IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

AMERICAN ASSOCIATION OF ANCILLARY BENEFITS,	§	
Plaintiff,	§	
vs.	§	Case No.: 4:24-cv-00783-SDJ
XAVIER BECERRA, et al,	§	
Defendants.	§	

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING PROCEEDINGS
BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Friday, September 20, 2024; 9:13 a.m.
Plano, Texas

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:
(Continued on page 2.)

Dominick L. Lanzito
PETERSON, JOHNSON & MURRAY, LLC
1301 W. 22nd Street, Suite 500
Oak Brook, Illinois 60523

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GAYLE WEAR, RPR, CRR
Federal Official Court Reporter
7940 Preston Road
Plano, Texas 75024
Gayle_wear@txed.uscourts.gov

APPEARANCES:
(Continued from page 1.)

FOR THE DEFENDANTS:

Kyla Snow
DEPARTMENT OF JUSTICE - Civil
1100 L Street NW
Washington, DC 20006

ALSO PRESENT:

Alex Gonzalez

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September 20, 2024 9:13 a.m.

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P R O C E E D I N G S

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THE COURT: Good morning. You can be seated.

So we're here today on cause number 4:24-cv-783, American Association of Ancillary Benefits versus Xavier Becerra, et al. And we'll have appearances first. We can start with plaintiff.

MR. LANZITO: Good morning, Your Honor. Dominick Lanzito, L-A-N-Z-I-T-O, on behalf of plaintiff.

MR. SMITH: Michael Smith on behalf of plaintiff. And with us is Alex Gonzalez.

THE COURT: All right. Thank you, all.

And for the government?

MS. SNOW: Good morning, Your Honor. Kyla Snow on behalf of the government.

THE COURT: All right. So counsel, we're here on the amended motion for preliminary injunction filed by the plaintiff. I do have all the filings made by the parties; I've been able to review them.

And I will let you know that we get the best sound from that podium sitting there in the middle of the courtroom. So while you're presenting, I'll ask that you speak from there.

And I am going to try to put some time limits on the argument. I'll probably have questions for you. So if necessary, I'll give you some additional time to speak, based on our discussion. But for the moment, I want to try to put 20-minute limits on each side. Given the issues before the Court right now, I think that's going to be appropriate. I'm sure we'll go a little bit longer to the extent, again, that I have questions for you.

Since this is the plaintiff's motion, Mr. Lanzito, I take it you'll be speaking for plaintiff.

MR. LANZITO: That's correct, Your Honor.

THE COURT: All right. Why don't you go to the podium, and we can have you make your presentation on the amended motion.

MR. LANZITO: Thank you.

THE COURT: And you can proceed when you're ready.

MR. LANZITO: Thank you, Your Honor.

Just briefly, I'm going to start with a little history about the short-term, limited duration insurance plans, the prior rules going back to 1996 because I think that's going to give a little context because before Your Honor today with CMS-9904 dash F, as in Frank, for the first time, this administration has taken a definition that I would say is completely contrary to the history, to the legislative intent of Congress from 2017, as well as the overall purpose

of this particular rule, Your Honor.

And so I think when we start with this purpose of this 2024 rule that impacts not only AAAB's membership, the -- those are the industry professionals -- it detrimentally and adversely impacts consumers to the magnitude of eight million people plus. And that's based on the National Association of Insurance Commissioners; that's a body of elected and appointed state regulators who specialize in the insurance industry and the regulation thereof.

THE COURT: That does raise one issue that I just want you to be sure that you address in your presentation. I'm sure that you're going to address how you substantively meet the requirements for injunctive relief. But as you know, the government has raised two arguments that I can consider to be preliminary to reaching the merits; one of those is a standing argument, and the other one is a venue argument.

The standing argument in -- speaks to, at least in part, something you just mentioned, which is who does the plaintiff have standing to represent or to appear in court on behalf of. And so, for example, consumers. Does your client have standing to represent consumers; and if not, who do they have standing to represent? And, of course, I'll want you to discuss what the injury is.

So I know you wanted to give some preview of

everything, but I wanted to let you know that topics that I'm hoping you'll be addressing are going to be venue, standing, as well as the merits of your request for injunctive relief.

MR. LANZITO: And, Your Honor, yes, I'll go to those right away and then I'll have --

THE COURT: All right.

MR. LANZITO: -- just so we can dispatch with standing, and that's really the *Hunt* case that was identified in our reply brief, as well as to address those particular objections.

There's a three-prong test. In our membership, it does not include consumers, it does include those individual companies, and they're identified in the reply and the supplemental affidavit of Michelle Delany. And those are companies that either administer and/or issue these short-term, limited duration plans, and those are the companies who are going to be irreparably harmed.

So we have what's known as associational standing, Your Honor, and we meet the three-prong test. Our members, undoubtedly, would have standing on their own because of the irreparable harm they would suffer.

Two, the interests -- our association is -- in part advocates on behalf of these particular industry professionals and companies, not only with guidance on regulations, but in the very instance we're before Your Honor

as to advocate on behalf of rules that will significantly impair their ability to serve the consumers.

And, three, you know, the last part of this is whether the claim asserted or the relief requested requires participation of the individual member, Your Honor. And as I indicated in our reply, at least one member, Premier Health Solutions, has indicated they would be willing to become a named plaintiff to establish that. But, Your Honor I don't think --

THE COURT: Well, to be clear, they're not before the Court at this time.

MR. LANZITO: Correct.

THE COURT: So right now, it's just your client and, as I understand your argument, that what you said so far, there's two aspects from the associational standpoint, you're saying that the companies that are members of your group -- I'm going refer to you as A-A-A-B. Is that --

MR. LANZITO: Triple A-B is fine.

THE COURT: Triple A-B, okay -- then there are members of AAAB that issue STLDI policies, you believe that you drive standing from them because you're saying they would be injured. Is that fair?

MR. LANZITO: Correct. And, Your Honor, the third aspect of the analysis is whether they're necessary to add or to be part of the litigation in order to derive some relief

from the Court. And I don't think the individual members, given the scope of the challenge here, are required individually for standing purposes; and as such, I think all three factors of associational standing have been met. And I --

THE COURT: Well, I wanted to hit on your second point for a moment and make sure I understand it because your second point I think was going up to the organizational standing or AAAB's standing itself. And maybe you can talk about that for a moment. I want to make sure I have your argument on that.

MR. LANZITO: Okay. So with respect to the second prong, Your Honor, it's whether the interests of the Association seeks to protect are germane to the purpose of the *Hunt's* preconditions in order to establish associational standing. And the American Association of Ancillary Benefits, AAAB, Your Honor, its purpose is in part advocacy on behalf of industry professionals with regulators and with -- in order to secure legislation and rules that are favorable, and they work with state regulators as well as federal regulators, Your Honor.

And so if that's their purpose, that's how we satisfy the second prong. I think it's clear. We've attached some of their -- with the supplemental declaration, we attached some of the materials from the Association

itself. So it's not going to ring hollow for Your Honor. This is something that the Association was created for, its membership relies upon, and that's why I think we have associational standing and meet each of the criteria.

THE COURT: All right. One follow-up question on that one, just to close the circle on that argument, is how does the new rule impose harm on AAAB? I understand the role you've talked about AAAB playing in this industry. But how does the rule harm AAAB itself?

MR. LANZITO: Well, Your Honor, it harms its members. And by harming its members -- and the new rule is an existential threat to some of the membership, but ultimately results in an existential threat to the Association itself by eliminating potential members or actual current members. So in advocating, you know, for the rule, I believe the harm to them is they're not being able to fulfill the purpose of the Association. And ultimately an ancillary benefit, which is either in this case short-term, limited duration insurance and/or other supplemental plans, is being removed from the market, and that's a market that our association members are part of and that we advocate on behalf of this particular market.

The Ancillary Benefits aren't necessarily -- we're not advocating for ACA plans, Affordable Care Act plans, Your Honor, or other plans. Our entire mission and purpose are

these other supplemental plans, and they advocate for legislation and rules that help these plans coexist in a marketplace.

THE COURT: All right. Is that what you wanted to say on the standing issue? Or do you have more you wanted to say on standing?

MR. LANZITO: That's all, Your Honor.

THE COURT: So maybe we can go ahead and talk about venue, the venue issue. And as you know, the government has said this Court is an improper venue. And I'd like to, first of all, get your response on that as we stand now procedurally, meaning we only have AAAB in front of the Court at the moment. And then I noted, obviously, in your filings with the Court an indication that one of the members may be part of the lawsuit, but they're not yet. So obviously, as we stand here today, what I'm look at is the AAAB on one side of the V. And so I would like to hear your response to the government's arguments on venue.

MR. LANZITO: Your Honor, yes. And I have reviewed that. I want to just start out with this wasn't forum shopping. This wasn't an attempt to skirt the federal rules. I just want to make it very clear. And I know maybe it was a little unclear when that response had been made and those objections had been made. But as we stated in our brief, we engage in a substantial amount of business. Our CEO is

present in Frisco, Texas, three miles from here, conducting the business of the Association -- I'm sorry, the president, not CEO, Your Honor. I misspoke. And I understand, if necessary, they would join.

So we're looking at basically a delay if we had to challenge the venue and get either transferred back to the Southern District of Florida where the location of AAAB's principal office is -- but, you know, given what we have supplemented with, I think we do satisfy that this is an appropriate venue, Your Honor.

THE COURT: Well, let me ask you if you -- I mean, you agree with the government on the controlling statute and the controlling test its put forward in page 11 of the government's brief, but it's basically tracking Title 28 United States Code, Section 1391(e)(1). And so it identifies districts that are the proper forum for this action mainly being a district where, you know, a defendant resides for a substantial part of the events or omissions giving rise to the claim occurred, or where the plaintiff resides, with some qualification, you know, about not having real property involved in the case.

And so, you know, the government's argument works through those and notes the defendants aren't here, and then makes the argument that the events and omissions complained of occurred in obviously Washington, D.C., and then notes

that the plaintiff is -- appears to be the principal place of business in Florida.

And so that's where I'd like to get your thoughts on, you know, you agree this is the test the Court needs to look at, and, you know, what's your position as to the government's -- the government's comments on how each one of those potential aspects of this being the proper district or not being the proper district plays out here.

MR. LANZITO: One, I don't think it -- I understand it's a venue issue as opposed to an ultimate jurisdictional issue. I believe they have cited to the correct statute. However, Your Honor, when I'm looking at this, it is our position that we're looking at a portion or substantial part of this is located in this district or in this venue. I would submit that it actually has been, and I think that was your second point that you had raised.

In all fairness to the government, they didn't have the opportunity to see the membership list, the location of the membership. But I think we have satisfied those prongs given where we conduct business and how we conduct business. And to say that, you know, we're not located or we're not officed here I think is belied by, you know, the affidavit, the actions of the Association. So I do believe we're in this venue, and venue is appropriate for that reason.

THE COURT: All right. And I may come back to you.

We're going to hear from Ms. Snow with the government's position on that. But I wanted to ask you about this specific argument made by the government in their brief on that. Is --

MR. LANZITO: I understand.

THE COURT: -- that what you wanted to say on venue for the moment?

MR. LANZITO: Yes, Your Honor.

THE COURT: All right. So you can proceed, then, to the merits of your preliminary injunction request.

MR. LANZITO: And I understand that my time's limited, Your Honor. I want to keep it brief. But, you know, the entire premise of this, the executive order which ultimately led to CMS-9904-F, was they redefined "short-term, limited duration" in a way that it's never been defined since 1996. And what I mean by that is the three months in duration had been defined. Thereafter, the 2016 rule with the premise of the ACA did not -- it didn't prohibit the industry from writing multiple short-term, limited duration insurance plans. The 2018 rule was consistent with the legislation from 2017 because they wanted to open up the ultimate -- a number of insurance plans and options available to consumers.

Here, the purpose is to avoid consumer confusion. And for the first time, we have a governmental rulemaking

agency and body that has taken the position that unlike prior administrations and rules which have attached notices to avoid consumer confusion, which have, I would say, identified and defined the legislation consistent with the legislation at the time, this new rule essentially seeks to remove any options of insurance, and has done so in a way that exceeds their authority and the rulemaking authority. And I think the *Loper Bright* decision is very important in that regard.

So what we have here is a rule premised upon informed choices, wanting to make sure that there's no consumer confusion, Your Honor. But from -- and I think that based on the record, based on the evidence in the rule, it is belied by the fact that even CMS's own press release in early of this -- 2024 -- January of 2024, that when the old rule and old definition of "short-term, limited duration insurance" was in place, meaning it's a policy with a duration -- a term of less than a year, and they cap the duration at 36 months, even in the face of that, the ACA without an individual mandate post-2019 and short-term, limited duration have coexisted.

So this premise that we need to get more people towards the ACA is belied by this January 2024 press release which indicated more than five million people, new enrollees, have joined the ACA, a record-breaking number of enrollees, pushing it to just north of 21 million people who are

enrolled in ACA plans; that's excluding private insurance.

So what that very fact tells us, Your Honor, is there's no consumer confusion, and people don't need you to get rid of -- or the government to get rid of a potential coverage option. It may not be as good. It may not provide all the coverages or the same benefits. But then again, our Congress has told us we want freedom of choice, and they did that with the 2017 tax cuts and jobs act legislation which effectively eliminated the individual mandate. Meaning, when you turn the fine or penalty to zero, there is no penalty for not having ACA or comprehensive coverage. So the legislator -- the legislation and Congress has spoken clearly. That has not been disturbed.

And so what this rule seeks to do is impose an individual mandate. And the timing of this could not be more clear, Your Honor. We have a situation where in the eleventh hour of an administration, without state regulatory conference -- and, Your Honor, I've attached those comment letters because even the frustration of state regulators where they're encroaching on the McCarran-Ferguson Act, and the obligations of the states and the rights of the states, I should say, Your Honor, to regulate insurance -- and they are the experts -- even they are at odds with the pending legislation or the rule that is now in effect, I shouldn't say -- I should say.

THE COURT: And I did see those arguments in your brief about timing and I would say the, you know, failed attempts at passing legislation relative to this topic in Congress over the last few years.

But one thing I want to be clear on is the legal framework for the arguments you're making, and to make sure I understand your arguments, because you have made an argument that the rule is in violation of the constitution, and I think you've also made the argument that the rule exceeds the authority of, I'm going to say, the Departments. You've got three government agencies here. You've also made some other arguments, but I'm not sure how -- whether they're pertinent to the injunctive relief sought at this point. But I see these I think as your principal arguments.

So I think you have arguments under -- to me, your first argument is this simply exceeds these Departments' authority under the legislation, the authorizing legislation.

I take your next arguments to be if it does not exceed the authority, meaning if it would otherwise be consistent with what the statute -- we have a major questions doctrine issue or a nondelegation issue. And maybe the major questions doctrine issue is one that you'd consider to be coequal, but I know nondelegation is obviously whether we have an intelligible principle in this legislation. And the major questions doctrine, as we know, has to do with whether

or not we believe that Congress would've given this type of authority to these Departments on this issue. Is that fair? Do I have those arguments correct in terms of what you're asserting?

MR. LANZITO: Yes. And, Your Honor, I think with respect to the Administrative Procedure Act, they failed to fulfill certain obligations under the Regulatory Flexibility Act, as well as the APA. So I think it all flows.

But I do want to touch upon the major questions doctrine. Your Honor's assessment is correct, to answer your question first and foremost. But if I may...

THE COURT: Yes.

MR. LANZITO: I think it speaks volumes, Your Honor, here when we have a case in 2015 -- that I believe it didn't mention it in name, but the major questions doctrine came up in *King v. Burwell* because they used the analysis, was this a vast economic or political significance? Will this rule have that effect? And it's not mentioned in the government's brief, but, yes, it will. And I'm going to tell you why.

Because that case dealt with an IRS code interpretation and tax ramifications. But interestingly, there's a quote and a reference stating that when you have millions of insureds or consumers who purchase insurance, and their rates are going to be impacted or otherwise affected,

that is a matter of vast economic and political significance. That was just millions.

Here, if we are to believe the record as provided by the Departments in their rule, we have 8.7 million consumers who -- and policyholders who are going to be adversely impacted. There's no way to argue that this is not a rule that falls under the major question doctrine specifically.

And I'm going to make a distinction between the prior rules and the current rule. The current rule, admittedly by the government, by the Departments' own take, will provide for gaps in coverage. They don't know how many gaps. But in four months, they know there is a potential for gaps in coverage options. It may not be perfect coverage, but it's coverage, Your Honor.

The other rules have never gone this far. If you concede that less than a year we'll get you from enrollment to enrollment, you're ensuring that the consumer has an option of coverage of their own choosing, at what they can afford. So we know it's of major economic and political significance for that reason. The detriment. And then our clients have regulatory costs that are not recoverable. And as we said in our brief, that demonstrates irreparable harm.

But with -- back to the major question doctrine, if we know that it's multiple -- in the millions, which has

already been by the Supreme Court deemed to be vast political and economic significance, then one can only conclude that without a direct delegation of congressional authority -- and here, the authority is the Departments are allowed to promulgate rules that are, you know, necessary or appropriate to carry out the ACA, HIPAA, and those particular pieces of legislation and --

THE COURT: What do you -- I'm sorry.

MR. LANZITO: Go ahead, Your Honor. I'm sorry.

THE COURT: Let me ask you a question about authority under the statute. And you can come back to major questions. But in terms of authority under the statute, the government has framed this as concerning the Departments' authority to define this term, "STLDI," "short-term, limited duration insurance" and their ability to define that under the legislation, and that this is within the scope of these Departments' authority to do that, and that's what they're doing.

So I wanted to ask you, do you agree that's what we have at issue, in terms of what is their authority and what are the limits or bounds of their authority, is how to define this "short-term," you know, "limited duration insurance"? Do you agree that that's the authority we're talking about? And then can you tell me, you know, why this is outside of their authority to do that?

MR. LANZITO: Okay, Your Honor. Yes. And I agree that's the -- the Departments' arguments in this particular case is we have this unbridled -- I'm going to call it unbridled authority, if you look at it, to define "short-term, limited duration insurance" as anything under a year. Well, I would think there is and should be a more critical view when you are contracting rights as opposed to expanding them. And when you are contracting rights with the purpose that is inconsistent with Congress's explicit legislation, meaning no individual mandate penalty and, thus, no individual mandate, you are now exceeding the bounds of your authority on how you define it.

THE COURT: Do you agree, though, that with the government that these Departments have been exercising this authority for about 25 years, since 1997? I believe that's what the government indicates in its brief. Have they been exercising this authority for that period of time, and defining this term, "short-term, limited duration insurance," for that period of time?

MR. LANZITO: Your Honor, they have -- I will concede they have defined "short-term, limited insurance plans" since HIPAA -- and I think the first rule came out in 1997 -- but they have never, in the history, defined it in such a way to prohibit it from meaning a definition of "less than a year," or from defining it in such a way to remove it

as any option that is -- functionally can cover a gap. So they have never done this.

This is the first time -- even in 2016, when there was an individual mandate, that particular rule, Your Honor, only defined it with a term of three months. In that rule, Your Honor, it specifically noted *we cannot prevent stacking* -- that's getting multiple three-month plans to cover a gap -- *because we can't enforce it*. So there was a recognition even with an individual mandate that we can limit the term, but ostensibly we can't really keep it from being in total less than a year.

THE COURT: Well, I think you're getting at this distinction in your argument. But I want to make sure that we close the circle on exactly, you know, what your argument is on this point because part of the government's argument is that if you took AAAB's argument to its logical conclusion regarding the bounds of the agencies' authority in regard to defining this term, that the 2018 rule which AAAB, you know, seems to be in favor of, would also be -- have been outside the authority. And as we know, that was approved by the D.C. Circuit, and seems to be a rule that AAAB thought was appropriate and thought it was an appropriate exercise of these Departments' authority.

So I would like to get your response on the notion of what is it about this new rule that somehow takes it

outside the authority of these Departments where, for example, the 2018 rule, I think from your client's perspective, is within their authority to define this term "STLDI." So, you know, where is the -- what is the distinction here that says this new rule somehow is outside of the Departments' authority where, for example, the 2018 rule was not?

MR. LANZITO: There's a couple points on that, Your Honor. Historically and for 20 years before the ACA, short-term, limited duration insurance had a term of less than a year; that's what the 2018 rule included. Even the 2016 rule, though, Your Honor, although the term is only three months, it was consistent with the legislation at that time.

So what I believe makes it distinct from both 2016 and the 2018 rule, Your Honor, is the Departments -- it's not the term that's the problem, it's the duration, right, because now we're going to say we are going to get rid of any product that is not consistent with what we want consumers to be in because we don't think that's best for them. That's the distinction, Your Honor.

Even if you were to go back to the 2016 rule, the industry would be able to assist consumers. Our clients would be able to adjust to that. The commissioners who have already dealt with that would be able to adjust to that. But

now we are taking -- we are going into an area where they're defining things in such a way that's inconsistent with legislative intent, which was never previously done, Your Honor, at least with respect to short-term, limited duration insurance. I know there's other matters --

THE COURT: Well, let me follow up one more time on that because you're saying what they're doing now is inconsistent with legislative intent. But, again, when we're talking about what the legislation is saying, the legislation is giving these Departments the authority to interpret this term, "STLDI," what does "short-term, limited duration insurance" mean. And if we agreed that the Departments have this authority and have had this authority under controlling legislation, then they are making decisions we all understand that are policy decisions, and those have obviously varied through particular executive administrations.

And so I would like you to put a little finer point on your argument that this rule is now contrary to legislative intent if the legislative intent that we seem to agree on is that the Departments have this authority to interpret what this term means, and they've exercised that authority over the years in ways that vary in terms of what types of LDI insurance they were going to define as available and that could be put on the market.

So what is it -- when you say that the current rule

is contrary to that legislative intent, I'm trying to get to the point of what you mean by that.

MR. LANZITO: So, okay. Thank you, Your Honor. The legislative intent I am talking about are the rules they're seeking is the legislation under the ACA and HIPAA, which they are saying "We have the authority to promulgate rules to -- that are reasonable, appropriate, and necessary to make -- to effectuate Congress's authority under those. That's not what they're doing.

Generally speaking, if we're going to speak in generalities, yes, they have the rulemaking authority to define "short-term, limited duration insurance" plans. Absolutely, Your Honor. However, what they can't do is define it in such a way that is now contrary to other pieces of legislation. If you are going to, Your Honor, promulgate rules to effectuate Congress's intent of the ACA, you have to look at all of the ACA.

THE COURT: Well, that's helpful. So what other legislation is this contrary to?

MR. LANZITO: Well, that's what I was referencing, Your Honor.

THE COURT: All right.

MR. LANZITO: So whether or not and then if we get into case law, you know, *Loper Bright Enterprises*, a very recent decision and, you know, post the publication of this

rule, really makes it clear that it's up for this Court to define what is meant by short-term -- what is a fair and reasonable interpretation of that legislation, defining "short-term, limited duration insurance" because what we're going to do is then waffle back and forth and vacillate between administrations, which does not foster consistency, does not stabilize insurance markets or other markets. And that was in one of the amicus briefs that we cited in our reply as well, Your Honor.

So I would say, Your Honor, that, you know, when we're looking at the authority, it has to be exercised within the confines and parameters of all of the legislation you're seeking to effect, not just, well, we can define "short-term, limited duration insurance." You have to do that with the current legislation. And if Congress wants to change its position on the ACA and reinstate the individual mandate with the penalty, they can do so. But until they do that, Your Honor, there's not -- there is not explicit or implicit authority to define "short-term, limited duration insurance" plans contrary to that legislation.

THE COURT: Well, I agree with you that under *Loper Bright* that there is no doubt that one of this Court's tasks is to determine what the bounds of the Departments' authority is in any given case and with regard to any particular grant of authority in legislation.

But I think what I heard you say a few minutes ago is the problem with the Departments' definition of "STLDI" and the current rule is that it brings it into some sort of irreconcilable conflict with other legislation. And I don't think I've heard from you what is that other legislation, what is the specific statute or statutes that this rule now would raise irreconcilable conflict with.

MR. LANZITO: Your Honor, the conflict I was referencing was the repeal essentially of the individual mandate, because by taking this product the way they've defined it, it is no longer a product that can be used for insurance coverage, even to cover gaps, which is what they're concerned about. And that's where it's inconsistent with the 2017 job cuts and tax act.

So when you have legislation that gives you clear Congressional intent, that's what they're not following, that's what this rule runs afoul of. And if you are going to -- and they're doing this under the guise of consumer protection. This has nothing to do with consumer protection. It doesn't distinguish this product at all.

So under the Administrative Procedures Act, too, it can't be arbitrary and capricious, Your Honor. So that legislation's out there. And when we have a purpose that's intended to avoid consumer confusion -- and past administrations on both sides of the aisle have attached

notices for consumer protections -- there are state regulators, with McCarran-Ferguson, who then -- which I would argue is yet another piece of legislation, that they are now preempting state control over insurance regulation which has been in place since 1946, Your Honor, and even before that, recognized through common law to the late 1800s. So these are the areas where I think this rule is running afoul of legislation.

So beyond the jobs or tax cut and jobs act as well as the McCarran-Ferguson Act, this is now encroaching not only states' rights, but, you know, consumer choice.

THE COURT: All right. Can we -- I want to move to irreparable harm with you. And I, you know, I have your submission on irreparable harm. I wanted to get your response. I think you filed a reply brief, but I wanted to hear from you on the government's argument that you don't meet the irreparable harm requirement for a few reasons, one of which is the government's identified the lapse in time from April to the filing of the suit in August. I saw part of your response where you, you know, reference a later time frame. So this is where I would like to hear more of your response on that.

But also substantively the government has raised the notion of how the rule is being implemented in this sequenced fashion, and has made the argument that because of

the way the rule's being implemented, you don't -- you don't have an irreparable harm to your client or the members of the AAAB.

So I would like to hear you address both of those points and anything else you want to say on irreparable harm.

MR. LANZITO: And, Your Honor, I would submit that, first and foremost, the rule wasn't phased in to give us time, it was phased in because they had to give an effective date and they can't apply it retroactively, constitutionally. So I submit that that's window dressing of something they're obligated to do.

With respect to the runoff in the second -- where the irreparable harm is, these companies have to -- and our association members have to absorb these costs. And based on the table that's contained in the proffered -- in the Federal Registry, there's hundreds of thousands of dollars that they're going to have to expend that are not recoverable costs. That's enough for irreparable harm.

Additionally, Your Honor -- and I understand that we don't represent consumers, Your Honor. I get that they're not parties, and we're not part of the state regulators. But it's the totality of the universe in which these plans are sold. So we're not going to -- it's great that we can try to roll these out with new notices, but even the state regulators, and the comments that you have in the record,

Your Honor, it's not enough time. So it's an arbitrary time frame. Because this is a eleventh-hour rule that's really not even going to take effect, if you even believe they are, in this administration, regardless of who's elected next time. The problem we have is there's no continuity between the rule, what needs to be done, the costs that we have to incur to try to comply with this rule -- oh, I'm sorry.

THE COURT: Well, yes. Let me ask you about that because you talked about hundreds of thousands of dollars that are being incurred and that are not recoverable. I take it, is that to members of AAAB?

MR. LANZITO: Yes, Your Honor.

THE COURT: And can you talk about what are those costs that are being incurred that are not recoverable?

MR. LANZITO: And, Your Honor, we cited it -- and I'll have to grab it out of the rule, but, Your Honor, there was compliance and regulatory costs. So for each state, now you have to modify policy, you have to go before state regulators. So it's administrative, legal, and compliance costs based on the record provided. And these are the numbers and figures provided in that table of definable costs.

And if I can -- I can find it in the rule, Your Honor, but it was hundreds of thousands of dollars. It was more than $350,000 for issuers. And then other members,

which we do have -- some of our members do have agencies within them, so those are the agents and brokers; they are undefinable, unknown, unquantifiable costs because they don't know what the impact is.

So when you're talking about irreparable harm, we're going over the abyss with a certain extent because the government didn't -- admittedly, in their brief, did not have -- and in the rule did not have the information and data necessary to quantify it. So if they can't quantify it, Your Honor, our cost -- if they could quantify, then we could tell you if it was reparable or irreparable. But we're at a juncture here where we know some costs for what I would say is an unenforceable illegal rule is irreparable harm. And we cited that in our reply brief, Your Honor, that I think was on page 5, the case that stands for that proposition, and that's the *Restaurant Law Center;* nonrecoverable costs complying with putative and valid regulations typically constitute irreparable harm.

And so we have some quantifiable costs, but we have great unknowns, not only from getting these policies up and running in time, which there has been really no analysis of the states who actually regulate insurance would be able to modify these in such a way to get these out on time. Because every other administration has done it at the beginning of the term or midterm so there was enough time for this rule to

take effect and for everyone and all of the stakeholders to work together.

So that's where the irreparable harm comes in because we can't pivot, when you have 50 state regulators to deal with, as quickly as the Departments would want us to do. So if we can't do that -- and the states also have to approve it, not the federal government. So now we have an unknown party -- they're not at the table, the states, right now, and they really weren't invited during the rulemaking process. How are they going to be able to handle it?

So now we're in a position where if we can't meet the notice requirements of the rules and the sales requirements, and get all of that approved, January 1 is a fiction, it's a false deadline that will never be met. So that is another basis why we would suffer irreparable harm. Forgetting the compliance costs, there's no evidence in the report that these states are going to be able to approve these plans as amended. And that's the problem with doing something at the last minute.

But it's very convenient to make an individual pull a product out of the market, a potential coverage product for getting gaps in coverage, to coincide with open enrollment. So, effectively, we're going to tell you, well, under the ACA, you're going to lose any coverage you want. And that's where this rule goes, Your Honor.

THE COURT: Let me ask you another question about the relief that's being requested. We're here on a preliminary injunction, and I want to be clear on the relief that's being requested. Is your client asking for a stay of this rule? Because -- so I'm not sure if you're seeking relief under 705 of the APA or we're just under 706 of the APA. And the reason I ask that is that, you know, there's sort of the is-the-horse-out-of-the-barn type of question here because the rule's already in effect. And so I suppose my question was twofold. Are you seeking some sort of stay under 705, and does the Court have any power to do that given our procedural posture?

MR. LANZITO: Right. I understand. At the time we filed, Your Honor, the relief requested in the form of a TRO pursuant to agreement with the Departments' counsel, Emma Snow, but prior counsel, Mr. Lewis, the --

(Court reporter clarification.)

MR. LANZITO: Mr. -- I believe it was Mr. Lewis was his name. We set a briefing schedule, and we're here.

With due respect to what we're asking this Court to do, we want a declaration that is invalidated. Also, if it is invalid, facially we have a likelihood of success on the merits, which I think we've demonstrated. A declaration that it's invalid would, ostensibly and practically speaking, be a stay.

THE COURT: Well, I'll hear from both you on this. I mean, that sounds to me like 706. And so maybe what, you know, what we're looking at is would be a schedule of making a final determination in the case as opposed to something that is preliminary that looks more like a stay or a relief under 705. And I'll follow up with you on that. I want to hear from Ms. Snow, but I -- but what I think I hear you saying is you're not here today saying we want relief under 705. You're saying what we -- I know what you're ultimately seeking is relief under 706, and I suppose my question is, is that where we're at right now.

MR. LANZITO: Your Honor, I think we're still at -- I think we're in the realm of 705 where injunctive relief would be appropriate because then it would give the time for the parties to actually litigate the merits without taking -- because we're coming up on that deadline, Your Honor, and I don't think -- without a stay, I don't think we can avoid the irreparable harm, Your Honor, unless there is some -- and I would never try to impose upon a court -- unless there is going to be a resolution in 30 days, and I don't think that's practical. I would suggest that maintaining status quo or even --

THE COURT: Well, that's -- that becomes the question --

MR. LANZITO: -- status quo at the time of our

filing, I should say, Your Honor, prior to the rule actually taking effect.

THE COURT: All right. Well, I may want to hear more from you on that. You've been going for a while, and I'm going to give you an opportunity to follow up. Is there something more you want to say in this opening argument?

MR. LANZITO: No, Your Honor. Thank you for your time.

THE COURT: All right. Thank you, Mr. Lanzito.

So, Ms. Snow? As you saw with your friend on the other side, I would be glad to hear the government's arguments on these preliminary issues that you raised in your filing on jurisdiction, subject matter jurisdiction, understanding principles, as well as the venue issue, and then to move into the merits. Of course, you can also address at the outset this issue I was just discussing with Mr. Lanzito that is also raised in your brief about, you know, where we are in terms of what kind of relief the Court could grant if it otherwise found that it had jurisdiction and venue was proper, et cetera, et cetera. And I will be interested to hear your arguments.

MS. SNOW: Thank you, Your Honor. I'll start with the preliminary issues of venue and standing. So plaintiff's reply brief attempts to assert new bases for venue and standing, but they don't remedy the issues, they don't remedy

the defects in either of those issues or show that this Court is the proper -- can hear its preliminary injunction motion.

So it seems to be that plaintiff is relying on -- primarily on the effects of the rule in the Eastern District of Texas because of -- or purported effects of the rule because of work that its members have had to do, but that is not a basis for finding venue. As courts have found, when you're looking at where the events giving rise to the suit occurred, when a plaintiff is bringing a facial challenge to a rule as plaintiff is doing here, the location of the events giving rise to the suit is the place where the rule is promulgated; and here, that's in Washington, D. C. And we cited the *Association of General Contractors* in our brief standing for that point, and several other cases at page 11 of our brief. And so on that prong of venue, plaintiff cannot establish a proper venue.

And, second, plaintiff does refer to a member based in the Eastern District of Texas, but as a corporation, the location of its members is irrelevant for venue purposes. The Court should only be considering the plaintiff corporation's principal place of business in Florida. And as Your Honor stated, the plaintiff -- this member that plaintiff is now pointing to is not currently a plaintiff in this case. And so until there is actually a plaintiff that has venue in this court, the Court lacks the power to enter a

preliminary injunction.

THE COURT: And, Ms. Snow, let me ask you -- as you've just stated, that member is not before the Court at this point. But let me ask you, if that member -- if presume that that member was an additional plaintiff in the case and let's say they otherwise met the requirements of being a defendant who is a -- who is a resident citizen in this district, would that change your analysis?

MS. SNOW: I think, you know, if that plaintiff were joined in a lawsuit or if that member were joined in a lawsuit and did establish that its principal place of business is in this district, then I think that would cure the venue issue. But until that happens, this Court doesn't have venue.

THE COURT: All right. I think I have your argument on venue. And maybe -- and so maybe you can talk about standing.

MS. SNOW: Yes. So I understand plaintiff's argument to be that it has associational standing. I don't understand it to be trying to show an organizational standing. But even if it were relying on organizational standing, plaintiff would have to allege some facts showing a significant and perceptible impairment to its business activities that's more than just a setback of its organizational interests, and hasn't established any of

those kinds of facts here.

But, really, it seems to me that the plaintiff is relying solely on the associational standing theory. And based on having STLDI issuers, you know, plaintiff does now name certain STLDI issuers that are part of its association, but it doesn't present any facts related to those issuers about how they are actually harmed by the rule.

This rule doesn't prevent issuers from selling STLDI plans; they're still available. And so these issuers can still sell plans. And it's not really clear what -- how the rule is harming them right now. And even if, you know -- the plaintiff -- it is plaintiff's responsibility, plaintiff's burden, to make a clear showing at the preliminary injunction stage by presenting facts that it has standing and that its members have suffered an injury in fact, and it just hasn't presented the facts related to that.

I can also address irreparable harm since this is related --

THE COURT: Yes.

MS. SNOW: -- to that.

THE COURT: I think that makes sense.

MS. SNOW: Okay. So it's even if simply naming the members were sufficient at this stage to establish standing, which we do not think it is, it certainly would not be enough to show irreparable harm. And, again, plaintiff bears the

burden of presenting facts. But instead of presenting facts about how its members have suffered harm, plaintiff relies on, in its reply brief -- which the Court should not consider these new theories and new arguments in the reply brief, but in the reply brief it -- plaintiff points to various statements by the Departments about potential costs, many of which are actually irrelevant to plaintiff's claims, and then others are speculative or de minimis.

So on the irrelevant costs, the plaintiff points to statements about potential costs to agents and brokers, that perhaps they will lose some compensation. But plaintiff doesn't purport to represent any agents or brokers. I don't see any identification of members that are agents and brokers. I understand plaintiff to only have STLDI issuers and administers as members. And so any costs to agents and brokers is irrelevant.

But, in any event, even if they were relevant, the page 23402 of the preamble which is talking about potential costs also says that, you know, it's not clear whether agents and brokers will be negatively affected. They could also be, quote, positively affected if there is an increase in sales of STLDI, unquote. So those statements do not show irreparable harm.

Plaintiff also cites to discussions of costs to update the notices of the company plans. But plaintiff isn't

challenging notices. It's not challenging the notice portion of the rule. It's only challenging the definition of "STLDI" based on the terms -- the term and duration. So those are irrelevant also.

The other harms that plaintiff points to as discussed, or potential costs discussed in the preamble that are actually related to STLDI issuers, is the cost of modifying plans and submitting them to state regulators. But presumably, that has already occurred. As plaintiff acknowledges, the rule became effective in June, and it's applicable to plans that were issued or sold on or after September 1st. So if these plans needed to be -- if the documents needed to be updated or approved, presumably they already have been. It's not clear.

But so if there is future -- there are future costs that an injunction would actually be appropriate to remedy, which it wouldn't be -- to be clear, even if there were future costs related to updating plans, we don't think they are significant enough to justify a preliminary injunction. But even if there were such future costs, it would be plaintiff's -- plaintiff would bear the burden to show that there are, and plaintiff hasn't shown that.

And also, these costs would -- like I said, we don't think that they would be significant. As the preamble also discusses at page 23402, costs to updating plans should

be minimal because, as the Departments explained, issuers change their policy documents routinely; and, therefore, the cost to issuers to make changes in response to the 2024 rule would be part of the issuer's usual business costs. And no commenter on the proposed rule provided estimates of the costs associated with the provisions related to STLDI.

And, finally, plaintiff points to Table 1, which is at page 23394 of the preamble, but misconstrues that table. The table has -- it lists two one-time costs to issuers and other interested parties nationwide. And so it discusses those costs in the aggregate nationwide, so -- and one of those costs is a one-time cost for regulatory review, and that's just reading the rule which collectively would cost around $350,000, but individually per interested person would be around $430. But that's just to read the rule, which presumably has already been done.

And then there's a one-time cost for complying with the notice provisions, which, again, notice provisions are irrelevant here. But those, too, would be de minimis and, as explained at page 23402 of the preamble, should be approximately 1,000 per -- $1,000 per interested party.

So all of these costs, you know, again, plaintiff bears the burden of establishing facts; instead of doing that, has relied on statements in the preamble, but those statements in the preamble do not show irreparable harm.

And as Your Honor also asked about the delay in plaintiff bringing this case, that also substantially undermines any claim to irreparable harm. This rule was published in the Federal Register on April 3rd. It went into effect on June 17th, and has been applicable now to plans sold on or after September 1st.

And despite having access to the rule, knowing that its issuers would have to prepare for any plans issued after -- on or after September 1st, despite knowing this since April 3rd, plaintiff waited until August 29th to bring this lawsuit, and that delay just shows that there is no irreparable harm here.

Plaintiff also references unknown costs and that it doesn't know the extent of costs. But it is -- again, it is plaintiff's burden to show what costs its issuers are actually incurring, and it should have access to that information. And I'm not sure what the January 1st deadline is -- you know, why that is significant for plaintiff's assertions of incurring costs for irreparable harm purposes. There's no discussion of that in its briefing that I recall. But the rule's already applicable to plans issued on or after September 1st, so I'm not sure what the future date is relevant to.

If Your Honor has other questions on --

THE COURT: Well, before we -- this is a corollary

to, if you will, the merits of the injunctive relief request. But at the end of Mr. Lanzito's opening argument, we were talking about an issue, again, that the government raised in its brief that has to do with what type of relief is being sought at this juncture, and whether we're in a posture where 705 relief is even possible or whether we're really at the stage of relief would come, if at all, in the case under 706 of the APA. And you've heard Mr. Lanzito's argument on that, but I wanted to get your response.

MS. SNOW: Yes, Your Honor. We -- at this stage, if any relief is appropriate, and we do not believe it is, it would be under 706. 705 is no longer really relevant because that -- the rule is already effective, so there would be no -- the Court wouldn't be able to stay the rule's effective date; it's already -- that date has already passed. So we're on 706.

And as we stated in our brief, any injunctive relief that the Court would find appropriate should be limited to the plaintiff in this case or its members with -- who have actually suffered an injury in fact. Yeah.

THE COURT: Yes, let's go ahead and move to the merits --

MS. SNOW: Okay.

THE COURT: -- of the request. And you've talked about irreparable harm. So why don't you begin with

likelihood of success on the merits.

MS. SNOW: Sure. So plaintiffs -- plaintiff has not established any likelihood of success on the merits of its claim, which is primarily that the Departments lack statutory authority to issue the 2024 rule. In making that claim, plaintiff does not engage with the text of the relevant provisions that did authorize the Departments to issue this rule and the rules preceding it; and, instead, raises arguments that basically challenge the reasonableness of the rule and show that this case really is about a policy dispute over the Departments' judgments -- the judgments that they made within their discretionary authority.

The plaintiff -- my friend on the other side did say during his argument that the Departments absolutely have authority to define "STLDI." There should be no dispute that they do have authority under the statute to define "STLDI." There are two -- the two provisions that give them that authority is the parallel provisions in the PHS Act, ERISA and the code authorizing them to promulgate regulations that are necessary or appropriate to carry out provisions of the statute, and then in the PHS Act the definition of "individual health insurance excluding STLDI."

And so at the D.C. circuit, in the *ACAP* case in 2020, in rejecting a challenge to the 2018 rule, did not even question the Departments' -- that Congress had delegated to

the Departments the statutory authority to define "STLDI." And *Loper Bright* confirms that in this kind of case where Congress has used flexible terms such as "appropriate" or "reasonable," it has authorized agencies to exercise a degree of discretion, and it's cited in -- *Loper Bright* is cited in footnote 6 in the EPA statute using similar terms. And that indicated that in those kinds of cases, Congress has delegated discretion to the Agency.

And so really the question here is whether the Departments have exercised -- reasonably exercised their discretion within the bounds of their statutory authority. And they have. And when assessing the reasonableness of the Departments exercising their statutory authority, the inquiry is essentially arbitrary and capricious review. And as *Loper Bright* also cites, in that same section where the Court is discussing, you know, the court's review in cases where Congress has delegated discretionary authority to the agencies, the Court follows with citations to cases laying the framework for arbitrary and capricious review such as *State Farm*, when the Court is analyzing whether the agencies have acted reasonably.

THE COURT: I think part of the argument from Mr. Lanzito is that this particular rule is an unprecedented -- represents an unprecedented departure by the Departments from how "STLDI" had previously been defined for

these purposes. And so I'd like to get your argument on that.

MS. SNOW: Yes, Your Honor. It is not unprecedented. As my friend on the other side also acknowledges, the 2016 rule did limit the term of STLDI to no longer than three months. This rule also limits STLDI to no longer than three months but then with a maximum duration of four months. And so that is entirely -- you know, this is not an unprecedented exercise of authority at all. And as the Department -- and it is reasonable and entirely within the bounds of its discretionary authority. It -- you know, the Departments explains in the preamble that the three-month term with a four -- one-month additional renewal period is in line with the Affordable Care Act's 90-day waiting period that applies when a new employee starts a new job.

During the first 90 days of the job, the employer does not need to provide health insurance. It can -- and in addition to that 90 days, there is a one-month optional reasonable orientation period. And so this definition aligns with that provision in the ACA which also, you know, restores STLDI, is consistent with STLDI's purpose -- as plaintiff also acknowledges, its purpose to be a short-term temporary stopgap coverage in between transitions in employment, typically. And so that is -- it's reasonable for the Departments to match the time period with that waiting

period.

It also, you know -- this -- it falls plainly within the bounds of the -- their discretion, as indicated by the statute of -- the statutory text defining independent -- individual health insurance excepts STLDI, indicating that STLDI must be something different than individual health insurance. And as its name indicates, it must be short term and of limited duration relative to individual health insurance.

Individual health insurance is typically twelve months long and is guaranteed renewable at the consumer's option. And here, this -- the STLDI definition is short term, of three months relative to twelve months, and of limited duration, four months instead of guaranteed renewable like individual health insurance is.

So the Departments made these decisions and to define "STLDI" in this way consistent with these statutory guideposts. And they did so based on significant evidence of consumer confusion and that consumers were not fully aware of the differences between STLDI and individual health insurance, and that they would sometimes opt into STLDI for a long period of time, assuming that it came with the same kinds of consumer protections that individual health insurance does, as comprehensive coverage, and then would be hit with unexpected medical bills or very high out-of-pocket

costs.

The Departments -- you know, the Departments explained all of this evidence that was before them as the basis for concluding that it was necessary and appropriate to modify the definition of "STLDI" so that it was further distinguished, so that consumers could further distinguish it from individual health insurance and make more informed healthcare decisions.

So plaintiff in its reply brief presents a new theory over why the rule exceeds the Departments' discretionary authority, and says that the rule is really all about restoring the penalty for the individual mandate that is now set at zero dollars. But that is a red herring. The Departments do not rely anywhere in its rule on the individual mandate. They didn't rely on it in 2016 either. There is just no basis in the preamble for concluding that the Departments were really trying to restore some kind of individual mandate penalty. And so the Court should disregard those arguments.

The Court, it is -- in reviewing whether an Agency decision is reasonable, the Court reviews the information actually considered by the Agency, the rationale actually provided by the Agency; and here, that is significant evidence of consumer confusion.

THE COURT: Can you give me a little bit of the

history up to 2016, you know, from 1997 to 2016, of where regulations were on STLDI?

MS. SNOW: So in 1997, the Departments issued an interim final rule which was issued very shortly after the term "STLDI" was first introduced in the statute in HIPAA in '96, and that rule defined "STLDI" as being less than twelve months. And then that definition was carried over into or adopted again in the 2004 final rule makings. And then in 2016, the Departments modified the definition to be less than three months.

THE COURT: And those earlier versions -- I know we've heard the term "stacking" -- but basically that allowed an initial term and then how much could you get on continued coverage as a maximum under these policies. Did those earlier versions in '97 and 2004 address that?

MS. SNOW: They did not address stacking. I do not recall if in the 2004 preamble there was any discussion of that as a possibility. But the rules themselves do not address stacking. The 2016 rule, while it doesn't have a limitation on stacking, the Departments did consider that and seek comments on it, and they explained in the preamble that they did not adopt a limitation on stacking at the time because they did not see a way of adopting that in a way that was actually administrable and enforceable.

And here, you know, the limitation on stacking --

but in concluding that, the Departments did acknowledge that stacking was an issue that would allow -- it was a loophole that allowed for plans to be issued for much longer periods of time and make them look more like individual health insurance, which could be confusing for consumers.

And in 2024, the Departments, after, you know, considering this issue of stacking further, determined that there was a way to limit stacking in a way they've done in this definition. They had also considered other options to go even further, but again explained that those other options were just not administrable or enforceable, and so...

THE COURT: So if I have this right, in 2016 you had the three-month rule, but it did not address stacking.

MS. SNOW: That's right.

THE COURT: In 2018 you had the less than twelve months, and then with stacking I think it was 36 months maximum; is that right?

MS. SNOW: That's correct.

THE COURT: And then now, obviously, this new rule is three months plus one month maximum of stacking; is that accurate?

MS. SNOW: Yeah. So I think that there is -- so stacking -- I understand stacking to be separate from the durational piece of the rule, because even under the 2018 rule, I don't believe there were any limits on stacking. An

issuer could provide a plan that had an initial term of less than twelve months and then a maximum duration of 36 months, but even then, it could -- that same issuer could issue another plan right after that that was again 12 months that could be extended up to 36 months. And it's that -- that's the stacking issue, that issuers being able to give -- provide multiple plans on top of one another, and then they can be just extended indefinitely, essentially. Even though there is, you know, under the rule there is a limitation on the total duration, stacking allows for issuers to get around that.

And so that's the issue that was addressed in the 2024 rule to prevent, you know, even in putting -- in limiting the total duration of the rule, the Departments also determined that -- you know, they explained that issuers for that -- for purposes of the 2024 rule would include issuers of the same controlled group, which meant that all issuers in that same controlled group could then not issue an identical insurance STLDI plan at the end of the four-month period.

I don't know if I'm explaining that all clearly. But it's a separate issue. Basically, you know, the stacking would allow issuers of the same company or controlled group to issue plans that would allow them to continue on, even past the durational limits.

THE COURT: Right, no, I see your point of, you

know, somebody who has -- in the initial instance they have a plan for three months and they're able to extend that an additional month. The stacking issue that is separate is what if you then try to issue a new plan after that --

MS. SNOW: Correct.

THE COURT: -- for that period.

MS. SNOW: Yes.

THE COURT: All right. I think that -- thank you. You can continue if there is more you wanted to say on likelihood of success on the merits.

MS. SNOW: Okay. I did want to just address -- I believe there's two other things, since we haven't --

THE COURT: Well, two other things --

MS. SNOW: -- and an opportunity -- sorry.

THE COURT: Well, two other things I'm assuming you will address are major questions doctrine and the nondelegation issue.

MS. SNOW: Yes, okay. Yes. Okay, three other things.

So the major questions doctrine has no relevance here. This is not a major questions case. The -- first, this is not a case where the Departments are exercising a new-found power in an ancillary provision in the statute. They've been defining "STLDI" since 1997, shortly after the term was first introduced in the statute.

And, second, this is not a rule of major economic significance, which if that even were accepted, it would also indicate that all the prior rules were also rules of major economic significance and were unlawful under the major questions doctrine, which I do not think that plaintiff intends to argue.

But this rule is not a rule of major economic significance. And the data that plaintiff points to to support its claim is actually not relevant to this rule. So plaintiff points to a portion of the preamble where the Departments are discussing, you know, up to 8.7 million consumers who would be affected by the rule. But that is a different portion of the rule related to fixed indemnity excepted benefits, and that is just not at issue here.

With respect to STLDI, the Departments explain, on page 23398, that there are approximately somewhere around 28 issuers nation -- STLDI issuers nationwide, perhaps more. The number is -- the data on the number of issuers is somewhat limited, but that is their estimate.

And then on page 23397 of the preamble the Departments also explain there could be roughly 1.5 million people enrolled in STLDI, but they do have reason that might -- that that number might actually be inflated, or the number might actually be less because that is a projection, and that projection was made before there were so many

subsidies -- before the availability of subsidies was expanded. So it might actually be less. But we're talking about much smaller numbers than plaintiff is indicating.

But this is simply, you know, not a major questions case. It's nothing like *King v. Burwell* where the Court was considering a question about the -- about how subsidies are administered under the ACA, which the answer to that question could totally change the entire structure of the Affordable Care Act and make it unworkable. This is just not -- we're talking about one exception to individual health insurance within the entire statutory scheme. So this is not a major questions case.

The nondelegation doctrine is also irrelevant. Again, so while plaintiff asserts that this -- that the delegation authority here is not constitutional, it's not -- it doesn't actually make arguments to show that that's the case that would compare the statutory text in this case with a text of -- with a text in other cases that delegate authority to agencies. Instead, it simply focuses on how the Departments have exercised their authority and whether it actually falls within the boundaries of the guidelines given by Congress.

And so this doesn't really seem to be a case about whether the delegation is constitutional, but it is. As *Big Time Vapes* explains -- the Fifth Circuit explained in *Big*

Time Vapes, it's constitutionally significant -- or sufficient if Congress clearly delineates the general policy, public agency which is to apply it, and the boundaries of the delegated authority. And Congress has clearly done so here, and this is entirely consistent -- the boundaries of the delegated authority established through the statutes authorizing the agencies to promulgate regulations that are necessary or appropriate, and then allowing them to define "STLDI," and consistent with its terms of being short term, of limited duration, distinct from individual health insurance, all of these textual guidelines fall well within the boundaries of a constitutional delegation.

You know, *Big Time Vapes*, the Fifth Circuit found that when Congress authorized the FDA to deem -- quote, deem which tobacco products should be subject to the Act's mandates, that was constitutional. In *Whitman v. American Trucking*, the Supreme Court found that delegating the EPA to regulate ambient air quality standards that are requisite to protect the public health, that that was constitutional.

And in *Allstates*, the Sixth Circuit case that was analyzing the Occupational Safety and Health Act, the Court found that Congress's delegation to OSHA to set workplace safety standards that are, quote, reasonably necessary or appropriate, unquote, was also constitutional.

This delegation falls well within these precedents,

and has even -- you know, has sufficient textual guidelines to guide the exercise of discretion of the Departments and, therefore, is constitutional.

I had one other just minor point that just because I don't -- I just want to make sure we have had the opportunity to fully respond to it, and that is related to the arguments about the McCarran-Ferguson Act and the state preemption. Plaintiff hasn't raised a preemption claim, so these arguments about the statute, the rule preempting state law, are really irrelevant. But at best, their argument is the Departments didn't respond to commentors raising this issue, or provided an unreasonable response. But it did respond.

At pages 23357 through 58 and page 23382, the Departments provided a response, and that response was reasonable and actually shows how the commentors, and from plaintiff's arguments here, misconstrue the law in the McCarran-Ferguson Act. As the Departments explain, that act preserves the state's authority to regulate the business of insurance unless Congress enacts legislation that regulates the business of insurance. And the Departments explained Congress has plainly done so through the Affordable Care Act, HIPAA, and other laws that are incorporating consumer protections.

I think -- if Your Honor has any other questions,

I'm happy to answer them.

THE COURT: I think I may come back to you, as I mentioned to Mr. Lanzito, on these topics. I'm going to give Mr. Lanzito an opportunity for some rebuttal. And then I want to talk with both counsel about procedurally where we're at in the case. We've talked about it a bit and we'll talk some more. So thank you, Ms. Snow.

Mr. Lanzito?

MR. LANZITO: Thank you, Your Honor.

THE COURT: I want to give you an opportunity to reply first to the arguments of Ms. Snow, and then I do want to talk to you about our procedural posture.

MR. LANZITO: Thank you, Your Honor. And, Your Honor, I do want to point out the table that's on page 23394 of the Federal Register. It's not only about what's contained in there, but based on that *Restaurant* case, compliance with any unlawful regulation or rule is irreparable harm. But it's also important for what it says -- for what it doesn't quantify here, Your Honor. And I don't think I was misconstruing it, and I don't think plaintiffs did, and I don't believe counsel intended to make that implication, but here are the non-quantified costs. Or the quantified are, first, $358,578 for issuers, issuers of fixed indemnity excepted benefits coverage, and other interested parties. So everything is lumped together.

So when we're talking about whether it's 1.5 million short-term, limited durations, which is still above a million, which I think would still fall under the --

THE COURT: I thought -- maybe I was mistaken. I thought Ms. Snow's argument was that didn't apply to STLDI. Did I have that wrong? The table --

MR. LANZITO: She said the 8.7 million --

MS. SNOW: That's correct. I --

MR. LANZITO: -- didn't apply to short term. That was a global with fixed indemnity insurance included. Approximately 1.5 million was the number that they had estimated for insureds of -- with short-term, limited insurance plans. Either case, we're in the million, we're above a million. And I think under *King v. Burwell*, that falls into the major question doctrine of having significant or vast economic and political impact.

But -- I'm sorry, Your Honor.

THE COURT: I'm sorry. Do you agree with her earlier comment about how many issuers there are of STLDI? Because I know when we're talking about gross impact, whatever the impact is per issuer, I think Ms. Snow referenced, again, something that's -- I think it was -- this was at 23398 maybe in the Federal Register -- that there are 28 issuers of STLDI. You know, you all will probably be very familiar with how many issuers there are of STLDI across the

country. Does that sound accurate?

MR. LANZITO: That does sound -- that's about right, Your Honor.

THE COURT: All right.

MR. LANZITO: So, yes, the number of issuers may not be tremendous because it's a specialty area. But, Your Honor, our Association, with the members we've identified, represent the vast majority of those issuers, by using even their own numbers.

THE COURT: And one other quick question for you, because it came up in Ms. Snow's argument, is do you all -- are your members also -- do you also have agents and brokers? Or are you here, you know, representing agents and brokers or really just the issuers?

MR. LANZITO: We identified issuers. But, Your Honor, our members within that hierarchy do have agents and brokers there within.

THE COURT: All right. So they have some agents and brokers --

MR. LANZITO: Yes.

THE COURT: -- that are affiliated with your issuers.

MR. LANZITO: Correct.

THE COURT: Go ahead.

MR. LANZITO: I apologize. But when we're talking

about significant alternatives, and when you're talking about the major question doctrine here, there was, really, other than *we want it this way*, and reading between the lines, is *we want it this way because we'll give you enough time so you can enroll in a ACA plan*. Again, the individual mandate is the trojan horse here because they -- *well, we're just going to have it coincide and it's going to be a coincidence that it's three months with maybe a fourth month just to get you to coverage*. And then ultimately, *what we've done is ensure that you have to accept an ACA plan*. But that's also presuming, Your Honor, someone gets a job that has this insurance available to them and they can actually take it without having a gap in insurance.

So the harm to our members is a product is being taken away that they can use that can serve the public. And it may not be the way that the Departments want the public served, but, you know -- and I will say the McCarran-Ferguson Act, it was in our complaint and it's incorporated therein, and what is not disclosed on that comment table -- and I'm going to quote it, Your Honor, it's on page 23394, "Potential costs --"

(Court reporter clarification.)

MR. LANZITO: "Potential costs to states if states enact or implement new legislation in response to these final rules." And the next bullet point on that same page, Your

Honor, is "Potential costs the state departments of insurance associated with reviewing amended marketing materials and plan documents filed by issuers of STLDI and fixed indemnity excepted benefits coverage in response to these final rules."

Now, I know there was some argument that we would presume that the states would be able to mobilize and approve all these materials, but I think that's contrary to what the comments were, and those are part of the record and those are part of what the Departments considered. So to say generally speaking, *well, they should have this done by now*, I don't think is accurate.

We have a situation where the Departments submitted comments. The National Association of Commissioners, who speaks for all the Departments, because they are all members of that national association, have in their comments said, one, you're invading our province of regulating insurance, but we're not going to be able to get these rules done. And allowed them to take effect.

So for those reasons, I think, you know, the irreparable harm just can't be quantified at this juncture, Your Honor. And counsel, with all due respect, said yes, you know, this is not unprecedented, this rule is not anything new. Well, the 2016 rule said, *stacking*, you know, *we can't regulate it, we can't identify it; no one's ever really tried to prohibit it* -- and that's the honest to God truth -- and

it's devoid of any reference in the new rule or any prior rule.

So the new rule says, *we can prohibit stacking*. Well, it does so in generalities. And the enforcement mechanism, of course, would be the states who regulate insurance. So it is unprecedented. It has never been -- it has never been identified as something that was capable of being accomplished. It had been noted, but it's not something that the federal government can regulate or has regulated. So it is unprecedented since even the 2016 rule, Your Honor. And so where now it is unprecedented, we are returning to or going to a definition which imputes a duration that is not consistent with the current state of the ACA.

And so I would suggest, Your Honor, not only does it, for all the reasons that I said before that it's unenforceable, the reality is under the RFA, the Regulatory Flexibility Act, they didn't look at significant alternatives to curb consumer confusion. It's unprecedented in the manner in which they've tried to define this, to curb consumer confusion, as they use -- if we are to believe even the numbers advanced by my colleague, that 1.5 million plans, and consumers had these plans; and yet, by the same token, we have a handful of anecdotes about people who did not know what their coverage was, when we have notices and other

administrations -- multiple -- I'm sorry, more than one administration identified that notice to consumers to avoid a confusion was the appropriate significant alternative, not defining this in such a way to eliminate a product from the market.

So when we have that as something arbitrary and capricious, if we're talking about consumer confusion and distinguishing the product, we don't do so by eliminating it from the market and saying, *well, now there's no confusion, you can't use this*, or do we just simply provide notice and enforce the notice?

THE COURT: And let me ask you about that. I think this is the point that you're making, but I want to make sure it is, is it seems like your client's position is that now that this rule is going to regulate and prevent stacking, that that is now going to eliminate -- you're saying eliminate STLDI completely from the market. Is that the argument?

MR. LANZITO: Functionally, it does, Your Honor. The product can still be out there. But if we can't cover a gap of insurance -- so, for example, if someone needs to cover five or six months between enrollment periods or loss of job, this product can no longer fill that void. That's why it was always allowed to be a duration of less than a year. Even under the 2016 definition, Your Honor, *it's three*

months for the plan, but we understand that you may have to reissue the plan or extend it. We're not going to interfere because we can't regulate it, we can't enforce that.

So by doing this, yes, I can give someone four months of coverage. But if they have a five-month need, Your Honor, the product doesn't work for them. And as a professional, you have a duty to your client to give them something that will work. So they've now eliminated the product functionally from the marketplace, Your Honor.

THE COURT: All right. And along those lines, do you have a response to your colleague on the other side's comments that these, you know, three-to-four-month periods correlate with the ACA periods? And is there a market there based on that correlation?

MR. LANZITO: So what the rule -- I believe that's what they're trying to say is the correlation.

THE COURT: Um-hum.

MR. LANZITO: But it's an avenue to get someone into the ACA, i.e., an individual mandate. But more importantly, Your Honor, what they don't talk about in the argument, with all due respect to my colleague, they don't quantify if the consumer can't afford this. And it's on the same page, on that same table, whether they can an afford the premium, whether they can afford the deductibles, and whether they could even apply.

So if it's a product that's available but financially unavailable, then it's irrelevant if it's a 90-day waiting period because the person may not qualify for subsidies. The person may not be able to afford an ACA plan because it lacks subsidy. So what do we do? We take away something that they may use to give some coverage that might fit their personal, financial, and health needs. Because maybe not everyone wants comprehensive coverage, and Congress already told them you don't have to have comprehensive health coverage.

THE COURT: All right. Mr. Lanzito, is there any more you wanted to say on any of the merits issues?

MR. LANZITO: If there's any other issues you want me to address. Otherwise, Your Honor, I think I'm fine.

THE COURT: All right. Well, I did want to talk with both counsel as we're closing out, you know, where we are procedurally.

And, Ms. Snow, let me have you come back up for the moment. Yeah, I may have you also back, Mr. Lanzito.

But let me start with you, Ms. Snow. The government indicated in its response that you do plan to file what I suppose would be a 12(b)(3) or 1406-type venue -- improper venue motion, and/or a 12(b)(1) motion. And you know, as we all recognize, we've been on an abbreviated timeline in this case, and you indicated that the government

would likely be filing those at the end of October. My question to you is whether the government could file those motions earlier than that kind of time frame.

I think these are substantive issues the Court needs to consider in this case and there are issues that necessarily must be considered first before the Court can get to the merits of this case. So my question to you is whether or not the government could submit those on a more compressed timeline, and potentially as early as a week from today or two weeks from today, so that the Court could have the benefit of those motions before it, and for AAAB to be able to respond to those motions, and for us to set a schedule that would allow the Court to get that in the near term.

So let me ask you, Ms. Snow, what kind of a time frame the government might be able to submit those motions, or if it's a combined motion.

MS. SNOW: I think, yeah, if we're -- it would probably be a combined motion, and I don't see a problem with filing it -- I mean, I think --

THE COURT: Today's the 20th.

MS. SNOW: Okay. So I think by two weeks from now would certainly -- I mean, we can consider other dates that are earlier than two weeks from now as well, but that's definitely -- we can definitely do that.

THE COURT: Well, what I was going to suggest, and

hear from Mr. Lanzito on this, is if the government is able to file it by next -- by a week from today, the 27th, then I will probably have -- see if Mr. Lanzito feels like they could respond within a week of that filing date. So then we're in the first week of October, and we could close that out, the briefing on that certainly, by about mid-October if that timeline works.

And I want to be clear, if you feel like you need two weeks for that filing, I'm just looking at how quickly we could get those motions submitted and briefed together with what the Court already has because of the significance of those issues.

MS. SNOW: Um-hum. I think, you know, if -- let's see. I was just thinking, you know, I have to build in the time for all the agencies to review the brief and everything. So I think like I could do a week from now, if that's what Your Honor wants, but a few more days would certainly be --

THE COURT: What about something that's more like -- the following Monday is September 30, or we could push it out a few days further than that. We're moving up a timeline that you would normally have --

MS. SNOW: Yes.

THE COURT: -- so that's why -- and I'm putting you on the spot, I understand. So it sounds like you may need two weeks.

MS. SNOW: Well, I think, I mean, I can do earlier than that, for sure. I'm thinking about -- so like -- I guess I was thinking somewhere between Monday and Wednesday of the next week.

THE COURT: Well, why don't we do that. Why don't we say October 2, which I --

MS. SNOW: Okay.

THE COURT: -- think would be the Wednesday.

MS. SNOW: Okay.

THE COURT: I think that's the Wednesday of that week.

MS. SNOW: Yes.

THE COURT: And then, Mr. Lanzito, is it going to be doable for you to respond within a week, the week of October 9?

MR. LANZITO: Yes, Your Honor. Yes, and with the one caveat that if I seek leave to amend, it may impact Ms. Snow's arguments. And I'll try to do it in advance so I'm not causing her to have to do undo work --

THE COURT: Right.

MR. LANZITO: -- if we have to correct those venue or standing issues.

THE COURT: So why don't we do this. What I may do is do an order on these motions. And if the plaintiff seeks to amend, then what we'll do is we'll revisit the timeline,

because if there is going to be an amended complaint -- and, of course, we need to know if the government is opposed to that or if there is any issue there with regard to the amended complaint. I'm not assuming anything one way or the other. But if that comes up and it needs to adjust the timeline, then we can do that. But my current thought is just to set this timeline on these motions because I need to see them before we rule.

So what I will do is set -- I'm not going set a deadline for a reply. We'll just set two dates on it. We'll set the October 2 date initially, and the October 9 date initially. And that means for you, Ms. Snow, I mean -- I know the parties -- because that usually means you can rule before anybody could file a reply, but I think you would have sufficient time to file a reply on those motions, but I don't need to set a deadline for that.

Did you have something you wanted to say, Ms. Snow?

MS. SNOW: No. No, I don't.

THE COURT: And I'll just say this is where -- and you can, if you want, sit down, Ms. Snow.

Mr. Lanzito, I do -- it does strike me that I think we are -- you're really looking at more 706 relief in this case rather than 705. And you had raised the notion that raised the issue of, well, if it's 706, then we certainly would hope that the Court would be addressing this in -- you

know, I suppose as quickly as it can under the circumstances.

So, you know, part of what I'm going to be contemplating, and I think the parties can be contemplating, is depending on where we are on the government's motions, I will be thinking about and may have you just get on the status -- just a phone call with me or something about potentially a timeline for any additional briefing or cross-motions for a complete resolution of the case. That presumes that we're not going to need to have some sort of evidentiary hearing. I think we're looking at an administrative record in this case, and I tend to think we could proceed in that type of manner. But I would like you both to be thinking about that.

Do either one of you have any comment on that at this time?

MS. SNOW: Only to note agreement with not -- with reviewing an administrative record --

THE COURT: Right.

MS. SNOW: -- that's where we're headed. So, yeah.

THE COURT: Right. I mean, it seems to me we can proceed in that manner.

Mr. Lanzito, you can think about that. And I'll be in touch with both parties. But I'm being mindful of your comment that if the Court is going to proceed and if what we're looking at is 706, then we need to figure out what all

additional material needs to be put before the Court to make a final decision, assuming this Court is going to go forward, which is going to depend on a ruling on the government's expected motions.

So I'm just looking down the road here past the government's motions and to what kind of a procedural framework we want to put in place. And my sense is what we're going to put in place is some sort of briefing for -- whether it's cross-motions for summary judgment or something like that on the administrative record. Does that make sense?

MR. LANZITO: It does for the plaintiff, Your Honor.

MS. SNOW: Yes, that makes sense.

THE COURT: All right. So what you'll see today is an order that just sets a time frame for the government to file its motion and a response from the plaintiff. And then we'll keep in mind -- and, Mr. Lanzito, if there's a request to amend, then we'll see if we need to make adjustments on the time frame for any additional filings for the government.

So anything else, counsel, that you think we need to talk about today? Mr. Lanzito?

MR. LANZITO: No. Thank you for your time, Your Honor.

THE COURT: Ms. Snow.

MS. SNOW: Nothing further from the government, Your Honor.

THE COURT: All right. Thanks for your arguments today, counsel. They were helpful and appreciated.

And we'll stand in recess.

THE COURT SECURITY OFFICER: All rise.

(Adjourned at 10:58 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Gayle Wear, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of Texas, do hereby certify that pursuant to Section 753, Title 28 United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated 26th day of September 2024.

/s/ Gayle Wear
GAYLE WEAR, RPR, CRR
FEDERAL OFFICIAL COURT REPORTER