UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

STATE OF FLORIDA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	**Case No. 3:10cv00091/RV**
	)	
	)	**Pensacola, Florida**
	)	**September 14, 2010**
v.	)	**9:01 a.m.**
	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANT'S MOTION TO DISMISS
BEFORE THE HONORABLE ROGER VINSON,
SENIOR UNITED STATES DISTRICT JUDGE
(Pages 1 through 106)

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PROCEEDINGS

(Court called to order.)

THE COURT: Pursuant to notice, we're here for a hearing on the Motion to Dismiss filed by the U.S. Department of Health and Human Services in the case of Florida v. Department of Health and Human Services.

And let me welcome those of you who are here as observers.

This case raises a number of significant constitutional issues. And perhaps you may not realize it, but tomorrow marks the 223rd anniversary of the completion of all the work by the Constitutional convention.

September 15th was a Saturday in 1887, and they finished their labors late in the afternoon or early evening and returned on Monday the 17th to go through the formalities and the final signing of the document. So we are marking the anniversary this week, and it starts -- constitutionality it starts there Friday the 17th.

I think we are ready to proceed. Pursuant to notice, we are here -- and let me see if everyone is ready. On behalf of the Plaintiffs, let me take appearances.

MR. WINSHIP: Blaine Winship, Your Honor, special counsel for the attorney general of Florida, here as lead counsel on behalf of the 20 plaintiff states.

MR. RIVKIN: David Rivkin, Your Honor, Baker &

Hostetler, here as outside counsel on behalf of all plaintiffs.

MR. MORSOVSKY: Carlos Morsovsky, Your Honor, Baker & Hostetler, on behalf of National Federation of Independent Businesses.

THE COURT: Mr. Winship, we have a number of people seated inside the well. Would you like to introduce those for the record? Whoever you feel is appropriate, go ahead.

MR. WINSHIP: I guess I would ask they please stand and introduce themselves, and we can go around the table here, starting with Mr. Smith.

MR. SMITH: Chesterfield Smith, Jr., Your Honor, for the office of the Attorney General, State of Florida, on behalf of plaintiffs.

MR. JACQUOT: Joe Jacquot, Deputy Attorney General of Florida, Your Honor.

MR. COBB: Bill Cobb, Deputy Attorney General, Texas.

MR. HUTCHISON: Mark Hutchison, Your Honor, for the state of Nevada, special counsel.

MR. KING: Troy King, Attorney General for the state of Alabama.

MR. SHURTLEFF: Good morning, Your Honor, Mark Shurtleff, Utah Attorney General.

MR. MCCOLLUM: Bill McCollum, Attorney General of Florida, Your Honor.

MR. DUNCAN: Kyle Duncan, Your Honor, appellate chief

of Louisiana Department of Justice.

MR. SIQUEFIELD: John Siquefield, senior counsel to the Attorney General of Louisiana on behalf of Louisiana Attorney General Buddy Caldwell.

MR. OEDEL: David Oedel, Special Deputy Attorney General for Georgia.

MR. SMYCZEK: Pete Smyczek, Your Honor, Special Deputy with the Alabama Attorney General's office on behalf of the state of Alabama.

MS. EUBANKS: Laura Eubanks, Your Honor, with the state of Alabama.

MS. HARNED: Karen Harned, executive director of NFIB Small Business Legal Center.

THE COURT: Anyone else over here? Appearances for the United States?

MR. GERSHENGORN: Ian Gershengorn, Your Honor, for the United States with the U.S. Department of Justice.

MR. BECKENHAUER: Good morning Eric Beckenhauer, U.S. Department of Justice.

MS. LIEBER: Sheila Lieber, U.S. Department of Justice.

MR. KENNEDY: Brian Kennedy, U.S. Department of Justice.

MS. MOINE: Pamela Moine with the U.S. Attorney's Office.

MR. WEINER: Robert Weiner, Department of Justice.

THE COURT: We also have others who are monitoring this morning by telephone conference, I think. Is there any way that I can get an acknowledgment?

THE CLERK: They will not be able to acknowledge. They're in lecture mode.

THE COURT: They cannot speak to us. If everything as it's supposed to there, listening to us I'm assuming that's the case.

We also have a closed circuit TV monitor in our jury assembly room set up on the second floor and most of our members of the press we have some over here but other members of the press over there, and I'm assuming that that is working as well. Is there any way we can double check that?

IT STAFF: Yes, sir, I double checked it with Jerry Johansen downstairs.

THE COURT: They're getting video and audio and everything that's necessary?

IT STAFF: Yes, sir.

THE COURT: All right. Counsel, before you begin your arguments, let me request that you alert me as to which -- we have six counts, six separate distinct claims. Each one of them raises at least some unique issue. So if you would tell me during the course of your argument about which of the claims you are arguing about, it would help me and it would also help me if

I have to refer to a number of cases that I have here. I have them arranged on my bench by count so it would facilitate me to find the particular case.

Of course, I've read all the cases and I know what you're going to be telling me about what the cases say and your interpretation of them, but again, it would facilitate my finding them if you would tell me what count you are arguing as you go through.

Beyond that, I've allotted 45 minutes per side. And I presume, Mr. Gershengorn, that you'll probably want to reserve some time?

MR. GERSHENGORN: I'd like to reserve ten minutes for rebuttal.

THE COURT: All right. I'll ask the clerk to remind us when we get to the ten minute mark.

All right. With that, we're ready to proceed. Mr. Gershengorn, it's your motion, so I'll recognize you now.

MR. GERSHENGORN: Thank you, Your Honor. Ian Gershengorn on behalf of the United States.

In the Patient Protection and Affordable Care Act, Congress sought to contained spiraling healthcare costs and fundamentally change the way Americans paid for their medical services. It did so principally by trying to expand both the affordability and the availability of health insurance.

Because virtually all Americans use medical services,

the Act is necessarily broad and comprehensive. Congress expanded eligibility for Medicaid and then committed federal funds to pay for the vast majority of that expansion.

THE COURT: It's a pretty big act, isn't it?

MR. GERSHENGORN: It is, Your Honor.

THE COURT: I have read that it's 2,700 pages, but I've checked Westlaw and other places, and I get different numbers. What is the official pagination number, do you know?

MR. GERSHENGORN: I don't know that there's an official pagination, Your Honor. It depends on the font. The version I have is 907 pages.

But the reason, Your Honor, is because the situation that Congress was trying to address demanded a broad and comprehensive approach. In addition to the Medicaid, Congress provided for insurance exchanges to ensure that individuals and small businesses could get affordable insurance. It provided incentive for employers to cover a greater portion of their employees. It regulated insurers directly, requiring them to make changes so that folks with preexisting conditions, such as cancer and other diseases, wouldn't be charged exorbitant rates or denied coverage altogether. And in the minimum coverage provision, Congress regulated how and when individuals will pay for the medical services they inevitably consume, encouraging individuals to pay for them now through insurance rather than at the time of service out of pocket when many find they cannot

afford those services.

THE COURT: While you're talking about the theory, let me ask you this:

The penalty provision, which you maintain, I think, as a tax, is expected to raise approximately $4 billion a year; is that the figure I've seen?

MR. GERSHENGORN: Annually, correct.

THE COURT: But that -- that money is to go into the treasury, is it not?

MR. GERSHENGORN: Correct, it goes into the general treasury.

THE COURT: But isn't the theory that that is necessary in order to ensure that the insurance companies are compensated for the requirement that they no longer underwrite their issuance of the policies and accept everyone with preexisting conditions or regardless of their current or prospective health?

MR. GERSHENGORN: No, Your Honor, I don't think that the purpose of the tax is to compensate the insurance companies. The purpose of the provision is both to raise revenue to offset expenditures of the federal government that it makes in connection, for example, with the Medicaid expansion. So I think the -- I think it is a relatively straightforward taxing provision that raises revenue for the general treasury.

If I could, Your Honor, just step back to frame the

overall picture, because I think it's important.

What the Plaintiffs have done is raise a series of constitutional challenges to the Affordable Care Act that we think really requires this Court to undo decades of settled precedent.

With respect to the coercion claim, for example, the Plaintiffs raise a claim that no court has ever used to strike down a federal spending condition and that has been repeatedly rejected in the context of Medicaid.

With respect to the exchanges, they ask this Court to ignore the 1981 decision in *Hodel v. Virginia Surface Mining* which directly forecloses their claim.

With respect to the minimum coverage provision, the states assert standing in the face of nearly a century of juris prudence that limits the ability of states to sue the federal government to exempt state citizens from the operation of federal law.

And with respect to the minimum coverage provision, the states challenge that regulation of economic activity on the basis of a theory of the commerce clause and the tax power that the Supreme Court laid to rest in the 1930s.

The States are certainly free to assert a policy disagreement with the Affordable Care Act, but that policy disagreement does not create jurisdiction in this Court and does not create a license to overturn settled constitutional law.

THE COURT: The Plaintiffs maintain exactly the opposite on a number of those issues; you admit that?

MR. GERSHENGORN: They do, Your Honor, but I think that if I could just start -- I can proceed whatever would be most helpful to Your Honor. What I was thinking of doing was addressing first the Medicaid coercion claim quickly, and then addressing the *standard and jurisdictional argument to the minimum coverage provision, and then address the minimum coverage provision, the power under the Commerce Clause, and the tax authority for the minimum coverage provision, and relying on our briefs for the other arguments.

So that would be, for Your Honor, that Count Four principally, the coercion Medicaid claim, and then Count One, the, individual mandate, if that addresses Your Honor's need, although I'm prepared to discuss any --

THE COURT: You're going to begin with Count Four?

MR. GERSHENGORN: I'm happy to begin with Count One, if that's easier for Your Honor.

THE COURT: It matters not to me.

MR. GERSHENGORN: So let me start with Count Four --

THE COURT: You tell me where you want to go, and I'll let you argue your case.

MR. GERSHENGORN: Okay. On Count Four, Your Honor, the Plaintiffs challenge the expansion of Medicaid to individuals with -- to individuals with incomes up to 133

percent of the poverty line.

The claim of the Plaintiffs is that this presents a Hobson's choice; they're forced to accept a transformed version of Medicaid or to drop out of Medicaid with what they claim will be serious consequences to the State fiscs.

In the 75 years since the Supreme Court in the Charles Steward case first acknowledged the possibility of a coercion claim, no court has --

THE COURT: That was a *Steward Machine v. Davis* case?

MR. GERSHENGORN: Correct, Your Honor, that was the first one, and the Supreme Court reiterated that in *Dole*, but no court has ever *found it, and there's good reason for that.

First, the federal government generally gets to decide how it allocates its funds, and States are free to agree to those conditions or not. And second, as the courts have repeatedly found, to try to adjudicate a coercion claim would plunge the courts into a judicially unmanageable situation to determine where exactly a condition crosses the line to coercion.

But whatever this Court thinks of the coercion claim generally, it has no application here where the courts have consistently rejected application of coercion in Medicaid.

In the *California v. United States* claim, the Ninth Circuit rejected the precise claim here where the State argued that "its choice to participate in Medicaid may have been

voluntary, but it now has no choice but to remain in the program in order to prevent the collapse of its medical system."

The D.C. Circuit rejected the exact same argument in *Oklahoma v. Schweiker* where the State contended that the loss of Medicaid funds was so drastic that the States have no choice to comply.

And even if there were some way that a coercion claim could survive in Medicaid, this expansion is particularly ill-suited for it. The States can't claim any surprise. Section 1304 of the Medicaid Act expressly reserved to Congress the right to change the program. Over the course of the program, Congress has repeatedly expanded the number of people eligible for Medicaid.

And the Supreme Court in the *Bowen* case cited in our brief has recognized that Congress retains great authority to change the contours of the program. In this case, moreover, this is not a situation in which Congress is seeking to regulate. It is seeking to define the nature of the program.

THE COURT: But this is actually a much more complicated issue than just a simple application of *South Dakota v. Dole*'s one sentence, isn't it? I mean, doesn't this really touch on the spending power of the United States and how that applies its authority to provide for the general welfare and this is really a question of spending power in the spending clause itself?

MR. GERSHENGORN: I think it is a question of the spending power, but I think Medicaid, as the Supreme Court has repeatedly held, is a proper exercise of the spending power. I think, with respect, Your Honor, this is actually a much easier case than *Dole.* Because in *Dole* what you had was an effort, arguably, to regulate. So the court would -- the Congress was using its highway funds to require States, or to encourage States, to raise the drinking age from 18 to 21; or in *Nevada v. Skinner* where Congress was using highway funds to create a national speed limit of 55 miles an hour.

Here, there is no regulation that is outside of the definition of the program. What Congress has said is, we are changing the definition of who is categorically needy. It's as if in *Dole* Congress said, here is what we mean by "highways," you have to use this money for highways.

Moreover, the States' argument that this is somehow transformative of Medicaid is hard to --

THE COURT: Well, I think the evidence in that case, according to the descent, was that most drunk drivers were 21 to 24 and not under 21.

MR. GERSHENGORN: Absolutely, Your Honor. And the Count that it was -- the Court found -- despite all that, the Court found that this was sufficiently related and proper. What I am suggesting is this is a much easier case than *Dole*, and it's true because -- precisely because it isn't an effort to put

in a speed limit or do something like that; it's to define the very content of the program.

Moreover, the notion that somehow Medicaid has been transformed is hard to take seriously, given that the statute provides the federal government shall pay 100 percent of the cost of the expansion for the first three years of the program and more than 90 percent for the next three years and 90 percent on and after. The State funding increases by less than 2 percent. And the other --

THE COURT: What do those percentages equate to in expected dollars, do you have any idea?

MR. GERSHENGORN: The State expenditures, roughly speaking, over the course of, say, 2014 to 2019, are on the order of $20 billion. The comparable federal expenditures are on the order of $450 billion. The States' spending would increase by approximately 1.4 to 2 percent. It is certainly --

THE COURT: Now, let me ask you, illegal immigrants are not included in the coverage, they're not going to be subject to any penalties. And the number of uninsured, which I've heard is, what, 45 million?

MR. GERSHENGORN: 45 million.

THE COURT: Does that include all of the illegal immigrants?

MR. GERSHENGORN: I believe it does include illegal immigrants who have --

THE COURT: So you're not going to deal with any of them at all?

MR. GERSHENGORN: No, but the Act -- the reforms in the Act are projected to cover an additional around 32 million Americans, I believe. And of the 13 that would not be covered, those would include the -- those would include illegal immigrants.

THE COURT: And the people who are subject to the penalty there are not going to be those who qualify for Medicaid?

MR. GERSHENGORN: Correct.

THE COURT: And they're not going to be those who qualify for Medicare?

MR. GERSHENGORN: Correct.

THE COURT: So you've got the ones who are over 65 and the ones who are otherwise eligible for Medicaid aren't going to be affected by this, presumably. And if everyone buys the mandated insurance, there will be no penalty at all; is that right?

MR. GERSHENGORN: That's correct.

THE COURT: But you don't expect that?

MR. GERSHENGORN: The projections are -- certainly we'd love to see that, but the projections are that it would be roughly $4 billion annually in penalties.

THE COURT: And $4 billion a year is a lot of money.

I know they have a number of other taxes identified and called taxes in this Act, at least five. And the projection for the tax on sun tanning parlors, for example, is $300 million a year, about -- less than ten percent of what you expect from this penalty; is that it?

MR. GERSHENGORN: To be honest, Your Honor, I don't know what the total expected from the tanning provision, but I do know it's $4 billion. I think it makes sense to turn now to the minimum coverage provision. I'd like to make a couple of points because --

THE COURT: I'm sorry, I didn't mean to get you off Count Four.

MR. GERSHENGORN: Well, I think with respect to Medicaid, Your Honor, I think that the Court in *Benning* in the Eleventh Circuit said, if a state wishes to receive federal funding, it must accept the related unambiguous provisions in their entirety.

With respect to the minimum coverage provision, let me explain why the Plaintiffs lack --

THE COURT: Well, before you leave the commandeering, this really -- this really puts all 50 states on the short end of the stick, because all the federal government has to do is say, we're going to give you some money, and we're going to require you to do this. And if it's something that is of the nature of medical care, which is, I think, generally regarded as

pretty central, states are in a catch-22 situation.

And because of the Government's dominate ability to raise income through the Sixteenth Amendment, they are able to do that; and the states are left almost powerless in that respect, according to your argument. Is that where we are?

MR. GERSHENGORN: Your Honor, I think that's exactly the argument that the courts have consistently rejected in the context of Medicaid, and it's precisely the argument that --

THE COURT: Well, that's what *Dole* says in one sentence, but that's -- as you point out, that's about the end of it.

MR. GERSHENGORN: But, Your Honor, what that argument is, is that basically, because a program becomes sufficiently big and sufficiently successful, it's up to the states and not to the federal government, to define the conditions on which the federal government spends its money. That has never been the law, and it has consistently been rejected.

It really would be a revolutionary proposition to find that because in Medicaid the program is so successful that the federal government can no longer define the very terms of the program -- to define who is categorically needy under Medicaid -- to deprive the government of that is really to deprive the government of its ability to spend.

THE COURT: Before the Government got all this money after the 1913 amendment to the Constitution, it was generally

accepted that spending power of the United States was quite limited under generally accepted Madison interpretation, was it not, the Madison versus Hamilton construction of the general welfare?

MR. GERSHENGORN: Well, Your Honor, by the time the Supreme Court decided *Charles Steward Machine*, and by the time the Supreme Court decided *Dole*, and by the time the Supreme Court decided *Harris v. McCrae*, and by the time the Supreme Court decided *Wilder*, the Sixteenth Amendment was well settled as of the ability of the United States to spend money, to give substantial funds to the states, and to put the very definition of the program in connection with those funds.

THE COURT: But in that same year, 1913, the Constitution was amended to provide that senators no longer represented the states but were elected by popular vote, so 1913 was a landmark event, but it also deprived the States of any direct representation in the Congress. Isn't that ultimately where we are where the states are almost powerless to affect what's going on in the Congress now, and that's being forced upon them whether they like it or not?

MR. GERSHENGORN: Your Honor, I think the suggestion that the states are powerless to control what goes on in Congress when Congress is representative of the states is a very odd notion, that, quite frankly, every state has its two senators, every state has its representatives. The idea that

there is some body disembodied from the states that is in control here is really quite a revolutionary one, and it's one that the Supreme Court has again rejected. There would be no limit to the courts to -- if that were the Plaintiffs' theory, then there would be no limit to it. It wouldn't just be Medicaid. It would be highway funds. It would be every federal program.

I think that the notion that what we have now is a situation in which the federal government spending program is dictated by the states is one that simply is one that there is no judicial precedent anywhere for. And so I think actually that would be quite a revolutionary proposition.

I think consistent with that, Your Honor, I think that the attacks that the Plaintiffs have made on the minimum coverage provision are likewise revolutionary. Their standing argument, for example, the notion that a state has authority -- that the state lacks authority to sue the federal government on behalf of its citizens to exempt them from the operation of the federal law dates back at least to *Massachusetts v. Mellon* in the 1920s, and it was reaffirmed quite recently by the Supreme Court in *Massachusetts v. EPA*. But that is essentially what the states are doing here.

The minimum coverage provision imposes no burdens, no obligations, no requirements on the state, and yet, the states are claiming a right to challenge that minimum coverage here.

That would simply eviscerate the Supreme Court's standing doctrine if the states were allowed to pursue that challenge here.

We think, likewise, the individuals lack standing here because the minimum coverage provision doesn't take effect until 2014, and quite frankly, a lot can happen in those years.

THE COURT: We're talking standing with respect to Count One?

MR. GERSHENGORN: Standing with respect to Count One, Your Honor, when a lot can happen in those four years, as Your Honor is surely aware in the *Baldwin* case, which was a challenge to this same Act out in California. The District Court dismissed the case for lack of standing in precisely the situation we have here in which individuals came forward and said, I don't have health insurance and I don't want health insurance. And the Court said basically, a lot can happen in the next four years.

The Court said, even if he doesn't have insurance at this time, he may well satisfy the minimum coverage provision of the Act. He may take a job that offers health insurance or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act. And the Court dismissed for lack of standing.

We think the same result is required here. And it's consistent with the Supreme Court's decision in the *McConnell*

case, which is cited in our brief, Section 305 of the Act. The Act created heightened -- more expensive ad rates for essentially attack ads. And Senator McConnell said, I'm going to run for reelection, and I'm going to use those attack ads, and I have done that previously.

And the Supreme Court said, you're not up for reelection for five more years. That is too far away for you to have standing. And the Court dismissed that provision for lack of standing. It is exactly the same here. We do not have in this court a plaintiff who has standing.

THE COURT: This is quite different from that, isn't it? Because this is not something that you can implement on the spur of the moment. There is going to be huge changes that have to be made in order to get ready and to write the regulations, to prepare the mechanics and all of the personnel that need to be lined up to handle all of this. That's going to require years of preparation to have all of this stuff ready.

MR. GERSHENGORN: Your Honor, a couple of things: First of all, with respect to the minimum coverage provision, it may be that the federal government has to do that, and it may be that HHS and the IRS has to do it. But the minimum coverage provision does not require anything of --

THE COURT: Well, maybe individuals may even have to do that, because I -- I've experienced buying insurance, and it's not something that you buy only after you have to have it.

You have to plan ahead.

MR. GERSHENGORN: Your Honor, I think quite the opposite. The whole entire point of the system is that it's going to be much easier to buy insurance, to obtain insurance. And so this is not something where somebody today is saying, I need to pick out my insurance that I'm going to have on January 1st, 2014. In fact, I don't think any of us work that way. It would depend on the job. It would depend on our physical condition. It would depend on the available options and the available prices at that time. It's exactly why the Court in *Baldwin* dismissed the case.

What Your Honor may be averting to is actually a different argument of the states, which is that because we have to put in other provisions that are not severable from the minimum coverage, we should have standing to challenge the minimum coverage provision. But that is simply not the law.

There is no case that has found standing based on such a severability analysis. In fact, the cases are just the opposite. Case after case says you must be injured by the particular provision that you challenge. And it would have to be that way; otherwise, you would have chaos. The states could challenge the tax on tanning salons, the tanning salons could challenge the individual mandate, the individuals could challenge the healthcare exchanges, and on and on and on.

THE COURT: Well, you're, once again, maintaining that

this is a tax.

MR. GERSHENGORN: No, Your Honor, I don't think that argument depends at all on whether this is a tax or a penalty or anything else. All it --

THE COURT: You're really making a dual argument. One is that the states can't because it's not part of their role, but you're also saying that it's a tax. And therefore, you can't challenge the tax until you pay it and then sue for a refund.

MR. GERSHENGORN: Absolutely, Your Honor. But I would like to just, if I could, separate out those two points. There are two separate points. One is, there is no plaintiff here who has standing. The second is that it falls within the text of the Anti-Injunction Act.

And I'd like to just, if I could, just articulate two -- one more point about standing and then turn to the Anti-Injunction Act to answer Your Honor's question more directly, because I think actually the way Your Honor has phrased it is picking up on something Plaintiffs have said which I think is not accurate, and so I would like to just correct that.

Well, let me turn right to that. The application of the Anti-Injunction Act does not depend at all on whether this is a tax or a penalty, and that is important. The Plaintiffs spend page after page in the Anti-Injunction Act section

suggesting that this is not actual -- that the Anti-Injunction Act isn't applicable because this is not a tax, it's a penalty. But that ignores the language of the statute. The statute applies not just to taxes, but to penalties.

In 26 U.S.C. 7421, the principal Anti-Injunction Act, it says, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained." Fair enough.

In 26 U.S.C. 6671, the statute says, "The penalties and liabilities imposed by this subchapter shall be assessed and collected in the same manner as taxes."

The penalties of that subchapter -- not all penalties, but the penalties of that subchapter are subject to the Anti-Injunction Act.

And then what the Affordable Care Act says in 26 U.S.C. 5000A(g)(1), that "The penalty provided by this section shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," which is that 6671.

So whether you call this a penalty or whether you call this a tax, it is subject to the Anti-Injunction Act. And so the argument in the Plaintiffs' brief, which Your Honor has adverted to --

THE COURT: Well, the Act itself excludes this penalty from all of the normal enforcement mechanisms of a tax. The IRS can't file a lien.

MR. GERSHENGORN: Correct.

THE COURT: They can't attempt to do all the collections efforts that they would normally do if it was a nonpayment of tax. It's specifically exempted from that, right?

MR. GERSHENGORN: That's correct. But that same provision that Your Honor just has described is the same one that says that "The penalty provided by this section shall be assessed and collected in the same manner as an assessable penalty." It is the same provision that, while the provision Your Honor cites exclude the penalty from certain collection mechanisms, it actually includes -- expressly it includes the penalty provision within the bounds of the Anti-Injunction Act.

It's precisely for that reason why the right way to challenge this is to have a plaintiff who has paid the tax and sought a refund. So, Your Honor, it is exactly that that --

THE COURT: But the senate went to great extreme measures to make sure that this was not characterized as a tax; isn't that correct? The senate version was the ultimate version that was adopted because of the political ramifications that happened. And we have the senate version that was adopted and never got to a conference committee, right?

MR. GERSHENGORN: Your Honor --

THE COURT: So all the way through we have the senate version speaking in terms of the Commerce Clause instead of taxing power.

MR. GERSHENGORN: Your Honor --

THE COURT: As I mentioned, on at least five occasions they talk about a tax, but they make sure that they don't call this a tax. They exclude it from the tax characterizations. Even the President himself said, "Absolutely not, this is not a tax," shortly before it was enacted.

MR. GERSHENGORN: Your Honor, there's a lot packed into that, and if I could, could I -- and I'd like to respond to a lot --

THE COURT: Well, I'm just saying that it's -- you've got to be intellectually honest with me. And what we have here --

MR. GERSHENGORN: Absolutely. And I'd like --

THE COURT: -- is a situation where, in the adoption of this, they went to great measures to say it's not a tax, and now you're coming in this morning and telling me, oh, yes, it is a tax.

MR. GERSHENGORN: I'm -- I'm saying a number of things which I would like to be very clear about, because I think it's easy to -- I think it's important to get them clear.

The first is, as I've said -- and I just want to repeat to make clear -- it doesn't matter whether you call it a tax or a penalty. Either way, it's subject to the statutory language in the Anti-Injunction Act. So it doesn't matter --

THE COURT: But the ultimate determination has to be

one for the Court to decide. It doesn't matter what Congress calls it. It depends on what it actually is --

MR. GERSHENGORN: Correct.

THE COURT: -- when you look at the totality of the circumstance.

MR. GERSHENGORN: Again, for the Anti-Injunction Act, if the Court determines it's a tax, it's subject to the Anti-Injunction Act. If the Court determines it's a penalty, it's subject to the Anti-Injunction Act. So it is for the Court to determine, but it's subject to the Anti-Injunction Act.

With respect to the tax power, Your Honor, we do think this falls within the tax power, despite the fact that it's labeled a penalty. It is -- the Supreme Court has said it is up to the Court to determine whether it's a tax, but the Supreme Court's test is whether it's productive of some revenue. And here it is, as the Court has noted, this $4 billion.

In addition to that, Congress put the provision within the Internal Revenue Code. The provision is paid for on the individuals's income tax filing. If the individual doesn't file a tax return for that year, they are not subject to the penalty. The key terms of the provision are dependent on household income, taxable -- a taxpayer. All the provisions are defined by the code. This has all of the hallmarks of a tax. The flip side is --

THE COURT: Well, let me just stop you before you

leave the tax part, because the argument of the Plaintiffs is that, if it is a tax, it's barred by the Constitution that prohibits a direct tax. And the Supreme Court has said that is certainly what the Constitution says, and that's why the original income tax was held to be unconstitutional and why we ended up with the Sixteenth Amendment.

MR. GERSHENGORN: Yes, Your Honor. And if I can address --

THE COURT: It doesn't apply, though, to this?

MR. GERSHENGORN: I'm sorry?

THE COURT: The Sixteenth Amendment doesn't encompass this, so --

MR. GERSHENGORN: No, Your Honor, but under no reasonable understanding of the direct tax provision is this a direct tax. And if I could finish, in addition to all of the hallmarks of a tax, it has none of the hallmarks of a penalty except the label, which the Supreme Court has said is not conclusive.

It is not a situation in which is -- where the penalty is based on *Scienter*. It is not a situation in which this is addressing illegal activity. It is not a situation in which the penalty is exorbitant. So even if this Court were to go back to the 1930s, as Plaintiffs have asked the Court to do, and even if this Court were to ignore what the Supreme Court expressly said in *Jones* which is we're past the point where we are deciding

whether this is really a regulatory tax or a revenue producing tax, even if the Court were to go back 70 some odd years, it still would be a tax rather than a penalty, and it would be a tax rather than a penalty that does not violate the direct tax provision.

It's certainly not a tax on income that would be problematic under the *Pollock* theory. But more to the point, what the Plaintiffs are really arguing is this is a capitation tax; it's applied, as they say, without regard to property, profession or other circumstance. But that is not correct. It is a tax paid -- and this is a critical point for both the tax power and the Congress power -- it is a tax paid on the decision to finance medical services by --

THE COURT: Well, actually, you may say that, but all the definitions of the authority under the Commerce Clause, the third element usually talks about activity. And this is not activity. This is inactivity. This is exactly the opposite. You're not buying -- you're being taxed for not buying insurance, not for buying insurance.

MR. GERSHENGORN: I could not agree more, and I think it's -- disagree more, Your Honor, I could not disagree more, and I think it's critical. So I'm glad Your Honor has raised that, and let me address that right away.

The appearance of inactivity here is just an illusion. This is the purchase of medical services without paying for

them.

What Congress found is that there were two interrelated markets; the market for medical services and the market for health insurance. And what Congress found is that the unique aspects of the market for medical services drive the analysis here that people -- virtually everyone uses the market for medical services. We go see doctors. You cannot control when you go see a doctor. The healthiest individual could get hit by a bus or get a disease. And whether you show up --

THE COURT: Even the Congressional Budget Office, which is supposed to be relatively neutral in this, as you know, back in 1994 said, this is unprecedented, it's never been done, it doesn't fall within any of the case law that interprets the constitutional power of the Commerce Clause.

MR. GERSHENGORN: Your Honor, I can -- and I firmly disagree with that. And if I could continue on why this is not inactivity, because Your Honor has put your finger on what I think is the critical point in the Commerce Clause analysis, the one that they hang their hats on.

What the -- what Congress recognized was that individuals, one, can't keep themselves out of the healthcare market, and you cannot control when you go see a doctor, because you can't control when you will be hit by a bus or when you will get injured.

And when you show up at the emergency room, when that

healthy 20-year-old who doesn't have insurance shows up at the emergency room, that individual gets healthcare, because we don't let people die on the emergency room floor.

And what Congress found was that the decision to finance healthcare -- not to finance insurance, but to finance healthcare out of pocket rather than having insurance resulted in substantial uncompensated care, $43 billion. That money was transferred -- was shifted to other participants in the market.

THE COURT: I've seen the -- $43 billion sounds like a lot, but I've read that that's only 2 percent of the healthcare expenditures altogether. Is that true?

MR. GERSHENGORN: I think that is roughly accurate, Your Honor, but --

THE COURT: Two percent is really, in the *term of percentages, a relatively small number. I think --

MR. GERSHENGORN: Your Honor --

THE COURT: -- the number I keep hearing about the expenses of the state, 17 percent -- 17 percent or more --

MR. GERSHENGORN: 17 percent of GDP is on healthcare. But I -- there is no Supreme -- two things: There is no Supreme Court case and no case anywhere that says $43 billion is not a direct and substantial effect for the purpose of the Commerce Clause.

Second, it is not the only effect. The other effect of deciding to finance healthcare out of pocket rather than

through insurance is there is a premium spiral. The cost shifting raises premiums, causes healthy people to drop out of the system, and increases the cost of insurance.

In addition, Congress had evidence that there was substantial job lock, that people couldn't move among jobs because they were afraid of losing their insurance and afraid of going to a job where a preexisting condition wouldn't be covered.

It is precisely all of these effects that Congress addressed when it addressed the decision to finance. It is not inactivity, because every one of those uninsured -- or the vast majority of uninsured do participate. They are not bystanders. They participate in the healthcare market. They are buying physician services.

The provision is also justifiable, Your Honor --

THE COURT: Well, you know, I've given this a lot of thought. And, you know, the whiskey rebellion was famous because everybody rebelled of having to pay a tax on their whiskey that they made. But the Government never even supposed that they could force people to buy the whiskey. That was half of the federal government's revenues at that time.

MR. GERSHENGORN: Your Honor, I -- there are a couple of points that I'd like to make there. First, the idea that the government has never forced people to buy things is just false. In the Militia Act of 1972, Congress required --

THE COURT: But that's under a separate clause of the Constitution.

MR. GERSHENGORN: It's under a separate clause, Your Honor, but it shows that there isn't this bright light. But if I could, Your Honor --

THE COURT: I think you've reached your ten minutes.

MR. GERSHENGORN: This is important, Your Honor, so I'd like to --

THE COURT: Go ahead.

MR. GERSHENGORN: In the Gold Clause Cases, Congress required people to turn in their gold bullion. In *Heart of Atlanta Motel,* the claim was, "I don't want to serve these people." And Congress said, "No. You have to."

And in *Wickard* itself, the result of the Supreme Court -- of the statute was that Wickard was forced to buy wheat that he wished to grow at home.

The second point, Your Honor, is that insurance for market participants is routine. Congress --

THE COURT: Well, we don't know that he bought wheat, but go ahead.

MR. GERSHENGORN: Right. It says that he would be forced to purchase the wheat that he otherwise --

THE COURT: Well, they stipulated that 20 percent of the wheat market was actually at-home consumption, and that pretty much controlled that case, but go ahead.

MR. GERSHENGORN: But, Your Honor, the other point is that insurance requirements are routine. In the trucking industry, Congress requires insurance. In the coal mining industry, Congress requires insurance.

What the Plaintiffs are doing with their arguments that this is a bystander, that this is tax on inactivity, that this is regulation of inactivity, is asking you to do what Congress didn't have to do, which is ignore the healthcare market.

These are not bystanders at all. They are participants in the healthcare market, and that's what distinguishes the whiskey case. This is not about telling people you have to buy a product. This is telling people this is how you finance your healthcare.

It is, in the whiskey case, saying you have to pay cash, not credit. It is not -- like the GM car, it's not saying you have to buy a GM car. It is saying you cannot buy a GM car and not pay for it. It's a very different analysis. And it's only by abstracting from the reality that these two markets are interrelated and that the healthcare -- the health insurance is principally a mechanism for paying for healthcare services. And this is a regulation of how and when you pay for healthcare services.

One last point, Your Honor, before I sit down or use all my time. The other reason that this is critically -- that

this is easily within Congress's power is because the minimum coverage provision is part and parcel of an integrated scheme to regulate this -- what Congress had before it was testimony that the preexisting conditions exclusion could not work without the minimum coverage provision.

Nobody disputes that Congress could impose the -- require insurance companies to cover people with preexisting conditions. But what Congress said was --

THE COURT: That's not determinative, is it, Mr. Gershengorn? I mean, if we had testimony in Congress that GM's only hope of salvation and survival is to require people to buy their cars otherwise the Government is going to lose its investment, that wouldn't -- that wouldn't authorize Congress to do that.

MR. GERSHENGORN: That is -- and that is not what is going on here. What is going on here is that Congress is saying, in order to make this work, we are changing the way you finance your healthcare purposes. It is precisely that difference, Your Honor, which I really -- if there is one thing that I accomplish today, it is to make clear to Your Honor that this is different from the whiskey rebellion, it is different from the GM car.

It is a purchase -- it is a regulation of how you purchase your healthcare services, your doctor services, your hospital services, and it is a regulation of how you finance

those services. And it's precisely that difference that makes this a much easier constitutional case under the Commerce Clause. I reserve the balance of my time.

THE COURT: You've got ten minutes.

MR. GERSHENGORN: Thank you, Your Honor.

THE COURT: All right. For the Plaintiffs, Mr. Winship?

MR. WINSHIP: Thank you, Your Honor.

I would note that I would like to use 20 minutes at this point, and I am going to be addressing issues of standing and justiciability as they pertain to Counts One, Two and Three in this case; and then we would have Mr. Rivkin addressing those same counts with respect to the unconstitutionality of the individual mandate. He is going to use 15 minutes of time, and I'm reserving ten minutes to come back at the end of that to discuss Counts Four, Five and Six, if I may, Your Honor.

And also, in connection with that, Your Honor, we have a PowerPoint presentation that we put together. We have a lot of ground to cover, so we thought this would help the Court, and we would ask if I could approach the bench. I have a hard copy of that for you.

THE COURT: If you do, that would help. I don't think the televised portion down on the second floor is going to be able to pick up what's on the screen, but we'll proceed. Go ahead.

MR. WINSHIP: Thank you, sir. I have a copy here for the Department of Justice.

Your Honor, I note that we are here today as Plaintiffs to bring to the Court's attention the Patient Protection and Affordable Care Act. We are here because it represents, in our view, an unprecedented intrusion of the sovereignty of the states and the liberty of their citizens.

I'm going to discuss standing and begin with the general standards for standing.

I ordinarily wouldn't waste any time on this, but it appears that we actually have some difference of view on this with the Department of Justice. So I just want to state very, very quickly, Your Honor, that the law is well settled.

Our allegations are to be taken as true for standing and justiciability purposes, both; and the cases that the Department of Justice has cited to the contrary are cases that turn on disputes of affidavits at later stages beyond the Motion to Dismiss stage; specifically, their cases dealt with preliminary injunction issues.

And I would note that the **Stalling* Eleventh Circuit decision, Your Honor, is really right on point in terms of how it expresses the issue exactly the way that we are presenting it. That is to say, we have a number of allegations in our amended complaint; and, for purposes of this motion, those allegations are to be taken as true.

I'll begin with discussing the individual Plaintiffs' standing. That standing is being contested, but only with regard to the injury in fact element under the Supreme Court's *Lujan* decision. I want to note here that we have extensive allegations concerning the standing and injury to our individual Plaintiffs, Mary Brown and Kaj Ahlburg. They are set fourth in paragraphs 27, 28, 62 and 64 of our amended complaint.

Basically, what these allegations say is that these individuals do not have, and intend not to have, insurance; that they will be in violation of the individual mandate in 2014, and they object to the mandate.

Now, the Defendants here refuse to accept these allegations as true, but they must. Instead, they argue that something might happen to change the future. But there is nothing in our allegations to warrant that sort of speculation. The cases that they have cited --

THE COURT: Well, the three elements of standing are injury in fact, a causal relationship, and redressability of the harm by the Court. And the only issue is an injury in fact, that's what you're telling me?

MR. WINSHIP: Yes, Your Honor.

THE COURT: Go ahead.

MR. WINSHIP: And with respect to that, I think our allegations are exceedingly clear about why they are going to be affected. The cases that the Defendants are relying on are

cases in which the impact itself was contingent upon something else. Here, it would be the lack of impact that would be contingent upon something else. They are just speculating that something might happen to one of these individual plaintiffs, but there is no basis in the pleading for it.

I note they cite, Your Honor, to the *Baldwin v. Sebelius* case, and I think it's very instructive for Your Honor here. That's a case that also had an individual challenging the individual mandate portion of the Act. And the Plaintiffs' complaint was dismissed, but it was dismissed without prejudice.

In that particular case, the allegations were far, far short of what we have here by way of allegations. The Court was left there to be pondering whether these folks might actually be getting insurance that would qualify them between now and 2014. The Court had no way of knowing whether they would be qualifying for Medicare or Medicaid, or if they had employment that would cover them. So the action was dismissed, but without prejudice and with leave to replead. But those deficiencies are not deficiencies that apply to the allegations here with respect to our individual plaintiffs.

I want to note as well, Your Honor, moving on to our associational plaintiff, the National Association of Independent Business, that interestingly enough --

THE COURT: Wait. Before you leave that, why are your two plaintiffs different from the *Baldwin* plaintiffs?

MR. WINSHIP: Different from -- pardon me, Your Honor?

THE COURT: Why are your plaintiffs different? I'm not sure I got the distinction that you're trying to make. The two plaintiffs in this case say they do not have insurance, do not intend to get insurance, don't want to get insurance. What's different?

MR. WINSHIP: Between them and *Sebelius*, the *Baldwin* case?

THE COURT: Yes.

MR. WINSHIP: The difference is the quality of the allegations, Your Honor. We don't know, because they haven't come forward with sufficient allegations yet to negate the inference that they might not be covered in the year 2014.

We have negated that inference with regard to our allegations. We have indicated that our individual plaintiffs will, in fact, not be covered in 2014. Those sorts of allegations were missing altogether in the *Baldwin* case. We have no idea whether, when they come back and file another complaint, they're going to cure that or not. That will depend, of course, on the nature of the individuals and the facts that apply to those individuals in that case.

But for the facts that apply to our individual plaintiffs in our case, we clearly have alleged the injury in fact element, I think, quite plainly; and it would only be a matter of speculation to believe that something might happen,

something untoward perhaps might happen to one of them between now and 2014 to change what otherwise is a very definite course for the future.

With regard to Plaintiff NFIB, I think the only real dispute we have with the Defendants is whether or not contesting the individual mandate is germane to NFIB's purposes. And we have, again, allegations in our amended complaint that indicate what NFIB is. It's a leading association for small businesses, including individuals. We have alleged that Mary Brown is in fact an NFIB member.

I would note that the connection between businesses and healthcare insurance, Your Honor, is very, very well established. The Defendants are suggesting that --

THE COURT: Well, the Defendants say that the only member of the NFIB that's identified at this point in time is one of the named Plaintiffs; and, if the named Plaintiff doesn't have standing, then there is nothing in the NFIB to indicate that its generally standing for it either.

MR. WINSHIP: I think that's incorrect, Your Honor. First of all, the cases that they cite tend to turn on affidavits. Assuming that we survive this Motion to Dismiss, we will be coming forward with affidavits about other NFIB members for Your Honor. In addition to which, we did note here in our allegation support that the NFIB itself has suffered injury. It itself is out of pocket with regard to educating its membership

about the Act. But I just wanted to note as well, the idea that there isn't a connection between --

THE COURT: Well, the argument Defendants make there is also germane, to coin a phrase here. They're saying they're going to have to do that anyway. Regardless of whether there is a mandate, they are going to have to educate their members anyway.

MR. WINSHIP: Well, they -- I believe our allegations are to the effect that this is an incremental cost for the NFIB; that this is not something that they would ordinarily have to do. When there are special things that develop in the law, they have discretion, I believe, about whether they are going to be advising their members about the course of it. But this particular Act has a particular impact on its members, and that's because it goes to the issue of healthcare. And healthcare is very, very connected with businesses. I think the Act itself establishes that.

The Act provides, as one of the methods of persons to get coverage that would be allowed by Congress, that in fact you could get it through one of the -- one of the insurance mechanisms is through large employers. So the connection between healthcare insurance and businesses is very well established.

Interestingly enough, Your Honor, the Act excludes small businesses. It does so because the burden on small

businesses for covering employees with healthcare is just too great. So the Act has left small businesses out for its purposes. But the connection is still there, and in fact the connection is that, if you're a small business --

THE COURT: Are these purposes of the NFIB different from, say, the taxpayers union that we had in a different case?

MR. WINSHIP: I think that they probably are different, Your Honor, in that, I think, if you're a taxpayer organization, I think it's a matter of your ordinary custom that you would already, in a sense, have capitalized the cost of going on and educating everybody about it. I don't think you could call it an incremental cost, but I don't think NFIB standing would necessarily turn on that in any significant way.

I do think it primarily rests here, Your Honor, on the fact that its members being deeply affected by this is the one-or-two member businesses that comprise the NFIB or substantially come out of the NFIB. And I just note that the burden on small businesses is so great that Congress has excepted them from the obligation of providing insurance; and, yet, the individual mandate affects small businesses because now, yeah, sure, if you're a one-person shop, you don't have to buy insurance under the Act for your employee; namely, for yourself as an employee, but you've got to go out and get it as an individual. The same harm attends, Your Honor. You're having to divert assets.

Moving along to the standing of the states, I think it's very important here to note, Your Honor, we have five different bases here for the standing of the states -- the 20 states that are Plaintiffs -- five separate independent bases, and we have them set forth here --

THE COURT: I only counted four. Tell me what they are.

MR. WINSHIP: All right, Your Honor. The first is what we call "piggyback standing." I don't actually believe that the Defendants are contesting that. We have in our memorandum at page 11, Note 14, we went through very extensively a lot of cases where we brought forward the appropriate quotations to show that, in fact, once one plaintiff in the case has standing with regard to a particular cause of action, the issue of standing for the other plaintiffs is not something that the Court has to be concerned about. This is a piggybacking of one plaintiff on another for the same claim. And I don't believe that they are contesting that, Your Honor.

The second basis, I think Mr. Gershengorn was touching on this morning, is whether or not the individual mandate actually causes injury to the states. And we have alleged that -- and I don't think this is actually contested -- that the Act is going to greatly expand Medicaid eligibility, and the individual mandate is going to drive millions of persons under the states' Medicaid programs.

I don't think this is reasonably disputable, Your Honor, but we're not at the summary judgment stage. We're at the Motion to Dismiss stage.

The Defendants responded that states can avoid this impact by simply dropping out of Medicaid. When I return to discuss Counts Four through Six, I am going to show that that is an absurd proposition on their part. This is not a feasible option for the states. But I note at this point, Your Honor, with regard to the standing proposition that whether the states incur costs of staying in Medicaid because of the individual mandate, or they incur costs because they are going to try to reorder their budgets and agencies to drop out of Medicaid in order to avoid the effect of the individual mandate. Either way, the states are going to be impacted. And I'd note in that connection, just to give a sense of scale here, that we have alleged that 26 percent of Florida's budget is for the Medicaid Act.

I'd note, Your Honor, also that in the *Virginia versus Sebelius* action, the District Court there, in determining that the state of Virginia has standing, stated that, "Virginia must revamp its healthcare program particularly with respect to Medicaid." And that's at page 16 of that opinion, Your Honor.

I don't think that it's reasonably disputable that the sovereignty being required -- that is, the States being required -- to deal with the Medicaid consequences under this

Act that are triggered by the individual mandate, I don't even think that's a matter of reasonable dispute, but it's clearly alleged.

THE COURT: Is that a more recent -- the number I had heard, I seem to recall, was 17 percent. Is it 26 percent this year, or what is that?

MR. WINSHIP: I believe it's 26 percent this year, Your Honor. That, of course, is subject to a lot of change, depending on, among other things, the determination by this Court of this Act's legitimacy.

The third basis for standing that we have, Your Honor, is also one that I think I am going to, in some respects, come back to when I return. This is a basis that turns on the non-severability of the individual mandate from the other features of the Act that we're complaining about -- the Medicaid features, the insurance mandate requirements, and the requirement that large employers, including these states, have to cover their employees in a health plan.

The fact that the individual mandate -- let's call that the cancerous core of this Act -- is inextricably interwoven with the other provisions that directly impact this, and that I don't think the Department of Justice disputes, would give us standing to contest the constitutionality of the entire Act. But I will return to the subject of the non-severability when I return. That is our third basis for standing.

Our fourth basis for standing, Your Honor, is the basis that the District Court in *Virginia versus Sebelius* actually used in rejecting the defendants' argument that Virginia lacks standing. And this has to do with the sovereign power to enact laws.

I'm sure Your Honor is familiar with that case and its determination. I will simply note that here, as we have alleged, four Plaintiff States have enacted comparable legislation to Virginia's, and most of the remaining Plaintiff States have proposed constitutional amendments or statutes to the same effect. And so we believe that that's really very imminently clear that the States have standing on that basis.

THE COURT: And, for the record, which four of the Plaintiffs have actually enacted that legislation?

MR. WINSHIP: I can get that information for you shortly.

THE COURT: It's in the record. That's okay.

MR. WINSHIP: I'm sorry. I apologize.

The fifth is -- actually, we had put this in a footnote for want of space, but it's our memorandum at page 10, Note 13. And this has to do with the quasi-sovereign standing of states as *parens patriae* to protect state citizens' rights.

I won't dwell on that, Your Honor. I think it's explained in our footnote. But it's simply, I would note, this is a standing position in which we are not trying to interpose

ourselves between the United States Government with its statutes and United States Citizens. This has to do with the right under dual sovereignty of the states as governments to step in and protect the rights of their individuals as state citizens.

THE COURT: Well, obviously, the Defendants take issue with your interpretation of that.

MR. WINSHIP: They do, Your Honor. I think we've pretty well set forth the arguments there. And I certainly will concede that we don't have cases in which that has been applied, but we will note that the United States Supreme Court in *Massachusetts versus Mellon* and *Massachusetts versus EPA*, in both of those cases, acknowledge that such a cause of action could exist; and we're simply pointing out that, if ever there were a case for it, Your Honor, this is it.

Moving along to ripeness. The Defendants addressed really very little attention to that in their reply. I think they just have a footnote on that. I would just note for Your Honor that the time delay for the individual mandate to take effect in 2014 is essentially irrelevant for ripeness purposes here. That's because the date is certain, and the effect is inevitable.

In that respect, we've cited *Blanchette versus Connecticut General Insurance Corporations*. That's the United States Supreme Court case from 1974. We cite a number of other cases for that proposition at pages 16 to 17 of our brief. And

I would simply note as well, Your Honor, that our attack on the individual mandate is facial. We don't need any record development here for that attack. And our claims are not hypothetical, remote or abstract.

And I would note as well, once again, that in the *Virginia versus Sebelius* action, Your Honor, that the district judge there ruled that Virginia's claim that the individual mandate is unconstitutional was ripe.

And that leaves me --

THE COURT: You have a number of other pages that you've given me, Mr. Winship. I recognize that, if any one of the Plaintiffs have standing, that would be sufficient.

MR. WINSHIP: Thank you, sir. I would note that some of these other pages I've given you will apply to Mr. Rivkin's discussion, and then they will apply when I come back. We've tried to sequence these as best we can. We apologize if there's any inconvenience. The point of these PowerPoint slides was actually to help all of us to literally stay on the same page.

The last point I wanted to bring up, Your Honor, is about the Anti-Injunction Act. We don't think it applies here and for several reasons.

First of all, the challenge here is to the individual mandate itself. There is an incidental penalty that accompanies the individual mandate, but the real problem we have here is the mandate itself.

Secondly, Your Honor, the individual mandate's penalty is not a tax. It is a penalty to enforce the mandate. And we would note that the cases that the Defendants have cited are basically situations where there are penalties for the collection of taxes. And it's an important distinction, Your Honor, and it's a distinction that continues to be alive and --

THE COURT: Let me stop you. I hear you saying that the mandate will apply regardless of whether there is a penalty enacted or exacted.

MR. WINSHIP: No, I'm not saying that, Your Honor. I'm saying that our attack is on the mandate. The penalty -- I think the two of them are inextricably interwoven, but we're simply saying that, as between the two of them, let's just say that the individual mandate is the dog and the penalty is the tail. In constitutional parlance, I actually think that's really not a bad way of looking at it.

Basically, the kinds of penalties that the Defendants are talking about are really situations where they actually are in aid of a tax itself or are related to taxes. This has nothing to do with raising revenue. That's the essence of a tax, Your Honor. Absolutely nothing to do with raising revenue.

If everybody does what the Congress intends, and they have expressly stated in this Act that the goal is near universal healthcare coverage, if everybody actually obeys the individual --

(Power outage.)

I apologize. We were afraid of this.

THE COURT: Well, let's see if everything comes back up.

MR. WINSHIP: In the meantime, we do have a hard copy, that's precisely why I wanted Your Honor to have that, so we wouldn't be burdened with rebooting the system here.

THE CLERK: We are right at his 20-minute mark.

MR. WINSHIP: Oh, I am?

All right. Your Honor, I just wanted to mention very briefly, and then I'll sit down.

Another argument against the Anti-Injunction Act, and this is the one that the court in the Virginia action determined was controlling, was that *South Carolina versus Regan*, the Supreme Court decision from 1984, clearly indicates that this cannot apply to the states here, because they have no alternative remedy.

The way this Act -- the Anti-Injunction Act is set up is the idea that you're supposed to pay your tax first, and then you can sue to recover it by way of a refund. The states are not subject themselves to paying the individual mandates penalty, therefore, they are not in a position to have a remedy other than through this court, Your Honor, as we are seeking today to have a remedy.

THE COURT: Let me just stop. We're not going to keep

the time limit because we've lost complete power. I'm not sure if our generator is on yet. We are not getting lights back.

We're going to have to stop for just a minute and see if we get any power. Gulf Power promised me they wouldn't let this happen this morning. We had this problem all yesterday afternoon, and it was supposedly attributable to an automobile hitting one of the transformers, but I think we still have a problem.

Let me check. Is the sound transmitted to the second floor? Are you able to hear us now?

IT STAFF: The conference call is still working, the phone call is still working, and the camera is still working.

THE COURT: Okay. As soon as the lights are back on. We have everything except the lights.

The lights are timing back out, and they will be on in just a moment, Mr. Winship. But we have enough light, and you can continue.

MR. WINSHIP: Thank you, Your Honor. I think maybe everything cut out when I was just addressing the very last point I wanted to make before I'm going to yield the podium to Mr. Rivkin, because I wanted to stick to my 20 minutes for this; and that was the *South Carolina versus Regan* point.

I don't know if you want me to restate that, Your Honor. I don't know how much of that may have been lost.

THE COURT: If you want to summarize it, go ahead,

because there was some disruption. But I understand what you're saying.

MR. WINSHIP: Thank you, sir.

I'll just -- I think the PowerPoint says it all really. *South Carolina versus Regan* controls here. The states have no other alternative. They don't pay the penalty and then have an opportunity to sue afterwards. And that in *Virginia versus Sebelius*, that was the basis upon which the court deemed that the Anti-Injunction Act and the Declaratory Judgment Act, which is coterminous in its effect, were inapplicable.

As far as the last point about the states not being persons, Your Honor, we believe we're correct on that, but I'm out of time, and so I think I'll just --

THE COURT: Well, let me give you just a minute. You haven't touched on ripeness either. You may want to at least mention the ripeness as well as standing.

MR. WINSHIP: Okay. I'm sorry. I thought I had mentioned that.

THE COURT: Maybe you did. Go ahead.

MR. WINSHIP: Thank you, Your Honor. I will at this point -- is there something else on ripeness you wanted me to discuss?

THE COURT: No. I just wanted to make sure you had an opportunity.

MR. WINSHIP: Thank you, sir. I appreciate it.

THE COURT: All right. Mr. Rivkin?

And if I understand, you're asking for 15 minutes, Mr. Rivkin?

MR. RIVKIN: Yes, it is. May it please the Court.

As the Supreme Court of the United States has stated many times with *Gibbons*, *McCulloch*, *Printz* and *Lopez* being some of the more prominent examples, our constitutional architecture is one of dual sovereigns, and the national government can only exercise limited and enumerated powers. Therefore, in assessing the constitutionality of any act of Congress, whether propounded under any of the enumerated powers in Article I, under the Necessary and Proper Clause, or any combination thereof, the key question and the one fully fit for judicial resolution is whether or not the legal justification of that act has a meaningful limiting principle that is consistent with this most basic constitutional truth.

I would note that the need for limiting principle in the application of the Commerce Clause has been expressed not just in cases like *Lopez* and *Morrison* where the court has struck down the congressional statute in issue, but it was reaffirmed with equal vigor in the leading Commerce Clause cases that have brought that clause to its modern parameters, including *NLRB*, *Darby* and *Wickard*.

The PPACA has no such limiting principles. If the Defendants are right and Congress can use the Commerce Clause to

force inactive Americans to obtain insurance or any other good or service from private entities and maintain it simply because they're lawfully present in the United States, there is no limit to the federal government's power. The federal government is exercising general police powers.

In that situation, contrary to what my colleague Mr. Gershengorn said, far from fitting within the four corners of existing case law, that situation fundamentally departs 220-plus years of our constitutional jurisprudence. Indeed, Your Honor, it would work a fundamental transformation of our constitutional system.

Now, as we talked earlier today, Congress has never tried to use the Commerce Clause to reach individual Americans regardless of whether or not there were activities involved. In fact, if you look at the original definition, the founders' definition of the term "commerce," the word "activity" is mentioned -- it's a constituent element of the term "commerce." It's mentioned --

THE COURT: How do you define "commerce"? I mean, that is what the Constitution says, "commerce."

MR. RIVKIN: It is a voluntary intercourse. It is a voluntary undertaking. Of course, the clause has evolved through complicated case law. The original version, of course, involved purely transactional activities, transporting goods and services from states. It did not involve manufacturing.

Manufacturing and related activities were eventually swept in.

Frankly, the most challenging question remains right now purely intrastate economic activities that exercise significant effect that commerce can be swept in, but there is activity, Your Honor --

THE COURT: Well, Congress has said that there are a lot of things that are almost entirely intrastate and still fall within the Commerce Clause.

MR. RIVKIN: That is absolutely true, Your Honor, but it has to be an activity. And I will submit to you in a second that it has to be --

THE COURT: You're going back to activity and what's not activity, right?

MR. RIVKIN: Maybe. I mean -- and I will go over it very carefully, but I might just say, to try to coin a term upfront, there are some activities that don't constitute commerce, but there's certainly no types of commerce that do not entail activity.

The thing I think, Your Honor, that the individual mandate is so far removed from any reasonable exercise of the Commerce Clause power, the Defendants have been driven to claim, including today, this morning, inactive individuals for whatever reason do not have the exact type of health insurance Congress has prescribed are somehow engaged in an ostensible activity subject to the Commerce Clause. And Defendants' insurmountable

problem in this respect is amply manifested by switching explanations of what is the type of activity here.

They begin, Your Honor, in their Motion to Dismiss characterizing the predicate activity as a decision not to buy insurance and then suggesting that the aggregate activity can be broken into monthly increments.

THE COURT REPORTER: I'm not -- I need you to slow down, please.

MR. RIVKIN: And then switching to describing the activity as "deferred, but inevitable future buying." And now in their reply and a little bit this morning it is described as a species of self-insurance.

I would note that in any Commerce Clause case since the beginning of the Republic, the government has many problems, but never the one in describing what is the nature of the activity involved.

Let me just briefly tackle what occurred this morning, which is really a notion that there is a quasi economic activity in the form of self-insurance, because people will be consuming healthcare and be paying out of pocket.

I would note, Your Honor, that self-insurance in both law and economics is a term of art. It doesn't just entail paying out of pocket. It entails actually behaving as an insurance company and set out contingencies in future reserves. There's extensive case law, including the Fifth Circuit case of

Thompson v. Goetzmann, which specifically stands for the proposition of when you pay a damage award out of pocket, you are not a self-insurer.

We also heard a lot this morning about market timing or cost-shifting, but this does not change the fundamental reality that we're dealing with a statute that takes people who are in repose or fail to act and tries to sweep them in. Commerce can regulate -- Congress can regulate commerce. Congress cannot create it.

Now, let me make a couple of points that I think would be very instructive here. The cost-shifting that the Defendants rely --

THE COURT: You're not saying that there is a problem with Congress getting involved with the insurance application?

MR. RIVKIN: Not at all. It's imposing the individual mandate, is all I'm focusing on this morning.

THE COURT: You're focusing on the inactivity?

MR. RIVKIN: Inactivity of those individuals. In order to vitiate this problem, the Defendants heavily rely on cost-shifting, and of course the point came up this morning. And mindful that we need to have a meaningful limiting principle, let me just mention, Your Honor, that the cost-shifting in the insurance healthcare market business of $43 billion that the Defendants rely on is not unique to healthcare, is not unique to our economy. Cost-shifting is ubiquitous and

permeates all aspects of our market economy.

For example, many Americans unfortunately default on their credit card bills to the tune of over $70 billion a year. A lot of Americans unfortunately declare personal bankruptcy to the tune of over $50 billion. All of these costs which dwarf the government's cost-shifting for the healthcare delivery marketplace, what happens to them, Your Honor? They get passed on to other market participants.

Let's take the most recent example. It was the most dramatic one of cost-shifting with the most dire consequences, the sub-prime mortgage crises that involved millions of Americans, over a trillion dollars worth of losses, and plunged the economy in the worst crisis since the Great Depression.

Under Defendants' logic, if cost-shifting is a sufficient basis for introducing the Commerce Clause regulation, nothing would prevent the government from imposing a mandate on individuals who did not participate in the mortgage or credit card market to buy a prescribed package of mortgages or credit cards in order to improve the recent -- or perhaps give them some kind of a mortgage lock.

It's worth noting that the government in *Lopez* pressed, to no avail, the argument about the cost of gun crimes. In dismissing it, the Supreme Court majority noted that, if we were to buy into this argument, we would be hard-pressed to find any activity by an individual that Congress is without power to

regulate.

The Defendants have argued, Your Honor, that there is some unique inevitability to the purchase of healthcare services. Once again, that's not true. There is nothing unique about it. We all need bread and water at frequent intervals, or else we'll perish. Can Congress require minimum bread or milk purchases?

THE COURT: Well, let me stop you, Mr. Rivkin. I think one of the fundamental principles that the Defendants have argued is that, ultimately, everyone is going to need healthcare, either voluntarily or not.

They may be struck by an automobile as they cross the street, or they may have an accident, or any number of things that require them to participate in the healthcare system. That's inevitable.

And that seems to make pretty good sense, that ultimately everybody is going to have to have medical care. Is that true?

MR. RIVKIN: That is not necessarily true. There are some individuals, Your Honor, who are likely to live for a long time and perish without consuming medical care, but that's not the point.

The point I'm trying to make this morning is twofold. First of all, there is no meaningful limiting principles. If the future alleged inevitability of your consumption of

particular goods and services allows the government to regulate that under the Commerce Clause before you engage in such consumption activities, the government can regulate infinite business of activities and non-activities. Number one.

Number two. Nothing prevents the government -- and I know maybe it's not the most efficient, but efficiency is not the most important constitutional principle -- nothing prevents the government, Your Honor, from regulating individuals at the point of their consumption. As a matter of fact, it would not be a very good, clever regulation, but constitutionally unobjectionable for the government to say, at least as a structural matter -- there are some Bill of Rights issues -- you cannot pay for medical care out of your own pocket; you have to pay with insurance. The government could do that.

But, again, formalism is very important in the context of a structural solution. Just because the government can do it one way does not mean that they can do it this way. Again, for the government to say, because you're going to consume medical services in the future, you're not consuming them now, we can regulate you now, means the government can regulate every inactivity, and we have a federal government of general police powers.

THE COURT: Well, the government could impose this penalty at the point of service at the doctor's office or the hospital and say, if you do not have insurance, you are subject

to a penalty?

MR. RIVKIN: I believe the government would be able to do it, Your Honor, just like the government would be able to say, as I said, I mean, given the privacy issues and the individuals' interest under various provisions of the Bill of Rights and thereby the economy, there could be some issues relative to that. But as a structural matter, nothing prevents the government from -- nothing prevents the government from saying you cannot sell medical services -- because most people, of course, who do this, selling items moved in commerce such as in *Heart of Atlanta Motel* -- from saying you shall not sell it to people unless they bring insurance to the table. But that is not what happened here. That is not what PPACA does.

If I can switch briefly to the Necessary and Proper Clause, Your Honor. We believe that the mandate cannot be saved by the Necessary and Proper Clause. As Chief Justice Marshall writing in *McCulloch versus Maryland* mentioned, that the clause, while quite capacious, is not a blank check.

And our key argument here is this: The mandate, if sustained, it will present palpably unconstitutional results. Now, why is that?

The Supreme Court in *New York* and *Printz* held that commandeering state officials, whether in legislative or executive branches, was not proper under the Necessary and Proper Clause, because it vitiated state sovereignty. There's

some excellent language to that effect by Justice Scalia who wrote --

THE COURT: Isn't the Necessary and Proper Clause key to the third part of the Commerce Clause application that it must substantially affect commerce?

MR. RIVKIN: That is -- what you are quoting, Your Honor, is the third prong in *Lopez* and similar cases. That is a factor to consider. Actually, I think it's a limiting factor to consider in the application of the Necessary and Proper Clause in the following fashion:

What the court said in *Lopez* is that, in order to aggregate intrastate activities that individually may be insignificant but in the aggregate have substantial impact on commerce, they have to be economic activities. Non-economic activities cannot be aggregated; and, by definition, non-activities cannot be aggregated. But I'm going to a different point.

Remember, it's the Necessary and Proper Clause. It is not only a necessary clause, no matter how palpable --

THE COURT: It has to be both.

MR. RIVKIN: Yes, it has to be both.

And no matter how real the government needs it -- and I note here, Your Honor, that the government's need is largely created, which is now viewed as in itself problematic, by its own exercise of enumerated powers.

THE COURT: Are you contesting the necessary prong or just the proper? I understand you're contesting the proper.

MR. RIVKIN: We're actually doing both, and I want to focus briefly on the proper part, because I think it's a very, very powerful argument.

So we know from the teaching in *New York* and *Printz* that vitiating state sovereignty is palpably improper, as per Justice Scalia. There is more than one way of vitiating state sovereignty. You can vitiate state sovereignty by commandeering, or you can vitiate state sovereignty by completely destroying any sphere of autonomous state action. Because the essence of sovereignty is some independence, some ability to do your own thing free from any external influences.

And of course, Your Honor, under the Supremacy Clause, if the federal government is exercising general police powers, general police powers at the federal level plus Supremacy Clause equals zero state sovereignty, equally palpable vitiation as well as --

THE COURT: Well, the Tenth Amendment says the states have all powers that are not enumerated and granted to the federal government, right?

MR. RIVKIN: Correct.

THE COURT: So how does that comport with your interpretation of what you're telling me about how the Supremacy Clause controls that?

MR. RIVKIN: If one construes the ambit of enumerated powers in Article I to include general police powers, there would be no powers that only the state can exercise. A state exercising no powers that are not exercised above the federal government vitiates state sovereignty. I'm not disputing the proposition that the federal government can exercise its proper constitutional authority, but it cannot be coextensive of that of a state. There has to be, Your Honor, some meaningful, meaningful delta.

And, again, what is happening here is, by imposing the mandate on inactive individuals, we are vitiating their state sovereignty. Let me just mention one thing.

THE COURT: You have one minute left.

MR. RIVKIN: Very briefly, the point that this mandate is not proper precisely because it is imposed on individuals, not on the most narrow provisions of Article I, being on a jury, being in the military, or answering the census. It is done under broad power. And it's very important that in all of those other instances -- in all of those other instances -- this was participation in governmental activities, not requiring one private individual to purchase service from another private individual. And, of course, given the teaching of *Comstock*, all the applied factors in *Comstock*, this fails.

THE COURT: If it was insurance from some other source other than private insurance, either a state or a federal

entity, would that change that?

MR. RIVKIN: It would not change, Your Honor, but it would be a somewhat closer question, because again, we have two things that are different here: Narrow powers in Article I relative -- it was three exceptions we're really talking about in terms of forcing inactive individuals and requiring them to partake of a private service or good. So in your hypothetical you would only have one, but not both.

I ran out of time, but let me just say this on the tax stuff:

The government continues to mix up the difference between a tax penalty, which is a penalty in aid of a collection of tax, and a penalty. Under the government's logic, everything is a tax. All you need to do is to have a penalty -- and God knows, every single statute in the federal rule book has some penalties -- run it through the IRS, and presto-pronto, you have a tax. There's no limiting principle. And, by the way --

THE COURT: Mr. Gershengorn cited Section 6671 of the Internal Revenue Code, which says that a penalty shall be assessed and collected in the same manner as an assessable penalty under Subchapter B of Chapter 68, even though it's a penalty.

MR. RIVKIN: First of all, Your Honor, we know that is not true. And you've gone into it earlier today in terms of how it is being assessed. But importantly, it cannot be -- if you

have penalties in aid of numerous federal mandates collected by EPA, FERC, and other agencies, all you need to do to convert it into a tax is to run it through IRS and put it in that provision of a tax code.

And notice, again, under the government's logic, not everything -- normally everything is a tax, provided you have a penalty, but everything has an indirect tax effect, which would vitiate the second key limitation on the taxing power, namely, the requirement for apportionment that you touched upon earlier. So everything is a tax, and everything is a indirect tax, and there is no limiting principle.

THE COURT: Thank you, Mr. Rivkin.

All right. Mr. Winship, you have ten minutes reserved, and you have it now.

MR. WINSHIP: Thank you, Your Honor.

THE COURT: And I understand you're going to be addressing Counts Four, Five and Six?

MR. WINSHIP: I will, Your Honor. I just very briefly wanted to come back to the ripeness issue, because Your Honor had raised a question of whether we had discussed that, and I think we have the ripeness slide up here now.

And I just wanted to note that, aside from the legality about the -- which I had addressed, I also wanted to note that individuals and the states already have to plan to implement now whether or not they are going to be -- and how

they are going to be paying for the cost of the individual mandates who are opting out. So I think that also pertains to the ripeness point.

And moving ahead now to slide 19, I wanted to talk about some points on Count Four.

I want to begin with the legal standards that really apply here. *New York versus the United States*, Your Honor, and I want to quote from that case where the court stated, "The take title provision offers states a choice of either accepting ownership of waste or regulating according to the instructions of Congress. Either type of federal action would commandeer state governments into the service of federal regulatory purposes."

And I wanted to note, Your Honor, that case establishes that Congress may not commandeer state processes or resources by having the states be forced to carry out a federal regulatory scheme.

We also rely on *Printz versus the United States*, which we cited heavily, Your Honor. That found it unconstitutional a federal requirement that state officials participate, even if only on a temporary basis, in the gun control program where they would be subject to fines.

I think it's clear from those cases that it's no defense that the commandeering by the federal government is temporary or -- and the scope of the commandeering is really

irrelevant. It is, per se, unconstitutional.

The Defendants have relied on *Hodel versus Virginia Surface Mining and Reclamation Association*. I wanted to point out that in *New York* the Supreme Court itself distinguished *Hodel*, because the congressional acted issue there -- and I'll again quote the Supreme Court in *New York*, "...did not commandeer the states into regulating mining, and the states were not compelled to enforce federal standards to expend any state funds or to participate in the federal regulatory program in any manner whatsoever."

Now, Your Honor, in our Count Four of our complaint, we allege that Medicaid has been transformed by this Act far beyond its origin as a voluntary partnership between the states and the federal government. That was to reimburse poor person's medical costs.

In our allegations, we go through quite clearly to show that the Act undoes every critical aspect of this partnership. It forces the expansion of eligibility criteria to cover non-poor -- this is up to 138 percent above the poverty line. This is quite a budget buster for all of us in the states.

The Act requires the states, but not the federal government, now to be responsible for the provision of medical care as distinguished from reimbursing for medical care. That's going to drive our cost up and our liabilities up.

The added cost to the states -- this is according to CBO estimates, which are being revised, Your Honor, today, and they're showing, as we will in the Summary Judgment Motion, if Your Honor will deny this motion and let us file for summary judgment -- we will be showing, Your Honor, that the price tag for this is going to well exceed the $20 billion to the states that the CBO itself had forecast.

THE COURT: What is your estimated cost in Florida? Have you come up with a cost?

MR. WINSHIP: We are still in the process of doing that. The numbers are very large, Your Honor. We're talking many, many millions of dollars and billions of dollars for the states. And we will be coming forward, if we get the opportunity, Your Honor, with a substantial showing of the impact in dollar projections of this Act.

THE COURT: The way the system will operate is, initially, the federal government will pay all of this additional cost, correct?

MR. WINSHIP: Well, that's not actually true, Your Honor. We are already being forced to incur a number of costs in order to gear up for this. There is a lot behind this Act, and it is 2700-plus pages. There are many, many provisions in there. We have -- in Florida alone, we have three or four different agencies, all of which are impacted by this.

We're incurring costs in trying to figure out how we

can possibly budget this. We're tasking our different agencies to figure out what it is they're going to have to do to in order to comply and what our options are with regard to compliance.

It's a very, very intensive kind of ordeal that we're being put to it, and it is highly expensive for us. And we will be, over time, Your Honor, once the federal government's initial picking up of most of this tab is going to have expired, so to speak, our costs are going to start to increase dramatically after that under this legislation.

I want to note, Your Honor, this Act imposes what we're calling, I think --

THE COURT: Is the state going to have to file 1099s for all of their purchases, like other businesses, over $600?

MR. WINSHIP: Your Honor, you've got me. I don't know. I can't answer that question.

THE COURT: The state makes a lot of $600-and-over purchases, I know.

MR. WINSHIP: We do, we do, Your Honor, and all of those costs keep going up, as we know. But this is something that -- you know, this is a lot of the reason why we brought this lawsuit. We simply cannot afford this Act, Your Honor.

It imposes a Hobson's choice on us. Either we have to give way to the federal government's dictates and run our budgets off a cliff, or we're going to have to, as the federal government suggests in their papers in this litigation, withdraw

from Medicaid. And I want to discuss the withdrawal from Medicaid point, Your Honor.

The Defendants deny that there's any coercion here from this Act, because they're claiming that the states can simply walk away from Medicaid. Well, we really can't afford to do that, Your Honor, for a number of reasons.

We are very concerned about the provision of healthcare services for poor people in our states, and we do not want to be in a position of having to abandon them, but we're getting millions of dollars of funding from the federal government that is going to be jeopardized for that and for other programs that are interrelated.

THE COURT: What are some of those programs? I've read in your memorandum that there are a lot of programs that are key to the Medicaid program, but I don't know what they are.

MR. WINSHIP: A very big one, for example, is the CHIP program. That's for children's health insurance in order to reimburse for illnesses and injuries that children suffer. That is a very, very big funding issue for us.

I wanted to note, really, on an almost more direct and important level here in a sense, Congress obviously expected that the states would not be dropping out of Medicaid when they passed this Act. We think it's really disingenuous, in a sense, for the Defendants now to be saying that we could.

If you think about it, Your Honor, there is no

provision in the Act whatsoever for the poor to get coverage except through Medicaid. There is nothing in there. There is no way for them to be covered under that Act that we're suing --

THE COURT: Well, before 1965, there was no Medicaid and people survived.

MR. WINSHIP: Well, that's true, Your Honor. But if we drop out of Medicaid, there would be no provision that exists for covering them. We're going to have to come up with something entirely new to replace it, if we're able to do that.

The point I want to make is that the Congress obviously assumed -- in having an individual mandate and requiring every American to get qualifying coverage, the Congress assumed that there would be these various doors to pass through. You're going to have a Medicaid door or a Medicare door, or if you have a large employer, you get coverage through you employer, or else you go to state exchanges. They've got doors here for people to comply with the individual mandate.

But they're telling us, well, walk away from Medicaid. That would lock that door shut, Your Honor, for poor people. We would have no provision for them.

And I want to point out that the goal of cost-shifting that the Defendants have been touting as a justification for this, because we have persons who supposedly can afford to buy insurance, and they go in and they don't have insurance, they get healthcare services, and then they don't pay for them, and

this leaves healthcare providers without compensation.

Just imagine, Your Honor, the kind of cost-shifting nightmare that would be created, because we have a number of statutes -- the federal government in its Summary Judgment Motion in the *Virginia* case has already cited some that show that providers have a number of obligations to provide coverage, healthcare services for poor people that would just come in off the street. And as a result of that, there would be no cost-shifting whatsoever for providers. This cannot be the intention that the Congress had in passing this Act. The idea that we could walk away from Medicaid is just essentially nonsensical.

I would note that all that they have cited to the Court for the proposition that we can walk away is 42 C.F.R. Section 430.12. Your Honor, that addresses amending, not ending, Medicaid plans. Moreover, it requires the federal government, that is, CMS's consent, its permission.

Defendants' position boils down to the states having to go to CMS and ask its permission to withdraw; and then CMS, as it may already, can threaten to withhold funding from other programs in the wake of the withdrawal.

I think this brings the *Dole* versus South Dakota language to life. This is the quote that I think is worth repeating:

"Our decisions have recognized that in some

circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."

Now, Congress has never gone this far before, but they've gone this far this time, and we believe that that is triggered.

THE COURT: Well, I raised it with Mr. Gershengorn. Isn't this really a function of Congress's spending power?

MR. WINSHIP: It is, but it's a violation of the spending power, and that's what *Dole* --

THE COURT: If it's their money, even though they take it from residents in the states, is there any provision for the money to go back to the states, if it isn't given to you in Medicaid? It's the taxpayers' money from the state.

MR. WINSHIP: I don't know how there is a provision for it. But I wanted to say that *Dole* -- we also contest not just the *Dole* coercion point having been past, but *Dole* also expresses four different restrictions on the federal government spending power. We believe all four of those restrictions are implicated here.

First of all, this Act is not in pursuit of the general welfare, not in its substance. This Hobson's choice is going to threaten our ability as states to afford to provide any care for the poor at all, because we can't really afford to stay with this Act; and if we pull out of the Act, the poor are left

out in the cold. That door is locked. I don't think this Act can clearly be called "in the general welfare."

Second provision under *Dole* for the restrictions: Congress's conditioning of the funds has not been unambiguous. None of the states that have agreed to have Medicaid programs, Your Honor, could have foreseen the sweeping changes of this Act. They are tantamount to an ambush.

The third condition: New conditions on continued Medicaid funding under the Act are unrelated to the federal interest in helping the poor. As we pointed out, that led to the Medicaid programs being established in the first place.

The last of them is that the agency -- this Act, the ACA, violates principles of federalism, the Tenth Amendment, individual liberty, and we think, perhaps for the first time in the history of our Union, it implicates the Guarantee Clause itself.

I wanted to mention that the Act --

THE COURT: I think your time is up, Mr. Winship. But if you want to touch on Count Six, I'll give you some time to do that.

MR. WINSHIP: Thank you, Your Honor.

I wanted to note with regard to Count Six two points: One, that that provision, like the others we're complaining about, is not severable from the individual mandate from the rest of the Act. These provisions have all got to rise or fall

together.

The Defendants have admitted over and over again, and it's in the Act, that Congress determined that, without the minimum coverage provision, the reforms in the Act would not work. These are the doors we're talking about.

THE COURT: How does that differ from Fair Labor Standards Act, which the Supreme Court in *Garcia* said state and local governments have to comply with what all the other employers have to comply with?

MR. WINSHIP: Well, Your Honor, we would note that we don't think *Garcia* can save this Act. We don't think it can save those provisions with regard to the employer mandate. We would note that there, the court was upholding Congress's authority to regulate workplace conditions involving minimum wages and hours. This is very different. This is about what is traditionally considered a fringe benefit. This is the first time Congress has ever dictated to the states that they have to provide fringe benefits.

I would note, Your Honor, that in *New York versus the United States*, the Supreme Court itself identified *Garcia* as an --

THE COURT: Well, the term that is normally applied in labor law is wages and conditions of employment. Conditions of employment normally encompass fringe benefits, right?

MR. WINSHIP: They can encompass fringe benefits, if

you determine that you want to make that a condition of employment.

THE COURT: Well, that's the way it's generally been applied by the courts.

MR. WINSHIP: We are saying, Your Honor, that *Garcia* is really about a narrower aspect of workplace conditions. It had to do with making sure that workers were, in effect, not going to be abused with regard to hours or inadequate wages. I think there is a very different concept we have here with regard to this fringe benefit concept.

And that's why the Court in *New York versus United States* made a point of saying with regard to *Garcia* that it represented -- it was an example of the, "...unsteady path of Tenth Amendment jurisprudence." And we think that that's exactly what it represents, it's an unsteady path, and that path has led us to this Act. And we think Congress, in effect, is overreaching with regard to what *Garcia* would have given it powers to do.

Directing states to incur cost to add thousands of employees to a plan or to pay huge penalties, we believe, is prohibited by *New York* and by *Printz*. And I believe my time is up.

THE COURT: It is. Mr. Winship, you haven't mentioned, and the government mentioned only briefly, Count Two, which is a substantive due process claim.

MR. WINSHIP: Yes, Your Honor. That was -- that's a Fifth Amendment claim on behalf of individuals. If Mr. Rivkin could have one minute for that, I believe that that was something that he was going to be addressing during his segment, if that would be possible for him to do that.

THE COURT: All right. Mr. Rivkin, you've got 60 seconds.

MR. WINSHIP: And, Your Honor, I just wanted to mention one thing before he speaks. I just wanted to say that we would ask the Court to receive our PowerPoint presentation as part of the record. I was hoping, after Mr. Gershengorn comes back, that -- we had a scheduling matter that we wanted to bring to the Court's attention.

THE COURT: Very well. We'll make that a part of the record, and it consists of 22 pages, I think.

MR. GERSHENGORN: Just for the record, we object to that. In our view, this is very close to a cert reply. We don't usually submit 22-page briefs to the Court after the briefing is done. I mean, obviously, the Court can do what it wants, but I would like to note our objection for the record.

THE COURT: Well, it's not a cert reply. It's actually a visual aid and, to that extent, it will be perhaps marked as an exhibit and left at that. Exhibit 1, Plaintiffs.

(Plaintiffs' Exhibit 1 admitted into evidence.)

Mr. Rivkin, you have 60 seconds.

MR. RIVKIN: Very briefly, Your Honor. Our point is that we recognize that Congress can regulate terms and conditions of contracts and many other aspects of fundamental interests. We do not believe that Congress can compel individuals to enter into contracts.

But more importantly than that, whenever you do even the most differential review under the rational basis test, you need to do a balancing act where you put on one side of the scale the individual interests, the other side of the scale the governmental interest, the government is acting beyond its enumerated powers. The government interest is zero. So it's invariably trumped by the individual liberty interest being infringed.

THE COURT: Is there a single case in the last 75 years -- your argument would have been a good one in 1930. Is there a single case in the last 75 years, including anything from the Supreme Court, that supports your argument here?

MR. RIVKIN: The logic does, Your Honor, but the government has never tried to do anything like that. And aside from the liberty of contract, with respect, it also has to do with fundamental interest in autonomy and rearing of one's children and family life. This literally requires you to pay for your children's healthcare up to the age of 26. And let's say you decide that you want to run your family in a different way, that you want your children to contribute -- and we're

talking about 18, 19, 20-year olds -- to contribute to their healthcare. You're on the hook to pay for them. That is unprecedented federal intrusion in family life, something the state perhaps can do under police powers, not --

THE COURT: You have to identify a fundamental right of interest. What is it?

MR. RIVKIN: The fundamental interest involved here, aside from the liberty of contract, is the right to organize your -- recognize both with regard to your bodily autonomy and use of medical care, but also you've got your family life, the right to run your family life as you see fit with some limited intrusions available in the exercise of appropriate state interest in the form of general police powers.

The federal government cannot come in and tell you how you should interact with your children in that respect.

THE COURT: The state has police power. The federal government does not.

MR. RIVKIN: Right. And this is the key point that the Defendants missed, because they're trying to say, what's the difference in the application. Well, the state does. So, when the state does it, you have something on the left side of the scale, Your Honor. When the federal government does it, you have zero on the left side.

THE COURT: But you still haven't told me what the fundamental interest or right that you're trying to protect here

is.

MR. RIVKIN: Well, aside -- the first one is the right not to be -- there is a difference in regulating terms and conditions of a contract. The second is being forced into a contract with another private party. There is no case that stands for that proposition, because the government has never tried to do that.

The second one is the right to have considerable autonomy. Again, I'm not suggesting you cannot be repairable. Family autonomy is usually exercised on state police powers, but this is not something that the federal government can do.

THE COURT: Thank you, Mr. Rivkin.

MR. RIVKIN: Thank you, Your Honor.

THE COURT: Mr. Gershengorn, I think you had ten minutes reserved.

MR. GERSHENGORN: Thank you, Your Honor. There's a lot to cover.

Where I would like to start is with the minimum coverage provision and the appropriate concession from the other side that Congress could easily have structured this to say that, essentially at a point of sale that doctors could require individuals to have insurance before they are treated.

And so then what their Commerce Clause boils down to is simply the argument that this is all about timing; that Congress is unable to make the judgment, which is obvious, which

Your Honor acknowledged, that everybody uses healthcare services. And it's quite an extraordinary thing to say that Congress -- and a true exaltation of form over substance, to say Congress had to do that.

THE COURT: It may be a distinction with a difference, though, Mr. Gershengorn, because the authority to tax any number of transactions -- for example, the purchase of an automobile is taxable, but the automobile itself is not taxable.

MR. GERSHENGORN: But, Your Honor, what Congress didn't have to do is say that when people show up -- and this goes, I think, to the uniqueness of this market -- that Congress -- that --

First, there are three unique things about this market. One Your Honor identified, that everybody uses it, the healthcare market. The second is that you can't opt out or control when you go in. And the third is that, when you show up, even if you don't have payment, you get treatment.

And so Congress was not put to the choice that Your Honor has just suggested or the Plaintiffs have suggested, that Congress had to say, if you show up at the emergency room door but you don't have insurance coverage, the hospital can refuse to treat you. That isn't the choice that Congress has to make.

What the Plaintiffs are saying -- are recognizing is that exactly is that --

THE COURT: The hospital does have that right. They

can say, we would like to help you, but we can't.

MR. GERSHENGORN: Your Honor, I think EMTALA, in emergency treatment, requires them to treat people whether or not they have insurance.

What the other side is acknowledging is that Congress could say, if you're going to use medical services, we can require you to have insurance, or we can require you to have insurance or pay a penalty. That is exactly what Congress has done.

Congress has said, we know you're going to use medical services. Your Honor has said it. It is exactly right, and it is exactly that unique -- that is one of the unique aspects of the healthcare market that makes this an appropriate exercise of the Congress power. It is precisely because Congress recognized that we all are going to use -- that we all are going to use healthcare. I'm sorry, Your Honor.

In terms of, Your Honor, what the purpose -- what exactly is the activity, there seems to be some confusion in Plaintiffs' mind, but I hope there isn't in the Court's mind, because it was the first finding that Congress make; that what Congress is regulating was economic and financial decisions about how and when healthcare is paid for.

I can't be any clearer than that, that that is exactly what -- that is exactly what the economic activity is here. That what Congress is talking about is to regulate the way

people pay for medical services. And what the other side has said, which is clearly right, is that Congress could do that at the point of sale.

Here what Congress has done, because of this unique market -- not GM cars --

THE COURT: The Court has said that the commerce application requires activity that substantially affects commerce. Activity. And you're trying to turn the word upside down and say activity is really equivalent to inactivity.

MR. GERSHENGORN: No, Your Honor, I really -- I can't stress more that that is not our position.

First of all, whether or not the activity or inactivity distinction isn't, in fact, either in the Constitution or the court's cases. Our point is that this is economic activity. It is the purchase of healthcare services without paying for them. It is the regulation of how you pay for healthcare services.

That is not a situation in which these are bystanders. These are not people who have opted out of the market. They have opted out, to some extent, of the insurance market, but they have not opted out of the healthcare market. And they can't opt out of the healthcare market, because you cannot control when you need healthcare services.

It is precisely that activity, or more precisely, the link between those two activities that is what drove Congress.

Congress did not have to say, I have to ignore reality -- ignore economic reality and pretend that health insurance exists independent and apart from the market for healthcare services. Congress could reasonably say, as it did and as any economist would, that the two markets are linked, and it is precisely that activity -- precisely that activity that we are claiming is regulated here.

And so we are not -- it is not verbal gymnastics. It is not playing games with words. It is, in fact, just the opposite. It is asking this Court to recognize the economic reality that Congress saw, so that Congress was not forced to pretend health insurance is just like a GM car. Health insurance is a means of paying for healthcare. These are not bystanders in the healthcare market.

THE COURT: Let's talk about power that you're describing versus the reason why you are saying it's justification. The power, you're saying, is because everyone will use healthcare. The reason why you feel this mandate is necessary and proper and authorized by the Commerce Clause is because a significant portion of the population, 40-something million, don't pay for it.

The difference between the power and the reason, you're saying, kind of melds together to give you something that's the equivalent of activity. That's what I understand you're saying.

MR. GERSHENGORN: I'm not sure I understand Your Honor's question. But it is -- it is the -- it is the fact that the uninsured are continuing to use healthcare services but don't pay for them. They are making the decision about how to pay for their -- they are making the decision to pay for them out of pocket and take the chance that they won't pay for them rather than buying insurance and ensuring they can pay for it. And that is the economic activity that Congress is regulating. It is the decision to finance out of pocket rather than to finance by insurance the cost of your doctor, the cost of your hospital. That is economic activity, plain and simple, as sure as if Congress said, you need to pay by cash instead of check or credit card. It is regulating the way people pay for healthcare services.

THE COURT: And the funds that come from this, the $4 billion a year that we anticipate, will go into the general treasury.

MR. GERSHENGORN: They do go into the general treasury.

THE COURT: It's not earmarked for anything.

MR. GERSHENGORN: It's not earmarked. But I should say, Your Honor, actually just to clarify one thing that came up earlier, the insurance companies are making additional payments to the federal government as part of this. So not only is it not -- the insurance companies get, of course, a big bargain

from -- or get a big benefit from the Act, which is that there is a whole lot of people coming into the insurance market. So actually the payment stream is coming into the government from the insurance companies.

THE COURT: So expanding the pool and spreading the risk to a much larger pool.

MR. GERSHENGORN: The insurance companies, I think, perceive that as a benefit.

If I could just very briefly -- I know there was a lot that was touched on, but I think I touched on the Commerce Clause.

Very quickly on Medicaid. The other side cites *Printz* and *New York*. Those cases have nothing to do with this case here. There is no commandeering going on in Medicaid. The choice is either make the payment or drop out of Medicaid.

To the extent there is some confusion on the state of whether they can opt out, we address that at page 5, Note 2 of our reply brief. Of course, the state can drop out of Medicaid if it wants. It's not something that we -- when they say that Congress expected to, as Your Honor said, the world --

THE COURT: If all 20 of the states who are Plaintiffs in this case, if all 20 decided, we just can't afford this, we have to drop out, that would be a very disruptive event.

MR. GERSHENGORN: It would be, Your Honor. It's disruptive because Medicaid is a terrific program that the

states want to use. It's exactly that. But that's not to say, because the federal government puts forward a great program, and because it adds people to that program and says, we are going to pay 100 percent of the cost of that expansion, and 95 to 93 the next three years, and 90 percent every year after that, that makes the program better, in our view.

Quickly on the Anti-Injunction Act, I just wanted to tick off a few quick things.

They claim -- they continue to not understand what I know Your Honor understood when you talked about 6671. It doesn't matter whether this is a penalty in aid of tax or a penalty in aid of marijuana or a penalty in aid of firearms. If it says penalty and it's covered by the statute, it's in. The statutory language controls. There is no abstract question here.

The idea that somehow they are challenging just the mandate, as I think Your Honor suggested, the mandate has no -- you know, the mandate and the penalty are flip sides of the same coin. But more importantly, in the Anti-Injunction Act cases, the Court has said that the Anti-Injunction Act covers anything which would enjoin the assessment and interfere with the -- interfere with the assessment and collection of taxes. If the Court enjoined the mandate, it clearly would enjoin the collection --

THE COURT: Let me make sure I'm clear about your

position. If I should determine that this is not a tax, are you saying that the Anti-Injunction Act still applies?

MR. GERSHENGORN: Absolutely, Your Honor. That's what the two cases we cite, *Barr* and *Warren*, there is no doubt that for the subset of penalties that are covered by 6671 -- it's Subchapter B of Chapter 68 -- that for those things, if you call them penalties, if the -- if Congress calls them penalties, they are subject to the Tax Injunction Act. That's what *Warren* says; that's what *Barr* says.

And 26 U.S.C. 5000(a)(g)(1) incorporates -- does exactly that. That's what it's intended to use, to loop in the Tax Injunction Act for it. And the same thing is true of the employer provision. That's 26 U.S.C. 4980(h)(d). It's the exact same language, except there, instead of saying penalty, it says assessment, because the employer provisions call it assessment.

On standing, Your Honor, they identified five bases. I want to make it crystal clear that we object to all five bases, lest there be any doubt about that.

With respect to *Baldwin*, there is no difference between this case and *Baldwin*; and, certainly, a distinction that the other side draws between -- by saying the allegations in our complaint were sufficient don't distinguish it from *McConnell*. In *McConnell*, Senator McConnell said, I'm running -- I'm running attack ads, and the Court said, you don't have

standing.

We think Your Honor has it exactly right with respect to NFIB. The NTU case, the *Taxpayers Union*, is exactly as in this case. The idea that somehow they don't have to come forward at this point and identify a member is squarely inconsistent with what the Court said in the *Summers* case. The Court, said, the Court has required plaintiffs claiming organizational standing to identify members who have suffered the requisite harm, and the Court could not have been more unambiguous about that.

With the five bases for standing, you know, the main one I wanted to address -- in terms of piggyback standing, we don't think that anybody here has standing. To the extent the Court thought that maybe one or two of the states had standing because of some state statute, which we think is wrong, it would require the dismissal of the other states.

The United States and both sides are entitled to know who exactly is bound by any judgment of the Court. Somebody without such a standard standing would not be. But more importantly, we think that is plainly wrong, although with all respect to Judge Hudson, he did find that the state statute there made a difference. We think it cannot make a difference. In fact, what the --

THE COURT: Let me just ask you -- you just touched on something that bothers me a little.

Are you saying that if, for whatever reason, I determine that the standing is based upon the four states that have adopted legislation similar to Virginia's, that all of the other plaintiff states would have to be dismissed?

MR. GERSHENGORN: I think that's exactly right, Your Honor. There is no standing for those states. I also think that Your Honor can't find that for the other four states, if I could, not just because we disagree with Judge Hudson, and I'll get to that in a second, but several of those states' statutes were passed after the time of the complaint, and it is Black Letter Law that the jurisdiction of the Court is decided at the time of the complaint. You cannot file suit and then later pass a statute that gives you jurisdiction to file suit. That's not how it works.

So the fact that there are these four state statutes, I think, doesn't begin to answer the question before this Court, which is was there jurisdiction at the time of the amended complaint when the courts were -- when the complaint was filed.

And if I may just touch on Judge Hudson's opinion, because Your Honor has indicated some interest in that. We do think that a situation in which a state statute that does nothing more than to exempt citizens from federal law cannot give the state standing. It would make a mockery of the *parens patriae* cases, if that would give a court standing. The two cases that are cited I think illustrate our point perfectly.

The *Alaska v. Department of Transportation,* that was a case in which the state's statute --

THE COURT: Well, let's not confuse standing with likelihood of success on the merits.

MR. GERSHENGORN: No. This is standing, Your Honor. The state has to have an injury from the minimum coverage provision. So what the Supreme Court has said is, you cannot get standing just because your citizens have standing; you have no *parens patriae* standing.

The states say, well, that's fine. All we need to do is pass a statute that exempts our citizens from the operation of the law; and, therefore, we have standing. It would make a mockery of those cases. And none of the cases, other than Judge Hudson's opinion, none of the cases support that. What the cases show is actually something quite different.

When the state enacts a legal regime, that gives them enforcement authority, then a federal statute that interferes with that can give a state standing. That's what *Alaska v. Department of Transportation* does. That was a federal regulation that interfered with state consumer protection statutes. The attorneys general in that case wanted to --

THE COURT: Half a minute to wrap it up.

MR. GERSHENGORN: All right. Your Honor, and I guess I'd just like to step back and say the -- there has been a lot of discussion about the constitutional issues here. We do

think, at the end of the day, that what Your Honor recognized with respect to the due process argument, which is that really you have to go back to *Lochner*, actually applies to many of the states's arguments here today. It is true in the due process clause area; it is true in the commerce area, where they really are going back to deciding -- placing things in categories that Congress can't regulate. It's true in the tax area, where we're trying to decide is this a regulatory tax or is it revenue raising tax. Something the Supreme Court hasn't done since the 1930s. It's true in the intragovernmental tax immunity area, where they're asking to overturn *Garcia* and to go back to *New York v. United States*, the one from 1946, which eliminated these distinctions. And it's true in the Medicaid area, where there is no case in the 75 years that has adopted the states' theory, and in fact several courts of appeal that have squarely rejected it.

That kind of analysis, as I said at the beginning, the state is free to disagree with the policy judgment Congress made. It is not free to overturn 70 or 100 years of constitutional law to make those preferences unlawful.

Thank you.

THE COURT: Let me thank both sides for excellent arguments and for excellent briefing.

And, Mr. Winship, you're standing for a reason.

MR. WINSHIP: Yes, Your Honor. I had mentioned that I

wanted to bring a scheduling matter up, if Your Honor would indulge me.

THE COURT: I would be happy to indulge you, and then I will tell you what I think we're going to do on a schedule. But go ahead and tell me what you want to do.

MR. WINSHIP: Thank you, Your Honor. I contacted the Department of Justice yesterday. And this is all, by the way, in the spirit to kind of move this litigation forward. We appreciate from some of the orders that Your Honor has entered in this case that Your Honor understands how important it is for our Nation to get this matter resolved as quickly as possible. We have so much at stake.

And I would just note, Your Honor, that the way that the final scheduling order was set up was going to provide for us, if we survived the Motion to Dismiss -- that is, the Plaintiffs -- if we survived the Motion to Dismiss, we would then, as we have told the Court, be coming forward with our own Motion for Summary Judgment. And the Court had set forth, basically, a schedule with 40 days for a response, and I believe it was 21 days for a reply, and then there would be an oral argument on our Motion for Summary Judgment.

What's happened since then, Your Honor, is that, after the Motion to Dismiss in the Virginia matter was denied, the parties have filed cross motions for summary judgment. And essentially what I proposed to the Department of Justice

yesterday was that we try to move this along, and I was just concerned about their filing a Motion for Summary Judgment that might somehow bog this process down. I proposed to them that what we would do would be --

THE COURT: Well, I have given you an opportunity to file a Summary Judgment Motion at any time, if you wanted to do that.

MR. WINSHIP: Yes, Your Honor. And we do believe it makes a lot of sense for judicial economy, as well, for us to wait and do that following your order on this motion being entered.

But the proposal that I made was that 14 days after Your Honor's order on the Motion to Dismiss is entered, assuming that Your Honor denies that motion and this case is going forward, that we would have -- we invited the Department of Justice to join with us in having cross motions for summary judgment filed at that time. And we were proposing that, because the legal issues have all been briefed, and they have already done a substantial amount of what they would be doing here, at least with regard to the individual mandate, in their summary judgment filing in Virginia, we thought that, instead of 40 days, we believed 28 days would be sufficient for the time to respond, and that ten days after that for the reply would work.

And we basically invited them to join us in that so that we could expedite this matter. And my understanding from

what I've heard back from them, I don't think I was entirely clear as to where they are; and, of course, they can speak for themselves on that, Your Honor. We simply want to point out that, if they are willing to do that, we think it would be a great idea. If they're not willing to do that, that's fine. We're not insisting that they file a motion at all. They can file their Motion for Summary Judgment at any time they want to. But what we're suggesting is, if they do not file in accordance with this kind of a timetable, we would like to have their motion and our motion disengaged from one another. That is say, Your Honor, they had an oral argument on their motion, and we would like for our motion to go forward and have an oral argument as soon after the reply has been filed and as soon as the Court can hear it, and not have our oral argument on our Motion for Summary Judgment held back, while we're waiting to get the briefing finished on the Defendants' Motion for Summary Judgment.

And, by the way, we are willing, as well, on their Motion for Summary Judgment, to live with those same time parameters. Whenever they file it, we would be willing to file our response in 28 days, and we would be looking for them to do a reply in ten days, Your Honor.

THE COURT: All right. Mr. Gershengorn?

MR. GERSHENGORN: Your Honor, I mean, obviously, that's something that has come up while we were preparing for

argument. But I will say this:

It does seem to me, a couple of things, first of all, cross motions -- were this Court to deny our Motion to Dismiss, that cross motions would be a more sensible way to proceed.

Second, I'm not sure I would understand why we would deviate from the schedule that Your Honor set back with -- set the schedule, which is 40 days for response and 21 days for reply, although we think cross motions is not always the most efficient way to do it, it results in six briefs for the Court, we are comfortable with that.

I think the major point of disagreement, we think we should stick to the schedule Your Honor set already on April 14th; and, second, 14 days seems to us a short time frame, because, quite frankly, we don't know what Your Honor is going to say in your opinion.

Although we have in other cases briefed things, they were all based on the opinion that the court ordered; and we think 14 days is, quite frankly, an extremely short time to digest whatever order this Court issues, and then figure out what's left for summary judgment.

I would also just say -- so I think largely where, you know, this Court were to enter something that's in 30 to 40 days after the Court issues its opinion, cross motions for summary judgment, 40 days, 21 days as reflected in the order, we're comfortable with that.

The only thing I would flag, again, without having seen your Court's order, it's very hard to know what the next set of proceedings would look like. We would just reserve the option to say, if Your Honor issued the order in such a way that made facts relevant, or something like that, we would reserve the right to come back to the Court and say we would review the schedule. I think largely we're saying that the schedule for cross motions for summary judgment, I believe a more reasonable time after Your Honor issues the order, and then the schedule Your Honor has already set.

THE COURT: Well, I had given you the opportunity when we had the scheduling conference, and you indicated it was not your intent to file a Motion for Summary Judgment or cross motion at that time. That was your decision, I thought. But I gave you the opportunity, if you want to do it, and I still do.

MR. GERSHENGORN: That's right, Your Honor. I think it's a question of -- I think both sides are comfortable with that approach. It really is a question of what is the trigger after Your Honor's decision, what is the relevant, essentially, due date for the cross motions. It does seem sensible to have them on the same schedule, and it just seems to us that 14 days is extraordinarily short on a case of this magnitude, without knowing what Your Honor is going to say in his opinion.

Other than that, as I said, the schedule Your Honor set out on April 14th makes sense to us.

THE COURT: Give me just a minute to look at my calendar.

Well, it is my belief that we can move this case somewhat faster than we originally had contemplated. And I think, because of the similarities of a number of these issues and because we've actually had a peek at the law already with respect to determining whether a claim stated a cause of action under the facts and the law, I think we can move it reasonably fast.

I will have the order out within 30 days. Thirty days from today will be by, or no later than, October 14th. If we add 14 days to that, that would be October 28th. If we add 28 days to that, I think that would take us to November 25th -- is that right? -- which happens to be Thanksgiving Day. And then ten days after that would be December 5th.

MR. GERSHENGORN: If you're inclined to go with that schedule, one request I have is, from our perspective, we would rather have three weeks and three weeks than two weeks and four weeks. So without changing the ultimate date, our preference would be October 21st and then three weeks --

THE COURT: I can certainly accommodate that. If that's your request, that's certainly fine with me. So we would have 21 days, 21 days, and then ten days. Is that what you want?

MR. WINSHIP: That would be agreeable with us, Your

Honor.

THE COURT: That's what we'll do. As I said, I will have a written order out no later than October 14th.

MR. WINSHIP: And, Your Honor, we would be hoping then that we would be in the position to have the oral argument on our Summary Judgment Motion by the end of this calendar year?

THE COURT: I was -- I was looking at January. Frankly, I was looking a little later than January. This schedule will permit to have oral argument before Christmas, if you want to try to do that.

MR. WINSHIP: We would like very much to do that, Your Honor.

THE COURT: Let's take five minutes. We'll come back and talk about it then. Look at your calendars, and I'll look at mine.

We're in recess for five minutes -- make it ten. Let's make it 25 after. We'll be back in ten minutes.

(Recess taken 11:22 to 11:30 a.m.)

THE COURT: Please be seated. Thank you.

It looks like we have everyone back. Let me count heads and see. Well, we have the ones that count. All right. All of the attorneys of record are here.

I can set argument and hearing in this for the Summary Judgment Motions almost any time during the first two weeks of December. Not the first two weeks, because actually December

begins on a Wednesday. But the week of the 6th or the week of the 13th almost at any time. So what's your preference?

MR. GERSHENGORN: What's our preference during those two weeks, Your Honor?

THE COURT: Any time during those two weeks.

MR. GERSHENGORN: I think we would prefer toward the end of the second week.

THE COURT: December 15th?

MR. GERSHENGORN: Can we do it the 16th?

THE COURT: The 16th would be fine.

MR. WINSHIP: That's agreeable to us, Your Honor. I believe that's a Thursday.

THE COURT: That's a Thursday. December 16th it is.

MR. GERSHENGORN: And I think if Your Honor is -- I don't know how long in advance Your Honor needs the reply, but I think we talked about a schedule we would have the reply done on the 10th.

THE COURT: Ten days -- of course, under our new civil procedural counting, we try to do away with 10 days. You want to make it 14 days?

MR. GERSHENGORN: With the intervening Thanksgiving holiday, we're trying to make it a little more sane, if Your Honor is comfortable getting the reply on the 10th.

THE COURT: We had 21 days, 21 days.

MR. GERSHENGORN: And then we ended up, right, we were

thinking, I think, the 4th. Is this right? The 4th of November for the motion.

MR. WINSHIP: Yes.

MR. GERSHENGORN: The 23rd for the opposition. And then, Your Honor, we were just trying to, quite frankly, make the reply briefing a little more humane, given the holidays. But we can make it the 10th, if that makes Your Honor's schedule easier.

MR. WINSHIP: Your Honor, I think the critical question here, if I may suggest, how much time are you comfortable with having all the papers in your possession between then and having the oral argument? We certainly want to accommodate you.

THE COURT: I normally plan on two weeks, and that looks like what we're dealing with. So that should be no problem.

MR. GERSHENGORN: I'm sorry, Your Honor. So you would want the reply by the 2nd?

THE COURT: I'm backing up now. If we had the hearing on the 16th, that would mean, if you got everything to me by the 2nd, and your 21 and 21 ends up about -- of course, it's quite possible I would have an order out before October 14th, not guaranteeing, but quite possible. So all of these days could move up some. But at the outset, we're talking 21 days -- I have to look at it.

Well, let's go with the schedule you proposed.

MR. GERSHENGORN: Is that the 10th, Your Honor, reply on the 10th?

THE COURT: That would be the 23rd.

MR. GERSHENGORN: The 24th, 23rd.

THE COURT: And ten days after the 23rd would be -- the 30th would be a week, three more days would be the 3rd. That's fine with me.

MR. WINSHIP: The 3rd is agreeable to us, Your Honor.

MR. RIVKIN: Just to clarify, if you issue an order earlier, you will then move all of the dates up?

THE COURT: Everything except the hearing date. The hearing date is a fixed date. Everything else will be predicated on when I get the order out.

MR. GERSHENGORN: Your Honor, would it be possible to have the 6th for the reply?

THE COURT: The 6th would give you over the weekend, right?

MR. GERSHENGORN: It would. And just because -- we would be working over Thanksgiving. If we could get the 6th, it would make a difference.

MR. WINSHIP: Your Honor, we're agreeable. The question is, is that enough time for you?

MR. GERSHENGORN: That's exactly what I'm asking.

THE COURT: That is a little bit of a problem. Let me

just check, because I have -- I have judicial duties in Washington for the entire week of the 29th. So I will not be back here in the office until the 6th, anyway. So that's fine with me.

MR. GERSHENGORN: Thank you, Your Honor. I appreciate it.

THE COURT: So we're talking, if, at the outside, the order doesn't come out -- my order doesn't come out until the 14th, we're talking about 21 days, which would take you to the November 4th; another 21 days, which would take you to the 23rd day of November; and then the reply would be a little bit more than ten days, to December 6th; essentially 13 days.

MR. GERSHENGORN: Thank you, Your Honor.

MR. WINSHIP: Thank you, Your Honor.

THE COURT: And, again, I can tell you a little bit on the leaning side that I suspect the leaning right now would be the Motion to Dismiss will probably be granted on a couple of counts and denied on at least one count. That's my leaning.

Anything else? If not, we're adjourned. Thank you very much.

(Proceedings concluded at 11:31 a.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy are noted within the transcript.

s/Donna L. Boland ***9-20-10***
Donna L. Boland, RPR, FCRR ***Date***
Official Court Reporter