as it was telling the American people that
7 it was trying to get rid of or make inoperative
8 this provision.

9 JUSTICE KAVANAUGH: On -- on the point
10 that you mentioned that allowing standing,
11 individual standing, here might open the door,
12 are you aware of any other examples in the U.S.
13 Code at least where Congress has enacted a true
14 mandate, not something hortatory, but a true
15 mandate with no penalties?

16 MR. MORGAN: Your Honor, I'm not aware
17 of that, and we don't think that's what Congress
18 did here. We think that they -- they just
19 created --

20 JUSTICE KAVANAUGH: No, I take that
21 point. I was just wondering if you were aware
22 of an example.

23 On the merits of the -- of the claim,
24 under NFIB, obviously, it was justified under
25 the taxing clause, but it now doesn't raise

1 revenue. How do you respond to that point?

2 MR. MONGAN: So, in light of the NFIB
3 construction, what Congress did here was to
4 create a -- a -- an inoperative provision. It
5 doesn't require anybody to do anything.

6 And Congress has routinely created
7 inoperative provisions. It's done so since the
8 founding. And they haven't been viewed as
9 constitutionally problematic because they don't
10 alter legal rights or responsibilities or bind
11 anyone.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: What should we make
16 of the fact that Congress didn't repeal the
17 provision? I mean, you said earlier repeal, and
18 then you corrected yourself and said zeroed out.

19 I mean, you're asking us to fun --
20 treat it as if it functionally has been
21 repealed, but that's not what Congress did.
22 Does that matter?

23 MR. MONGAN: Your Honor, I think
24 Congress understood how this Court had construed
25 5000A as a choice, and it understood that it

1 would make the provision effectively inoperative
2 to zero out the tax. And that was a reasonable
3 thing for it to do.

4 Obviously, it was operating under
5 reconciliation procedures that allowed it to
6 make the change compliant with the Byrd Rule,
7 and CBO had told it that there was no material
8 difference between repealing the provision and
9 zeroing out the tax.

10 JUSTICE BARRETT: Let me ask you
11 another question that's related to some of the
12 hypotheticals you've heard some far -- so far.
13 You know, the Chief asked you about a mandate to
14 mow the lawn, and, you know, Justice Thomas
15 asked you one about forcing people to wear a
16 mask.

17 What if, in this case, you know, and
18 as I understand it to be the case, you have to
19 certify whether you've complied or not and then
20 the government keeps track of that? So the
21 government keeps track of whether you wore a
22 mask or whether you purchased health insurance.

23 Does that change your view of whether
24 there's an injury?

25 MR. MONGAN: Well, I'm not sure that

1 there is an ongoing certification requirement at
2 least in the tax forums, Your Honor. Perhaps
3 that would change the analysis.

4 But, if we get to the -- the merits,
5 then I think that it -- it's plain that this is
6 not an operative provision and there is no
7 ongoing command, so even if that would establish
8 standing, it wouldn't be enough to allow the
9 individuals to prevail on -- on the merits.

10 And, Your Honor, I would like to just
11 make the point that, if the Court were to
12 disagree with us on the merits and hold that
13 this is a naked command, then the only proper
14 remedy for that would be an order making the
15 provision unenforceable and holding that it's
16 invalid. That would completely address the --
17 the -- the problem.

18 What would be deeply problematic for
19 the plaintiffs, for the Petitioner states, and
20 for the rest of the nation is if plaintiffs were
21 allowed to leverage this single inoperative
22 provision to tear down hundreds of other
23 provisions that Congress --

24 JUSTICE BARRETT: Okay, counsel, let
25 me -- let me just return to the question on the

1 merits. So the states have said these Forms
2 1095B and C do require as part of taxes for one
3 to certify whether or not one has maintained the
4 minimum coverage necessary. Is that incorrect?

5 MR. MONGAN: Well, Your Honor, the
6 states do have to send out the forms. Those are
7 required by separate provisions, and they serve
8 continuing purposes related to the premium tax
9 credit and the employer mandate that have
10 nothing to do with 5000A. So those are costs
11 that they would continue to have regardless of
12 whether 5000A were on the books or not.

13 JUSTICE BARRETT: And individuals
14 don't have to certify whether or not they've
15 maintained coverage?

16 MR. MONGAN: Well, the IRS website
17 makes clear now that there's no longer an
18 obligation on the annual tax forms to check the
19 box regarding coverage. They've gotten rid of
20 that requirement.

21 JUSTICE BARRETT: Okay. Thank you,
22 counsel.

23 CHIEF JUSTICE ROBERTS: A minute to
24 wrap up, General.

25 MR. MONGAN: Thank you.

1 The plain intent of the 2017 amendment
2 was to make 5000A inoperative and unenforceable,
3 not to impose the very command this Court said
4 would be unconstitutional.

5 And the current statutory framework
6 makes clear that Congress wanted every other ACA
7 provision to remain in effect if 5000A were
8 unenforceable because that's the precise
9 situation Congress created.

10 Respondents' inseverability theory
11 would do violence to Congress's intent,
12 invalidating hundreds of provisions that
13 Congress chose to leave in place and that are
14 functioning perfectly well without an
15 enforceable 5000A. It would cause enormous
16 regulatory disruption, upend the markets, cast
17 20 million Americans off health insurance during
18 a pandemic, and cost the states tens of billions
19 of dollars during a fiscal crisis.

20 There's no basis for that result in
21 text, intent, or precedent.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 General.

24 Mr. Verrilli.

25

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 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 to the market to allow
5 it 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 a
14 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). That's

1 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, thank
12 you, Justice Breyer.

13 JUSTICE BREYER: I -- I'm connected, I
14 think.

15 A question about severability. Since,
16 at the time we heard, when this was first
17 passed, that the mandate was absolutely crucial,
18 as you 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, that's
14 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.

22 But I thought many of the briefs
23 showed that that -- that it -- it was a faulty
24 premise for other 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 implied

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
12 -- the -- the mandate to purchase insurance
13 backed by the 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. 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 is inoperative and doesn't have any consequences
3 for anyone. So it's effectively like a statute
4 that's been repealed, and that's, I think, why
5 so many in -- in Congress and the President
6 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 this is 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 that the answer, the -- the
19 objective answer, to that is quite clear that if
20 -- that the very same Congress that had zeroed
21 out 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. And absent clear
25 evidence that Congress wanted to depart from the

1 Court's definitive construction, the Court --
2 the presumption is that the definitive
3 construction stays in place.

4 And I do think that that has to be the
5 case here, because the only way to make sense of
6 what Congress was doing and what, as I said,
7 everybody involved in this process said Congress
8 was doing was that they assumed that the
9 choice-creating structure that was the
10 definitive construction of the Act after NFIB
11 remained and that, by zeroing out the tax, they
12 relieved any perceived need by anyone to
13 purchase insurance if they didn't want it.

14 That's what everybody involved in this
15 process said they were doing.

16 JUSTICE BARRETT: But why can't we say
17 that when Congress zeroed out the tax, it was no
18 longer a tax because it generated no revenue,
19 and, therefore, it could no longer be justified
20 as a taxing power, so Congress was presenting it
21 as a mandate which would have to be justified by
22 the Commerce Clause?

23 MR. VERRILLI: Well, I think for the
24 reasons I said, Your Honor. And I do think that
25 the statements by the legislature -- by the

1 legislators and the President and everyone else,
2 I know that that's legislative history in a
3 sense, but I do think there's wide agreement
4 that those kinds of statements can be looked to
5 as evidence of what -- of the meaning that a
6 provision is capable of bearing.

7 The meaning -- it's clearly capable of
8 bearing the meaning that we've identified. And
9 it seems like the only explanation for what
10 Congress did here is that they assumed that that
11 was its meaning.

12 If they had assumed the opposite and
13 wanted to impose a command, I presume they would
14 have -- somebody would have said that. And --
15 and everybody said the opposite. And, of
16 course, we all --

17 CHIEF JUSTICE ROBERTS: A minute to
18 wrap up, Mr. Verrilli.

19 MR. VERRILLI: Thank you.

20 The Affordable Care Act has been the
21 law of the land for 10 years. The healthcare
22 sector has reshaped itself in reliance on the
23 law. Tens of millions of Americans rely on it
24 for health insurance that they previously
25 couldn't afford. Millions more rely on the

1 Act's other protections and benefits.

2 To assume that Congress put all of
3 that at risk when it amended the law in 2017 is
4 to attribute to Congress a recklessness that is
5 both without foundation in reality and
6 jurisprudentially inappropriate.

7 In view of all that has transpired in
8 the past decade, the litigation before this
9 Court, the battles in Congress, the profound
10 changes in our healthcare system, only an
11 extraordinarily compelling reason could justify
12 judicial invalidation of this law at this late
13 date.

14 Respondents' arguments in this case
15 are anything but. They should be rejected.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 General Hawkins.

20 ORAL ARGUMENT OF KYLE D. HAWKINS

21 ON BEHALF OF TEXAS, ET AL.

22 MR. HAWKINS: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 This case should be resolved on the
25 basis of three operative provisions that appear

1 in the U.S. Code today. The first is the
2 individual mandate, which is a command to the
3 American people to purchase health insurance
4 that the federal government deems suitable. The
5 second is a penalty provision that ensures that
6 the mandate raises no revenue for the federal
7 government. The third is a legislative finding
8 enshrined in the text of the law itself
9 declaring the mandate essential to the operation
10 of the marketplace reforms that the ACA set out
11 to achieve. The Obama administration's
12 Department of Justice described that finding as
13 a functional inseverability clause.

14 Under NFIB versus Sebelius, the
15 mandate as it exists today is unconstitutional.
16 It is a naked command to purchase health
17 insurance, and, as such, it falls outside
18 Congress's enumerated powers. And the
19 legislative findings declaring the mandate
20 essential require this Court to conclude, as did
21 the district court below and the joint dissent
22 in NFIB, that the mandate is inseverable from
23 the remainder of the law.

24 In asking the Court to hold otherwise,
25 Petitioners are really asking this Court to

1 ignore statutory provisions in the U.S. Code.
2 Petitioners instead prefer to hypothesize about
3 what various legislators might have been
4 thinking when they voted to eliminate the
5 penalty provision yet retain the mandate and the
6 legislative findings.

7 But that's just an argument that this
8 Court should set aside the text of the law in
9 favor of non-textual considerations. That gets
10 things exactly backwards, as this Court has
11 confirmed time and again in recent years.

12 There is no basis to ignore the words
13 that Congress enacted and that remain operative
14 today. The proper course is to take Congress at
15 its word and declare the mandate
16 unconstitutional and inseverable from the
17 remainder of the ACA.

18 CHIEF JUSTICE ROBERTS: General
19 Hawkins, on the severance question, I think it's
20 hard for you to argue that Congress intended the
21 entire Act to fall if the mandate were struck
22 down when the same Congress that lowered the
23 penalty to zero did not even try to repeal the
24 rest of the Act. I think, frankly, that they
25 wanted the Court to do that. But that's not our

1 job.

2 MR. HAWKINS: Well, Mr. Chief Justice,
3 I would respectfully submit that it -- it is
4 this Court's job to follow the text of the law
5 as written. And I think it's critical that, in
6 2017, Congress could have excised the
7 legislative findings in 18091, but it chose not
8 to do so. It could have excised --

9 CHIEF JUSTICE ROBERTS: Well, but I
10 mean -- I -- I certainly agree with you about
11 our job in interpreting the statute, but, under
12 the severability question, where -- we ask
13 ourselves whether Congress would want the rest
14 of the law to survive if an unconstitutional
15 provision were severed.

16 And, here, Congress left the rest of
17 the law intact when it lowered the penalty to
18 zero. That seems to be compelling evidence on
19 the question.

20 MR. HAWKINS: I don't think so,
21 Mr. Chief Justice. I think what that
22 establishes, or at least one reasonable reading
23 of what happened, is that Congress wanted to
24 give the American people a tax cut, and it went
25 through lots of provisions of the Internal

1 Revenue Code cutting taxes here and there, and
2 one place it found to give the people a tax cut
3 was in 5000A(c), but it wanted to keep that
4 mandate in place because the mandate would still
5 drive people to acquire insurance.

6 And, indeed, it would have been quite
7 reasonable for Congress to conclude that simply
8 having a mandate will lead people to sign up for
9 health insurance. As originally enacted, the
10 Affordable Care Act included groups of people
11 who were subject to the mandate but exempt from
12 the penalty, including the very poor and members
13 of Indian tribes.

14 And I think that's an indication that
15 Congress believed that simply ordering people to
16 do something would get them to do it,
17 notwithstanding any penalty that may be
18 attached.

19 CHIEF JUSTICE ROBERTS: General, you
20 talk about the findings in the legislation and
21 -- and treat them as if they were an
22 inseverability clause. But it doesn't look like
23 any severability clause anywhere else in the
24 rest of the U.S. Code to me.

25 MR. HAWKINS: Well, Your Honor,

1 there's certainly no magic words requirement for
2 a severability clause or an inseverability
3 clause. What we see in 18091 is a repeated
4 emphasis by Congress that the mandate is
5 essential to what they were seeking to
6 accomplish. This is not some fleeting reference
7 in -- in one provision. In subsections (h),
8 (i), and (j), we see over and over again this --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas.

12 JUSTICE THOMAS: Thank you, Mr. Chief
13 Justice.

14 General Hawkins, I think we're
15 shadowboxing a bit here. The -- the individual
16 mandate now has no enforcement mechanism, so
17 it's really hard to determine exactly what the
18 threat is of -- of an action against you.

19 Could you comment on that a bit and --
20 and just give us an understanding of what your
21 injury is?

22 MR. HAWKINS: Sure, Justice Thomas.

23 So we've offered seven different bases
24 to conclude that the standing requirement of
25 Article III is satisfied. I would submit that

1 the easiest path to confirm standing is through
2 the injury that the states have suffered. In --
3 in particular, the CBO confirmed in 2008 and
4 2017 that simply requiring people to sign up for
5 health insurance would lead people to do so.
6 And it's reasonably likely, based on that, that
7 people will sign up for Medicaid who otherwise
8 would not have done so because of the command to
9 do so.

10 Now General Mongan suggested that
11 we've not put on evidence of that, and I
12 respectfully disagree. We've put on the 2008
13 and 2017 CBO reports. The individual affidavits
14 themselves, at pages 73, 76, and 77, confirm
15 that individuals will sign up just based on a
16 command to do so. And there are numerous State
17 affidavits, including from Mississippi,
18 Missouri, and South Dakota, at 148, 154, 187,
19 talking about costs imposed by the mandate on
20 the states. And we see the increased Medicaid
21 enrollment set out in, for example, page 91 of
22 the Joint Appendix, which is a Wisconsin
23 affidavit.

24 Now we would submit that, under
25 Department of Commerce versus New York, that is

1 more than enough to conclude that there's a
2 substantial likelihood of at least one person
3 signing up for a state Medicaid program, which,
4 of course, would cause at least one dollar in
5 injury and satisfy the standing requirement.

6 And that's just our first of seven
7 theories. I'm -- I'm happy to go through more
8 if Your Honor would like.

9 JUSTICE THOMAS: No, that's fine.
10 The -- I'd like to move to, at what stage would
11 you determine inseverability? The -- you know,
12 there's a lot of talk that we should consider
13 this at the standing stage, but, when I look at
14 inseverability, I think of it as a statutory
15 construction and something more suitable for the
16 merits stage.

17 But I'd like your comment on that.

18 MR. HAWKINS: Well, Justice Thomas, we
19 think that this Court has described the
20 severability analysis as part of the remedial
21 analysis. And so we submit that the proper
22 course here is to conclude that at least one
23 plaintiff has standing for any of the reasons
24 we've put forward and then to conclude that the
25 mandate is unconstitutional. And upon doing so,

1 we would submit that that's when the
2 severability analysis comes into play.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE THOMAS: Thank you.

6 JUSTICE BREYER: Turning to the
7 merits, are -- is your point -- what do you say
8 about many, many statutes, I suspect, that do
9 have or could have statements do this, don't do
10 that, or do this, and they aren't -- they do not
11 have any enforcement, they do not have any
12 effect.

13 World War I, defense statutes; buy war
14 bonds. An environmental statute; plant a tree.
15 A one of a thousand statutes commemorating
16 something, beautiful cities day, clean up the
17 yard. I mean, I can recall or I believe just
18 dozens and dozens of statutes where Congress
19 says something where normally we would say it's
20 precatory.

21 Now are all those statutes suddenly
22 open to challenge? I mean, are none of them?
23 If so, you lose. And if it's in between, which
24 ones are and which ones aren't?

25 MR. HAWKINS: So, Justice Breyer, you

1 asked whether they're open to challenge. I -- I
2 guess I'd want to know what the --

3 JUSTICE BREYER: We're talking on the
4 merits, on the merits. If you have a merits
5 claim, can you suddenly say, this is no good
6 because people will do it? They'll buy war
7 bonds. They will plant a tree. At least one of
8 them will clean up the front yard, okay? And,
9 thereby, I don't know, you see the point. It's
10 a merits point.

11 MR. HAWKINS: So, Justice Breyer, I
12 guess I'd want to look at the particular
13 statute. We know from NFIB that the government
14 cannot order people to enter commerce, people
15 who are not already in commerce, and if another
16 statute is like that, then I think NFIB would
17 control.

18 JUSTICE BREYER: I'm sorry, you're
19 missing the point. You're missing the point.
20 On each of them, there is some constitutional
21 argument that if there were a penalty attached,
22 it would be unconstitutional. They take the
23 penalty out from all my examples. Now no
24 penalty.

25 And do you say that they are

1 nonetheless unconstitutional for whatever
2 reason? If so, I think there will be an awful
3 lot of language in an awful lot of statutes that
4 will suddenly be the subject of Court
5 constitutional challenge.

6 MR. HAWKINS: Justice Breyer, we don't
7 dispute that inherent in the nature of
8 sovereignty is the power for the government to
9 speak, and so we don't challenge the idea of
10 truly hortatory statements or Congress giving
11 suggestions or recommendations. And if those
12 statutes could be read that way, then that might
13 change my answer.

14 But what we have here -- and this is,
15 I think, the critical difference -- it is not
16 some suggestion, not some hortatory statement.
17 It is the law of the United States of America
18 today that you have to purchase health insurance
19 and not just any health insurance, health
20 insurance that the federal government has
21 decided would be best for you. And that is
22 certainly subject to challenge.

23 JUSTICE BREYER: All right. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: General Hawkins, can I
2 ask you, I hope, two quick questions about your
3 theories of standing.

4 First of all, as to increased Medicaid
5 costs because you are required to calculate
6 eligibility based on modified adjusted income,
7 what would happen if you didn't do that?

8 MR. HAWKINS: Well, we don't know for
9 certain because we haven't tried, but I believe
10 the federal government could bring some action
11 against us, or somebody who should be eligible
12 for Medicaid under the ACA but -- but isn't
13 because of the way we've done the regulations, I
14 suppose, would be able to sue us.

15 JUSTICE ALITO: Would there be
16 penalties? Does the statute -- does the
17 Affordable Care Act set out any penalties for --
18 for failing to do that?

19 MR. HAWKINS: I -- I don't know of a
20 specific penalty or fine that would be levied
21 against the state in connection with a failure
22 to comply with the Maiji requirements. Of
23 course, there are penalties that states can
24 suffer in connection with IRS reporting and --
25 and other things like that.

1 JUSTICE ALITO: Okay. As to the
2 reporting requirements in sections 6055 and
3 6056, the consequences for failure to comply
4 with those, I believe, would be a penalty under
5 the Internal Revenue Code, which this Court has
6 suggested is a tax for purposes of the
7 Anti-Injunction Act.

8 So how could that theory of standing
9 survive the limitations imposed by the
10 Anti-Injunction Act?

11 MR. HAWKINS: Well, the -- the
12 provisions in 6055 and 6056 are -- flow from the
13 mandate and are echoed in IRS regulations. The
14 2020 instructions, which were released recently,
15 say that the states have to provide this
16 information to the federal government about how
17 they are covering as employers their employees.

18 And that reporting requirement itself
19 inflicts a pocketbook injury on the states.
20 Those forms don't produce themselves.

21 And our theory is that that pocketbook
22 injury itself is enough to -- to satisfy Article
23 III. I don't think that poses an AIA problem.
24 And, indeed, those injuries, as the Fifth
25 Circuit correctly held, flow from the individual

1 mandate itself and are traceable back to the
2 mandate.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, I -- I'd
7 like to understand that a little bit more, your
8 last statement. As I understood the theory you
9 explained earlier of your standing, you say that
10 you assume some people would comply voluntarily
11 with a -- the legal command at issue here, the
12 individual mandate.

13 As I understand it, the -- the CB --
14 the CBO report predicted that only a small
15 number of people would do that, the exact
16 opposite of what it said in 2009, because of a
17 willingness to comply with law.

18 But you have to take it a step
19 further. You have to prove that those -- that
20 small number would include people who didn't
21 enroll for Medicaid and didn't enroll for CHIPs
22 when it was a legal requirement as a tax, but
23 they would do so now after they're told there's
24 no penalty for it, there's no tax for it.

25 At some point, common sense seems to

1 me would say: Huh? There's only a small number
2 of people who would do it. That small number of
3 people have to include Medicaid and CHIP
4 recipients to affect you as the state at all.

5 And they would, once they're told
6 there's no tax, enroll now, when they didn't
7 enroll when they thought there was a tax. Does
8 that make any sense to you?

9 MR. HAWKINS: It -- it does make sense
10 to me, Justice Sotomayor, under Department of
11 Commerce versus New York. I would note that in
12 that case as well, we were talking about a very
13 small number of people who would unlawfully
14 refuse to respond to the Census if it included a
15 citizenship question. And the standing theory
16 in that case was premised on assumptions about
17 people breaking the law.

18 Our theory in this case is at least in
19 part predicated on assumptions about people
20 following the law.

21 JUSTICE SOTOMAYOR: The problem is --

22 MR. HAWKINS: And I think that --

23 JUSTICE SOTOMAYOR: -- that your
24 theory assumes that people are going to pay a
25 tax and break the law by not buying insurance,

1 but they wouldn't do it when the tax is zero.

2 That -- that makes less sense.

3 But moving on from that, on to the
4 substance, okay? In NFIB, we said at least four
5 times by my count that individuals cannot be
6 compelled to buy health insurance under the
7 Commerce Clause. They could only be asked to
8 make a choice under the tax clause.

9 Now the individual plaintiffs here
10 still believe that there's a command, contrary
11 to what NFIB said, that they must buy health
12 insurance. What -- your only remedy would be to
13 say that provision's unconstitutional under the
14 Commerce Clause and it's unconstitutional under
15 the tax clause.

16 But I don't understand why you're
17 entitled to greater relief when NFIB only says
18 -- it already says it's unconstitutional. We
19 could say it's unconstitutional now. But you're
20 arguing that somehow us saying it a second time
21 would convince Congress that it could command
22 you to do something we said it couldn't do.

23 Again, does that logic make sense?

24 MR. HAWKINS: It -- it does, Justice
25 Sotomayor, based on the text of the law. The

1 Court, of course, in 2012 upheld --

2 JUSTICE SOTOMAYOR: Well, we said --
3 we said in NFIB that we couldn't read the text
4 of the law the way your clients want us to
5 because it would be unconstitutional.

6 MR. HAWKINS: So, Justice Sotomayor,
7 in III-A of the Chief Justice's opinion in NFIB,
8 that -- that part of the opinion notes that the
9 best reading of the individual mandate is as a
10 command to purchase health insurance. And then,
11 in subsequent parts, III-B and III-C, the Chief
12 Justice explained that an alternative reading
13 was fairly possible.

14 That's what's missing today. There is
15 no fairly permissible alternative reading of the
16 law. And that leaves us with the conclusion in
17 III-A of the Chief Justice's opinion that the
18 mandate is best read as a command to purchase
19 health insurance, and that is unconstitutional.
20 And the text of the law says that the remainder
21 of the ACA cannot work without that individual
22 mandate.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Yes, Mr. Hawkins,
25 continuing on on the merits, I -- I'm not sure I

1 understand the position.

2 In NFIB, we held that the ACA -- that
3 the ACA was not an unconstitutional command. So
4 I would think that that has to be the starting
5 point.

6 Now, since then, there has been the
7 change -- this change, and -- and -- and -- and
8 in this change, where Congress reduces the
9 penalty to zero, Congress has made the law less
10 coercive. So how does it make sense to say that
11 what was not an unconstitutional command before
12 has become an unconstitutional command now,
13 given the far lesser degree of coercive force?

14 MR. HAWKINS: Well, Justice Kagan, I
15 -- I'd like to start with the premise of your
16 question about the holding of NFIB. That
17 holding is an alternative reading of the
18 statute, a savings construction, predicated on
19 the fact that at the time, the individual
20 mandate could possibly be read as glued together
21 with the penalty provision --

22 JUSTICE KAGAN: Well, I think you have
23 to --

24 MR. HAWKINS: -- to --

25 JUSTICE KAGAN: Excuse me, if I might

1 interrupt, General. I think you have to accept
2 that holding because that holding is what
3 allowed the ACA to remain in existence all this
4 time. I mean, so, however it was, that it was
5 four plus one and what exactly that one said,
6 the holding of the Court was that the ACA was
7 not an unconstitutional command.

8 MR. HAWKINS: And -- and we would
9 submit this Court is not bound by that holding
10 today because the underlying predicate of that
11 holding is no longer in the United States Code
12 today.

13 JUSTICE KAGAN: Well --

14 MR. HAWKINS: When Congress --

15 JUSTICE KAGAN: -- the only thing
16 that's changed is something that made the law
17 less coercive, is what I'm suggesting.

18 MR. HAWKINS: Well, Your Honor,
19 what --

20 JUSTICE KAGAN: If you make a law less
21 coercive, how does it become more of a command?

22 MR. HAWKINS: Well, Your Honor, the
23 law was always best read as a command, as III-A
24 of the Chief Justice's --

25 JUSTICE KAGAN: Okay. So --

1 MR. HAWKINS: -- opinion makes clear.

2 JUSTICE KAGAN: -- you're just
3 disputing the premise of what we held in NFIB,
4 which has, you know -- which I -- I don't think
5 you can dispute, but let me go on.

6 So 5000A(e) says that a class of
7 people -- and these are mostly poor people, who
8 are subject to the mandate but have -- those
9 people are subject to the mandate but have never
10 had to pay anything.

11 So do you think that in NFIB, what we
12 really should have concluded was that those
13 people were subject to a command, whereas
14 everyone else had a lawful choice?

15 MR. HAWKINS: So I think that those
16 people, the very poor and members of Indian
17 tribes, I think that if at any point they had
18 brought an as-applied challenge, I think they
19 would have been entitled to prevail because Your
20 Honor is correct, from day one, Congress has
21 been ordering to do -- them to do something
22 which is beyond Congress's commerce power, and
23 if --

24 JUSTICE KAGAN: I mean, doesn't it
25 seem exactly backwards, General, to say that

1 those people who'd never had to pay a thing were
2 subject to a command, when people who did have
3 to pay, who felt the coercive power of
4 government, did not, were not subject to a
5 command?

6 MR. HAWKINS: Your Honor, that is Part
7 III-A of the Chief Justice's opinion in NFIB,
8 indicating that the mandate is best read as a
9 command.

10 Now, to some people, to many people, a
11 savings construction was available at the time,
12 but, in 2017, Congress effectively took these
13 subsection (e) exemptions and expanded them to
14 everybody, and the result is that there is no
15 tax savings construction now available and we're
16 just left with the command.

17 JUSTICE KAGAN: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Well, I -- I'd like
21 to pick up on that, on the merits, Mr. Hawkins.
22 And good morning.

23 As I understood Mr. Verrilli, his
24 argument on the merits is that this is still
25 necessary and proper to the taxing power. And

1 that coercive authority is still in play; it's
2 just that Congress has chosen to set it at zero
3 and wants to -- the flexibility of retaining
4 that provision in law because it might choose
5 later to increase the tax again.

6 What do you -- what do you say to that
7 response?

8 MR. HAWKINS: I would say two things,
9 Justice Gorsuch.

10 Number one, this cannot be a tax
11 because it does not raise revenue for the
12 government and, indeed, cannot raise revenue for
13 the government. In NFIB, the Court noted,
14 citing cases going back to the 1950s, that the
15 essential feature of a tax is raising revenue.

16 My second response, though, is that if
17 the Necessary and Proper Clause were to somehow
18 save that, that would be giving Congress a
19 police power. Everything is potentially a tax.
20 And if Congress could justify any legislation on
21 the grounds that, well, maybe one day we'll
22 impose a tax, there would be no functional limit
23 on Article I power.

24 JUSTICE GORSUCH: Let -- let me turn
25 to the remedial question here, and if you could

1 address it with respect to the individual
2 plaintiffs.

3 They've asked for declaratory and
4 injunctive relief. I guess I'm a little unclear
5 who exactly they want me to enjoin and what
6 exactly they want me to enjoin them from doing.

7 MR. HAWKINS: So the -- the
8 declaration, which was Count I on which the
9 district court has entered partial final
10 judgment, was a declaration that the mandate is
11 unconstitutional and inseverable from the
12 remainder of the Act.

13 The defendants include the United
14 States, HHS, the IRS, and their respective
15 commissioners. And so the judgment would be a
16 declaration that the -- that the defendants
17 cannot -- or, excuse me, the -- would be a
18 declaration that the individual mandate is
19 unlawful and inseverable from the remainder of
20 the Act.

21 JUSTICE GORSUCH: What do we do about
22 the fact that usually declaratory judgments in
23 aid of preexisting remedial jurisdiction, we'd
24 normally require some proof that we can remedy a
25 -- a plaintiff's injury more concretely than

1 just a mere declaratory judgment?

2 MR. HAWKINS: Well, here, I think --

3 JUSTICE GORSUCH: We -- you'd have to
4 show that there would be an injunction that
5 would be available and then this is essentially
6 an anticipatory action.

7 MR. HAWKINS: So two things, Justice
8 Gorsuch.

9 Number one, the United States in
10 district court insisted that an injunction would
11 not be necessary and that it would treat the
12 declaration as an injunction. And we took them
13 at their word.

14 Second, if that's not good enough,
15 Count V in our complaint is still pending in
16 district court, and that is our request for
17 injunctive relief. And that -- that's still a
18 live issue before the district court. And we
19 can pursue that remedy if necessary.

20 JUSTICE GORSUCH: Thank you, counsel.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.

23 JUSTICE KAVANAUGH: Good morning,
24 General Hawkins. Assume for purposes of my
25 questions that there is standing, just assume

1 that. On the merits of the mandate before we
2 get to severability, I want to follow up briefly
3 on Justice Breyer's questions because my
4 understanding might be a little different from
5 his about the existence of other laws.

6 I think, when I asked General Mongan,
7 he agreed with me that there are no examples in
8 the U.S. Code that he's aware of where Congress
9 has enacted a true mandate to do something, to
10 purchase a good or service, not something
11 hortatory, but a true mandate with no penalties.

12 Are -- is that right?

13 MR. HAWKINS: I think it is, Justice
14 Kavanaugh. I can't think of anything. And it
15 would make sense that that were correct because
16 the Affordable Care Act, of course, was an
17 unprecedented statute. I believe that Congress
18 had never tried to do before what it did here.

19 JUSTICE KAVANAUGH: Right. With or
20 without penalties, right?

21 MR. HAWKINS: I believe that's
22 correct.

23 JUSTICE KAVANAUGH: Then, on -- on
24 severability, if the mandate can't be justified
25 or the mandate as currently structured -- I'm

1 using that, the term "mandate" -- I understand
2 the arguments from the other side about that
3 term -- but the mandate as currently structured
4 can't be justified under the Commerce or Taxing
5 or Necessary and Proper Clauses, we get to
6 severability, and looking at our severability
7 precedents, it does seem fairly clear that the
8 proper remedy would be to sever the mandate
9 provision and leave the rest of the Act in
10 place, the provisions regarding preexisting
11 conditions and the rest.

12 So the question to you, obviously, is,
13 how do you get around those precedents on
14 severability, which seem on point here?

15 MR. HAWKINS: Justice Kavanaugh, I get
16 around them by relying on the text of the
17 statute. AAPC, Your Honor's plurality opinion
18 for the Court, recognized that non-severability
19 clauses can be statements of congressional
20 intent. And as I noted earlier, the Obama
21 administration's Department of Justice referred
22 to 18091 as a functional inseverability clause.

23 In that statute, we've got multiple
24 instances of Congress insisting --

25 JUSTICE KAVANAUGH: If I could just --

1 I'm sorry to interrupt, but inseverability
2 clauses usually are very clear, and we did
3 indicate what they look like in AAPC and we
4 cited an example of what they look like, and,
5 you know, Congress knows how to write an
6 inseverability clause, and that is not the
7 language that they chose here.

8 So I -- I agree with you about
9 focusing on the text, very much agree with that,
10 but I just am having trouble seeing that as the
11 equivalent of an inseverability clause.

12 MR. HAWKINS: Justice Kavanaugh, we
13 would respectfully submit that that would
14 elevate form over substance. In subpart (h), we
15 see the mandate as essential to the larger
16 regulation of economic activity. Sn subsection
17 (i), it's essential to creating effective health
18 insurance markets, and the same thing again in
19 subsection (j).

20 This is Congress saying over and over
21 again that the mandate is essential to the
22 operation of the law. And I don't believe
23 there's any serious argument that Congress would
24 have enacted the ACA in 2010 but for the
25 individual mandate or without the individual

1 mandate.

2 JUSTICE KAVANAUGH: Well, they did
3 something to that effect in 2017, however.

4 MR. HAWKINS: Well, in 2017, they gave
5 the American people a tax cut, but they wanted,
6 evidently, to continue ordering people to
7 acquire health insurance, and they left in place
8 the finding saying that that requirement is
9 essential.

10 And it's worth --

11 JUSTICE KAVANAUGH: Don't you think --
12 in 2017, do you read Congress as having wanted
13 to preserve protection for coverage for people
14 with preexisting conditions? Because it sure
15 seems that way from the -- the record and the
16 text.

17 MR. HAWKINS: Well, Your Honor, we
18 would submit that the best approach is to just
19 look at what's in the United States Code rather
20 than get into the game of what different
21 legislators might have been thinking and -- and
22 saying in speeches and all that.

23 And -- and, indeed, Congress certainly
24 could have excised these findings. We've seen
25 Congress amend legislative findings before in

1 cases like Lopez, where Congress amended its
2 findings in response to this Court's grant of
3 certiorari.

4 It's telling that Congress didn't do
5 that here. And it's telling --

6 JUSTICE KAVANAUGH: Thank you,
7 counsel. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett.

10 JUSTICE BARRETT: Good morning,
11 General Hawkins. I want to go back to Justice
12 Gorsuch's questions about standing for the
13 individual plaintiffs.

14 So let's say that we agree with you
15 that the mandate, by making them feel a legal
16 compulsion to purchase insurance, has caused
17 them a pocketbook injury.

18 Why is that traceable to the
19 defendants that the individuals have actually
20 sued here? I mean, I can see how it's caused by
21 or traceable to a mandate itself, but how is it
22 traceable, say, to the IRS or to HHS? Why is it
23 their action that's actually inflicting the
24 injury?

25 MR. HAWKINS: Well, so, Justice

1 Barrett, we have sued five defendants, including
2 the United States. And this Court has applied a
3 longstanding presumption that the federal
4 government acts in good faith.

5 And by suing the five defendants who
6 we have sued here, I think that's the best way
7 of ensuring that the individual plaintiffs'
8 injuries from the individual mandate and the
9 other parts of the ACA that interact with the
10 individual mandate will be fully remedied.

11 JUSTICE BARRETT: But -- but doesn't
12 it really seem that Congress is the one who's
13 injured the individual plaintiffs here, and you
14 can't sue Congress and say: Hey, you've put us
15 under this mandate that's forcing us to buy
16 insurance and that's harming us, right?

17 MR. HAWKINS: Well, we've sued the
18 United States. It is the United States' law
19 that the individual plaintiffs have to acquire
20 health insurance that the United States thinks
21 is good for them.

22 JUSTICE BARRETT: Let me switch gears
23 a minute and talk about state standing. There's
24 some confusion or, I mean, it's my confusion
25 based on differing positions taken in the briefs

1 about these 1095B and C statements.

2 So the House at page 31 of its brief
3 says that the states would have to issue them
4 regardless whether the mandate is intact in the
5 statute or not, but the states point to the cost
6 of producing these -- you know, these forms and
7 mailing them out as part of what created their
8 pocketbook injury. Who's right?

9 MR. HAWKINS: So they are correct,
10 Justice Barrett, that 6055 and 6056 are
11 independently on the books.

12 But, if this Court were to apply the
13 longstanding presumption that the federal
14 government will operate in good faith and
15 respect this Court's judgments, then it is
16 reasonably likely that a declaration from this
17 Court that the mandate is unlawful would prompt
18 the federal government to in any way reduce the
19 administrative burden that that paperwork
20 causes, including going through and saying who
21 had what kind of coverage during 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.

7 On standing, the regulatory burden
8 that is imposed today by the IRS forms is the
9 most straightforward way to conclude that the
10 states have suffered a 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 is 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.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Wall.

14 ORAL ARGUMENT OF JEFFREY B. WALL
15 ON BEHALF OF THE UNITED STATES, ET AL.

16 GENERAL WALL: Mr. Chief Justice, and
17 may it please the Court:

18 This case pushes at the line between
19 faithfully following what Congress actually does
20 rather than what it may have intended to 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 finding 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 is challenging to 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
3 very rare that you're going to have the sort of
4 textual evidence that overcomes the presumption
5 of inseverability. And so these claims go out
6 on a motion to dismiss if they're ever brought
7 at all.

8 But I -- I -- the -- the theory,
9 and -- and Justice Alito was pressing this with
10 -- with Mr. Verrilli, I think, is, you know, if
11 you imagine a statute that had a clearly
12 racially discriminatory provision and an express
13 inseverability clause, I think the theory of the
14 other side is that plaintiffs regulated by that
15 statute couldn't challenge it.

16 And that doesn't seem right to us.
17 The plaintiffs here have an Article III injury.
18 They want certain kinds of insurance plans, we
19 think --

20 CHIEF JUSTICE ROBERTS: No, but it's a
21 common feature -- it's a common feature of
22 standing that the result is people can't
23 challenge provisions. I mean, it -- it's an
24 important doctrine. It is the -- the only
25 reason we have the authority to interpret the

1 Constitution is because we have the
2 responsibility of deciding actual cases, and
3 that's what standing filters out.

4 GENERAL WALL: I agree with all of
5 that, Mr. Chief Justice. The plaintiffs here --
6 and this is in the amended complaint at
7 paragraph 46 and then in their declarations that
8 appear at pages 71 to 78 of the JA -- they say
9 that they're injured because they want plans
10 that they had before the ACA and that they
11 cannot obtain now but for the ACA's insurance
12 form provisions.

13 That's a straightforward Article III
14 injury under this Court's --

15 CHIEF JUSTICE ROBERTS: Thank -- thank
16 you, counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Yes. Thank you, Mr.
19 Chief Justice.

20 General Wall, I'd like you to discuss
21 at what stage we should confront the
22 inseverability issue. There's much talk that we
23 should do that at the standing stage, but,
24 again, I think, as I've said before, that this
25 -- it seems more like a statutory construction

1 issue that you consider at the merits stage.

2 Would you comment on that?

3 GENERAL WALL: The government's view
4 is yours, Justice Thomas. The other side, my
5 friends on the other side, keep referring to
6 standing through inseverability.

7 That's not right. Those two are
8 distinct things. The plaintiffs here want
9 insurance plans that they cannot get that they
10 used to have but for the ACA. That's an Article
11 III injury. It is an injury in fact in the real
12 world for them right now. They want different
13 kinds of insurance.

14 On the merits, they have arguments
15 about why those insurance reform provisions
16 can't be enforced against them. And their
17 argument on the merits is that the provisions
18 are tied as a matter of statutory interpretation
19 to the mandate, and the mandate is
20 unconstitutional.

21 Now that argument may be right or
22 wrong on -- on -- on the merits, Justice Thomas,
23 but it doesn't have anything to do with
24 standing. As you say, it's distinct from the
25 standing inquiry. They have an Article III

1 injury. Then we move to the merits and
2 severability.

3 And as I was trying to explain to the
4 Chief Justice, the reason that doesn't open the
5 floodgates is because it's just rare that the
6 text of the statute, which we know has to be the
7 focus under AAPC and Seila Law, is going to
8 provide the kind of evidence that would allow a
9 plaintiff to overcome the presumption of
10 severability.

11 It's virtually always going to be true
12 the provisions are severable. It just doesn't
13 happen to be true here, given the unique wording
14 of this statute.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer.

18 JUSTICE BREYER: Yes, I'm going to the
19 merits, and I think I have a -- I do have a very
20 different understanding than Justice Kavanaugh.

21 What I thought I heard said was that
22 someone in the Solicitor General's Office read
23 through the entire United States Code, which
24 must be quite a job, and discovered that there's
25 no precatory language in the Code. There is

1 nothing in the Code that says something like buy
2 war bonds or something like plant a tree or
3 something like clean your yard. Is that right?

4 GENERAL WALL: Justice Breyer, there's
5 plenty of precatory language in the Code that --

6 JUSTICE BREYER: Fine. If you say
7 there is precatory language, "precatory" means,
8 in the dictionary, pertaining to entreaty or
9 supplication. Now how is it that you know that
10 this mandate, just by itself, without any
11 penalty, is something more than a supplication
12 or an entreaty?

13 GENERAL WALL: A couple of reasons,
14 Justice Breyer.

15 The first is that it says "shall," you
16 shall maintain minimum coverage, not that you're
17 encouraged to do so.

18 And the second is that when the
19 majority in NFIB in Part III-C turned to the
20 statute, it looked at not just subsections (a)
21 and (b), as my friends on the other side say,
22 but also (c), which is at page 562.

23 So, when it's looking at the statute
24 and adopting a saving construction, it's looking
25 at all three provisions and saying it has this

1 essential feature of raising revenue. That's
2 what allows us to take something that's more
3 naturally construed as a command and read it as
4 a tax.

5 JUSTICE BREYER: All right. So you
6 had someone read through the entire United
7 States Code, and you discovered that there is no
8 precatory language in that code that uses the
9 word "shall." Is that right?

10 GENERAL WALL: Justice Breyer, I'm not
11 aware of any. And in all the briefs in --

12 JUSTICE BREYER: I didn't say you
13 weren't aware of any. I might be -- have a
14 misplaced idea, but I remember when I used to
15 work there, we passed lots of things like
16 National Port Week and all kinds of stuff that
17 was precatory or said let's have a celebration
18 or "the nation shall," but -- "plant a tree," et
19 cetera.

20 But you have read through the U.S.
21 Code, or someone in your office, and have
22 learned that there is no word "shall" in a
23 precatory phrase?

24 GENERAL WALL: Justice Breyer, I
25 cannot vouch that I've read the entire United

1 States Code.

2 JUSTICE BREYER: I -- I -- I haven't
3 either. I tell you, I haven't either.

4 GENERAL WALL: But I -- I -- we have
5 looked at this question, and we -- all of the
6 precatory provisions to which anyone has pointed
7 or of which we are aware say things like
8 "should," not you "shall" do these things. So
9 I'm not aware of statutes that say --

10 JUSTICE BREYER: All right.

11 GENERAL WALL: -- you "shall" buy --

12 JUSTICE BREYER: The difference
13 between "shall" and "should," okay. Thank you.

14 GENERAL WALL: I think that's one key
15 distinction, Justice Breyer. I would also point
16 to not just the -- the passage in NFIB but the
17 exemptions. There are exemptions from the
18 mandate for people with religious exemptions and
19 prisoners and illegal aliens. And if it really
20 is just a choice-conferring provision, as the
21 other side says, a choice you would have anyway
22 just by virtue of existing, it's hard then to
23 explain what the exemptions to that mandate do.

24 JUSTICE BREYER: Well, as you say
25 that, it reminds me in English, have I ever said

1 or have you ever said to someone in your family,
2 you "shall" do it, but that is an entreaty, an
3 entreaty or a supplication, rather than
4 threatening a punishment? Have you ever heard
5 that or used "shall" in respect to a
6 supplication or an entreaty?

7 GENERAL WALL: No, Justice Breyer. In
8 my family, when I tell my kids that they shall
9 do things, they're -- that's a command backed by
10 a penalty.

11 JUSTICE BREYER: Well, that's a much
12 more organized family than mine.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: Perhaps there's a
15 difference between a supplication and a tax.
16 Are you aware of any provisions in the Code in
17 which Congress has purported to use its taxing
18 power to say you must do this and we're going to
19 tax it and we're going to set the tax at zero?

20 GENERAL WALL: No, Justice Alito.

21 JUSTICE ALITO: The -- the -- what --
22 what -- the feature of this case that has a -- a
23 strange aspect is the sea change that's occurred
24 in the understanding of the role of the
25 individual mandate between our first Affordable

1 Care Act case and today.

2 At the time of the first case, there
3 was strong reason to believe that the individual
4 mandate was like a part in an airplane that was
5 essential to keep the plane flying so that if
6 that part was taken out, the plane would crash.
7 But now the part has been taken out and the
8 plane has not crashed.

9 So, if we were to decide this case the
10 way you advocate, how would we explain why the
11 individual mandate in its present form is
12 essential to the operation of the Act?

13 GENERAL WALL: Well, I think a couple
14 of things, Justice Alito.

15 Yes, I -- our basic position is that
16 the finding and the findings are the -- the
17 functional equivalent of a targeted
18 inseverability clause. The government said that
19 back in NFIB. If the Court -- the joint
20 dissenters agreed with that, I think. And if
21 the Court had invalidated the mandate, I think
22 there's good reason to believe that the Court
23 would have and should have also invalidated with
24 it guaranteed issue and community rating because
25 that was the most natural way to read the

1 finding.

2 And if that was the most natural way
3 to read that finding, its text, before 2017,
4 it's still the most natural reading. Nothing
5 about the text in 2017 changed.

6 Congress did a very targeted thing in
7 2017. It said we don't want people to have to
8 make this payment anymore if they don't want to
9 get insurance. And, yes, that was less coercive
10 in a sense, as Justice Kagan pointed out, but
11 more coercive in another, which is now it's just
12 a naked command. And they didn't disturb the
13 finding.

14 And I take the point on the other side
15 that, if you look at all these things, from CBO
16 reports to statement of legislators, that you
17 can divine in the collective consciousness of
18 Congress a -- a judgment that the finding is no
19 longer correct. But they didn't amend or alter
20 the text of the Act.

21 JUSTICE ALITO: Thank you, General.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel, do you
25 concede that Congress has the authority to enact

1 taxes with delayed start dates?

2 GENERAL WALL: Yes --

3 JUSTICE SOTOMAYOR: In other words, a
4 tax --

5 GENERAL WALL: -- Justice Sotomayor.

6 JUSTICE SOTOMAYOR: Okay. Can
7 Congress also enact taxes that phase out some
8 years in the future, 10 percent this year,
9 8 percent next year, going down by two until
10 five years from now? Can Congress do that?

11 GENERAL WALL: Absolutely.

12 JUSTICE SOTOMAYOR: And -- okay. So
13 that -- you agree that if, in 2020, Congress had
14 enacted the shared-responsibility payment, the
15 tax, to phase in in 2014 and phase out in 2009,
16 that would have been permissible, correct?

17 GENERAL WALL: Yes. I think it
18 would --

19 JUSTICE SOTOMAYOR: All right. Then
20 let me finish, counsel.

21 If Congress had, in the TCJA, provided
22 that the shared-responsibility payment would be
23 zero in 2019 and 2020 and 2021 but would phase
24 back in as of 2022, would that be
25 constitutional?

1 GENERAL WALL: I want to say one
2 thing, Justice Sotomayor, which is I believe it
3 would, but I think all of that would have been
4 evidence before the Court in NFIB why you
5 wouldn't read it as a tax, because if you were
6 sort of phasing it out, it would look more like
7 a penalty that you were graduating down.

8 JUSTICE SOTOMAYOR: But all -- but all
9 that Congress did -- answer the question to my
10 last hypothetical. If Congress had in the TCJA
11 provided that the shared responsibility would be
12 zero for the first three years but would start
13 up at a certain percentage in 2022, would that
14 be constitutional?

15 GENERAL WALL: If -- if they had just
16 delayed the payment of the shared-responsibility
17 payment, Justice Sotomayor, yes, I believe that
18 would.

19 JUSTICE SOTOMAYOR: All right. So
20 what's the difference between that and a
21 decision often made by Congress that for a
22 certain number of years, whatever fines,
23 penalties, taxes were due from people, they're
24 not going to collect?

25 We've had cases with that where we've

1 -- I -- I think we had a case just last year
2 where Congress was going to pay a bonus to
3 soldiers and suspended that bonus for three
4 years and then reapplied it later.

5 What's the difference between that
6 constitutionally? If Congress has the power
7 constitutionally to delay, to extinguish, to
8 restart, why is this any different, that at
9 least two Congresses have chosen to forego the
10 tax but another Congress has the power not to?

11 GENERAL WALL: All of those other
12 provisions, Justice Sotomayor, are written
13 naturally like taxes. They say, if you do a
14 thing or you don't do a thing, you -- you -- you
15 make a -- a -- a payment.

16 The -- the reason this is different is
17 because, once you eliminate the revenue-raising
18 function, it -- it's not naturally written like
19 a tax, as the Chief Justice recognized. It was
20 never most naturally thought of as a -- as a
21 tax.

22 What allowed it to be reasonably
23 construed as a tax was the revenue-raising
24 function. Once you cut that out of the statute,
25 it no longer reads like any of those provisions

1 that have suspended or delayed taxes. It reads
2 very differently if you set them side by side.

3 JUSTICE SOTOMAYOR: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: General Wall, assume
6 for the moment that I don't really buy your
7 standing through inseverability theory. Could
8 you tell me what your view is about whether the
9 states or the individual plaintiffs have
10 standing here?

11 GENERAL WALL: We haven't taken a
12 position on that, Justice Kagan, because we
13 think the individual --

14 JUSTICE KAGAN: No, I know you
15 haven't. I know you haven't, General, but
16 I'm -- I'm asking you for one because we have to
17 take a position on it. And, you know, think of
18 this as a one-justice CBF.

19 GENERAL WALL: Justice Kagan, I -- I
20 think Justice Barrett was asking some very
21 difficult questions about traceability with
22 respect to the individual Respondents.

23 With respect to the states, I -- I
24 think at page 22 of Texas's brief that's
25 reporting -- it's pointing to reporting and

1 administrative costs in its direct role as an
2 employer. And I -- I think that might be enough
3 to give the state standing, but, again, I want
4 to emphasize that the United States has not
5 taken a position on that.

6 JUSTICE KAGAN: Okay. I mean, the
7 United States is usually pretty stingy about
8 standing law, so it did surprise me, in much the
9 way that it surprised the Chief Justice, that
10 you're coming in here with a theory which, to my
11 mind, threatens to kind of explode standing
12 doctrine.

13 I mean -- and I -- I guess I want to
14 go back to that because I wasn't sure I
15 understood your answer to the Chief Justice.
16 You know, a lot of legislation now is in these
17 huge packages, I mean, even more than the ACA,
18 that -- that involve a thousand different
19 subjects, omnibus legislation where it's just
20 everybody pours everything in that they can
21 think of.

22 And it would seem a big deal to say
23 that if you can point to injury with respect to
24 one provision and you can concoct some kind of
25 inseverability argument, then it allows you to

1 challenge anything else in the statute.

2 Isn't that something that the United
3 States should be very worried about, and isn't
4 it something that really cuts against all of our
5 doctrine?

6 GENERAL WALL: We would be worried
7 about it, Justice Kagan, if we thought that the
8 floodgates were going to open, but, you know,
9 Alaska Airlines was more than 30 years ago.
10 People have been able to bring these claims for
11 a long time.

12 The reason they don't is that they
13 rarely are -- it's not a problem of Article III
14 standing. It's not that they're not injured by
15 these statutes. Plaintiffs here --

16 JUSTICE KAGAN: If I could just
17 interrupt for a second, General, I -- I just
18 don't think that that's right. I mean, I -- I
19 have to say for myself, I -- I was -- this --
20 this theory was new to me, and I think it would
21 be new to many people.

22 And it's not so hard to construct some
23 kind -- I mean, you're -- you're not -- all you
24 have to do is to present a theory of
25 severability. You don't have to win on your

1 theory and -- you know, in order to make this a
2 -- under your view, a proper Article III claim.

3 GENERAL WALL: Well, but, of course,
4 Justice Kagan, the Court, as a matter of
5 avoidance, can do severability before doing the
6 merits. We don't think it should here. But --
7 but normally a court would. And if the theory
8 of inseverability were weak, as it usually is,
9 it's very hard to overcome the presumption of --
10 of severability. The claim would go out on a
11 motion to dismiss stage, which is why you don't
12 see the claims.

13 I think the problem for the other
14 side, just to drive home Justice Alito's
15 hypothetical, is I think the other side is
16 saying that even if you had a statute with an
17 express inseverability provision and an obvious
18 constitutional problem, like racial
19 discrimination, so it was obvious that the
20 statute was a legal nullity, everyone regulated
21 by that statute couldn't challenge it until
22 somebody came along who was racially
23 discriminated against.

24 And as an Article III standing matter,
25 that doesn't seem right. All we're doing is --

1 CHIEF JUSTICE ROBERTS: Thank you.
2 Justice Gorsuch.

3 JUSTICE GORSUCH: I'd like to just
4 pick up where we left off there and -- and
5 understand from you your response to Justice
6 Kagan and her -- and the concern about opening
7 the floodgates here.

8 GENERAL WALL: Justice Gorsuch, we
9 just don't see the problem because it's going to
10 be -- as I was trying to say, it's going to be
11 very hard to make out an inseverability claim
12 that's going to get you past the motion to
13 dismiss stage, which is why we just don't see
14 people walking in and challenging single
15 provisions of omnibus acts, because they don't
16 have something like the textual finding here.

17 This is -- it's rare to have an
18 inseverability clause. It's even rarer to have
19 a factual finding that goes to exactly the same
20 question as you're asking when you do
21 severability.

22 I mean, in all of the briefs in this
23 case, no one has pointed to any other statute
24 like this one. So I think -- I understand the
25 -- the -- the sort of reaction that we don't see

1 this sort of theory very often, but, again, I
2 don't think that's a function of Article III
3 standing.

4 The plaintiffs here are injured. They
5 want plans that they can't get. It's a function
6 of the fact that their argument on the merits is
7 not the type of argument that most plaintiffs or
8 hardly any plaintiffs, frankly, are going to be
9 able to make plausibly.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Good morning,
14 General Wall. Justice Breyer rightly points out
15 that the U.S. Code has a lot of precatory
16 language in it. My understanding matches his on
17 -- on that point.

18 And to the extent that the mandatory
19 language here might be different and unusual,
20 which was my question earlier, I think his
21 question suggests: Well, why not just construe
22 this language as being similar to those
23 precatory provisions that are strewn about the
24 U.S. Code, which probably is both a standing and
25 merits question as I understood him to be

1 asking.

2 Can you respond to that?

3 GENERAL WALL: Sure. A few brief
4 things, Justice Kavanaugh.

5 The first is, of course, the Court in
6 NFIB said that the essential feature that
7 allowed for the saving construction was that it
8 raised revenue.

9 Once Congress has eliminated that, I
10 think they cut out the basis for the saving
11 construction and then you have the word "shall,"
12 which, as the Chief Justice recognized in NFIB,
13 is most naturally read as a command. It's read
14 as a command in all of these other statutes.

15 So I think the Court would have to
16 extend or -- or -- or stretch NFIB further than
17 the Court went there. And it seems to me --

18 JUSTICE KAVANAUGH: With -- with
19 respect to the mandate as currently structured,
20 you make a forceful argument that it's not
21 justified under the Commerce or Taxing or
22 Necessary and Proper Clauses, at least as
23 construed in NFIB. But then we go to
24 severability, and I understood your opening
25 comments to say that the findings in the

1 original Act are, in essence, the equivalent of
2 an inseverability clause.

3 I just want to test that for a second.
4 I mean, as you know, we have a strong background
5 presumption of severability, which is --
6 reflects a longstanding understanding of how
7 Congress works and our respect for Congress's
8 legislative role under Article I. And it also
9 establishes a clear default rule or fairly clear
10 default rule against which Congress can
11 legislate.

12 Congress knows how to write an
13 inseverability clause, but this language is
14 different from how that usually looks. So I
15 just want to give you an opportunity to respond
16 to that.

17 GENERAL WALL: Sure. So everyone
18 agrees that there's no magic words requirement.
19 And at that point, the finding speaks directly
20 to the question here. It says the mandate, a
21 requirement that you get into the market, is
22 essential to guaranteed issue and community
23 rating.

24 And if, as the joint dissenters said
25 in NFIB, once that triad is down and as the

1 court-appointed amicus said there, it's very
2 hard to limit it to the triad. It takes down
3 the other pieces of the Act.

4 So I take the point, Justice
5 Kavanaugh, that it's not written in the way one
6 normally sees an inseverability clause, but it
7 speaks directly to the question that the
8 inseverability clause is meant to address, which
9 is what is in the Act that the mandate is
10 essential to.

11 And by its very terms, it says -- and
12 that's why I think the government argued
13 powerfully in NFIB -- that it's the equivalent
14 of a targeted inseverability clause.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett.

18 JUSTICE BARRETT: General Wall, the
19 Petitioners have pointed out that if, in fact,
20 Congress zeroed this out and -- and made it no
21 longer a tax, they've argued that Congress would
22 have deliberately done something
23 unconstitutional by grounding this language, if,
24 in fact, it has force, assume that, in its
25 commerce power.

1 Do you think that it's indisputable
2 that NFIB would render such an exercise of the
3 commerce power unconstitutional? And I -- I'm
4 asking because, you know, there were five
5 justices who thought that, but it wasn't a
6 majority opinion who said it. So do you think
7 there's room for doubt on that score?

8 GENERAL WALL: I do think there --
9 there is a passage in Part III-C which was
10 joined by five members of the Court that does
11 say it can't be upheld under the Commerce
12 Clause, Justice Barrett, but -- but even if it
13 weren't, yes, I think it is clear from NFIB that
14 if it is read as a command, that is not
15 permissible under the Commerce Clause.

16 And I don't even take any of the
17 parties -- I don't take House of -- the House or
18 California to be disagreeing with that. They're
19 just disagreeing on the statutory question of
20 how best to read it.

21 And one quick point on that, to finish
22 my answer to Justice Kavanaugh, you know, it --
23 it -- it says "shall," but I think at that point
24 it's very difficult to make "shall" do the work
25 of "should." That's just more work than

1 avoidance can do. That move would be open to
2 the Court in every case, like Lopez and
3 Morrison, and you could say, well, it just says
4 that you shouldn't bring school -- guns into
5 school zones, or you shouldn't commit domestic
6 abuse. But the Court took those commands as
7 what they were, commands that people shall do or
8 not do something. And --

9 JUSTICE BARRETT: Well, General Wall,
10 let's assume that I agree with you and that I
11 think "shall" is "shall" and not "should" and so
12 it's a command, but don't -- don't you think
13 then the Petitioners have a point that if, you
14 know, as you say, NFIB squarely would say that
15 the mandate would be unconstitutional as an
16 exercise of the commerce power, as opposed to
17 the taxing power, that it would be odd for us to
18 construe this statute as Congress saying, well,
19 we're going to change the statute in a way
20 that's going to render it constitutional or this
21 provision in a way that will render it
22 constitutional -- unconstitutional?

23 GENERAL WALL: I think they have a
24 fair point that if you were trying to define the
25 collective consciousness of Congress, it may be

1 that many or most of its members didn't
2 understand the legal consequences of what it was
3 doing because all they were doing was something
4 more targeted, and they weren't thinking about
5 the broader provisions or the findings or any of
6 the rest. So I think it's fair to say that they
7 didn't focus on this.

8 But I don't think it's fair, Justice
9 Barrett, to say that the Court shouldn't apply
10 the Act by its terms just because that would
11 create a constitutional problem. That's exactly
12 what NFIB would say -- said would be the case,
13 and that's what Congress did, whatever it may
14 have been thinking or whatever it might have
15 intended to do.

16 JUSTICE BARRETT: Thank you.

17 CHIEF JUSTICE ROBERTS: A minute to
18 wrap up, General.

19 GENERAL WALL: Thank you, Mr. Chief
20 Justice.

21 As -- as you wrote in NFIB, quoting
22 Chief Justice Marshall, "the peculiar
23 circumstances of the moment may render a measure
24 more or less wise but cannot render it more or
25 less constitutional."

1 As it now stands, subsection (a)
2 requires every law-abiding American to obtain
3 health insurance, unless they fall within one of
4 three exemptions. That broad mandate, whatever
5 its wisdom or practical import, exceeds
6 Congress's enumerated powers, and the Court
7 should so hold.

8 As for what that defect means for the
9 ACA, Congress left standing the answer it gave
10 in enacting the ACA. And whatever one's view of
11 the wisdom of that answer in retrospect, the
12 Court should respect Congress's answer, adhere
13 to the text of the ACA, stay its mandate, and
14 allow the political branches to decide how to
15 proceed given the peculiar circumstances of this
16 moment.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General.

20 General Mongan, you have three minutes
21 for rebuttal.

22 REBUTTAL ARGUMENT OF MICHAEL J. MONGAN

23 ON BEHALF OF CALIFORNIA, ET AL.

24 MR. MONGAN: Thank you, Mr. Chief
25 Justice. I have three points.

1 First, if you read the text
2 Respondents' way, you have to attribute to the
3 2017 Congress an intent to impose the very
4 command this Court said would be
5 unconstitutional.

6 The Court should avoid that result if
7 there's any other possible way to read the text.
8 And, here, there's an obvious alternative. If
9 you adhere to the choice construction the Court
10 gave to 5000A in NFIB, that just makes the
11 statute inoperative: a choice between buying
12 insurance or doing nothing.

13 Now that's a somewhat unusual statute,
14 but it aligns with this Court's authoritative
15 construction. It's exactly how Congress and the
16 President understood the amendment and what they
17 told their constituents they were doing. It
18 allows Americans to freely choose whether to buy
19 health insurance. And I think I heard at least
20 one of my friends acknowledge that, on that
21 reading, it would be 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 pointed to the
3 2010 Commerce Clause findings. But those are
4 not an inseverability clause, and they're not
5 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
11 after the markets were created and after CBO
12 told it that they would remain stable even if
13 5000A were 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's no doubt that it's been
8 controversial, and in 2017, Congress debated
9 whether to keep it. But Congress ultimately
10 chose to preserve every provision while zeroing
11 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.)

22

23

24

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<p style="text-align: center;">1</p> <p>10 [3] 1:16 59:21 104:8 10:00 [2] 1:20 4:2 100,000 [1] 13:8 1095B [2] 32:2 90:1 119 [1] 3:18 12:01 [1] 122:20 148 [1] 66:18 154 [1] 66:18 18091 [4] 49:21 63:7 65:3 85:22 187 [1] 66:18 19-840 [1] 4:4 1950s [1] 81:14</p> <hr/> <p style="text-align: center;">2</p> <p>20 [1] 33:17 2008 [2] 66:3,12 2009 [2] 73:16 104:15 2010 [13] 35:23 36:10 49:3 50:6,8, 11,25 51:9,9 56:8,11 86:24 121:3 2012 [2] 49:3 76:1 2014 [1] 104:15 2017 [36] 4:16,22 25:9 33:1 34:7,9 36:14 39:12,17 44:4,9,16 46:6,19 50:15,18,21,24 51:14 55:6 56:8, 14,16 60:3 63:6 66:4,13 80:12 87:3,4,12 103:3,5,7 120:3 122:8 2019 [1] 104:23 2020 [4] 1:16 72:14 104:13,23 2021 [1] 104:23 2022 [2] 104:24 105:13 21 [1] 19:8 22 [1] 107:24 23 [1] 34:20 26 [1] 22:9</p> <hr/> <p style="text-align: center;">3</p> <p>30 [1] 109:9 300gg [1] 49:23 31 [1] 90:2 34 [1] 3:8</p> <hr/> <p style="text-align: center;">4</p> <p>4 [1] 3:4 42 [1] 49:23 46 [1] 95:7</p> <hr/> <p style="text-align: center;">5</p> <p>5000A 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