

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DEPARTMENT OF HEALTH AND :

4 HUMAN SERVICES, ET AL., :

5 Petitioners : No. 11-398

6 v. :

7 FLORIDA, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, March 27, 2012

11

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

15 APPEARANCES:

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20 Respondents Florida, et al.

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22 Respondents NFIB, et al.

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will continue
4 argument this morning in Case 11-398, the Department of
5 Health and Human Services v. Florida.

6 General Verrilli.

7 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
8 ON BEHALF OF THE PETITIONERS

9 GENERAL VERRILLI: Mr. Chief Justice, and
10 may it please the Court:

11 The Affordable Care Act addresses a
12 fundamental and enduring problem in our health care
13 system and our economy. Insurance has become the
14 predominant means of paying for health care in this
15 country. Insurance has become the predominant means of
16 paying for health care in this country. For most
17 Americans, for more than 80 percent of Americans, the
18 insurance system does provide effective access. Excuse
19 me.

20 But for more than 40 million Americans who
21 do not have access to health insurance either through
22 their employer or through government programs such as
23 Medicare or Medicaid, the system does not work. Those
24 individuals must resort to the individual market, and
25 that market does not provide affordable health

1 insurance. It does not do so because it -- because the
2 multibillion dollar subsidies that are available for
3 the -- the employer market are not available in the
4 individual market. It does not do so because ERISA and
5 HIPAA regulations that preclude -- that preclude
6 discrimination against people based on their medical
7 history do not apply in the individual market. That is
8 an economic problem. And it begets another economic
9 problem.

10 JUSTICE SCALIA: Why aren't those problems
11 that the Federal Government can address directly?

12 GENERAL VERRILLI: They can address it
13 directly, Justice Scalia, and they are addressing it
14 directly through this -- through this Act by regulating
15 the means by which health care -- by which health care
16 is purchased. That is the way this Act works.

17 Under the Commerce Clause, what Congress has
18 done is to enact reforms of the insurance market,
19 directed at the individual insurance market, that
20 preclude -- that preclude discrimination based on
21 pre-existing conditions, that require guaranteed issue
22 and community rating. And it uses -- and the minimum
23 coverage provision is necessary to carry into execution
24 those insurance reforms --

25 JUSTICE KENNEDY: Can you create commerce in

1 order to regulate it?

2 GENERAL VERRILLI: That's not what's going
3 on here, Justice Kennedy, and we're not seeking to
4 defend the law on that basis.

5 In this case, the -- what is being regulated
6 is the method of financing health -- the purchase of
7 health care. That itself is economic activity with
8 substantial effects on interstate commerce. And --

9 JUSTICE SCALIA: So, any self-purchasing?
10 Anything I -- you know, if I'm in any market at all, my
11 failure to purchase something in that market subjects me
12 to regulation.

13 GENERAL VERRILLI: No. That's not our
14 position at all, Justice Scalia. In the health care
15 market -- the health care market is characterized by the
16 fact that aside from the few groups that Congress chose
17 to exempt from the minimum coverage requirement -- those
18 who for religious reasons don't participate, those who
19 are incarcerated, Indian tribes -- virtually everybody
20 else is either in that market or will be in that market,
21 and the distinguishing feature of that is that they
22 cannot -- people cannot generally control when they
23 enter that market or what they need when they enter that
24 market.

25 CHIEF JUSTICE ROBERTS: Well, the same, it

1 seems to me, would be true, say, for the market in
2 emergency services: police, fire, ambulance, roadside
3 assistance, whatever.

4 You don't know when you're going to need it;
5 you're not sure that you will. But the same is true for
6 health care. You don't know if you're going to need a
7 heart transplant or if you ever will. So, there's a
8 market there. In some extent, we all participate in it.

9 So, can the government require you to buy a
10 cell phone because that would facilitate responding when
11 you need emergency services? You can just dial 911 no
12 matter where you are?

13 GENERAL VERRILLI: No, Mr. Chief Justice. I
14 think that's different. It's -- we -- I don't think we
15 think of that as a market. This is a market. This is
16 market regulation. And, in addition, you have a
17 situation in this market not only where people enter
18 involuntarily as to when they enter and won't be able to
19 control what they need when they enter, but when they --

20 CHIEF JUSTICE ROBERTS: It seems to me
21 that's the same as in my hypothetical. You don't know
22 when you're going to need police assistance. You can't
23 predict the extent to emergency response that you'll
24 need, but when you do -- and the government provides it.
25 I thought that was an important part of your argument,

1 that when you need health care, the government will make
2 sure you get it.

3 Well, when you need police assistance or
4 fire assistance or ambulance assistance, the government
5 is going to make sure to the best extent it can that you
6 get it.

7 GENERAL VERRILLI: I think the fundamental
8 difference, Mr. Chief Justice, is that that's not an
9 issue of market regulation. This is an issue of market
10 regulation, and that's how Congress -- that's how
11 Congress looked at this problem. There is a market.
12 Insurance is provided through a market system --

13 JUSTICE ALITO: Do you think there is a
14 market for burial services?

15 GENERAL VERRILLI: For burial services?

16 JUSTICE ALITO: Yes.

17 GENERAL VERRILLI: Yes, Justice Alito, I
18 think there is.

19 JUSTICE ALITO: All right. Suppose that you
20 and I walked around downtown Washington at lunch hour
21 and we found a couple of healthy young people and we
22 stopped them and we said: You know what you're doing?
23 You are financing your burial services right now because
24 eventually you're going to die, and somebody is going to
25 have to pay for it, and if you don't have burial

1 insurance and you haven't saved money for it, you're
2 going to shift the cost to somebody else.

3 Isn't that a very artificial way of talking
4 about what somebody is doing?

5 GENERAL VERRILLI: No --

6 JUSTICE ALITO: And if that's true, why
7 isn't it equally artificial to say that somebody who is
8 doing absolutely nothing about health care is financing
9 health care services.

10 GENERAL VERRILLI: It's -- I think it's
11 completely different. The -- and the reason is that the
12 burial example is not -- the difference is here you are
13 regulating the method by which you are paying for
14 something else -- health care -- and the insurance
15 requirement I think -- I mean, the key thing here is my
16 friends on the other side acknowledge that it is within
17 the authority of Congress under Article I under the
18 commerce power to impose guaranteed-issue and
19 community-rating reforms, to end -- to impose a minimum
20 coverage provision. Their argument is just that it has
21 to occur at the point of sale, and --

22 JUSTICE ALITO: I don't see the difference.
23 You can get burial insurance. You can get health
24 insurance. Most people are going to need health care,
25 almost everybody. Everybody is going to be buried or

1 cremated at some point.

2 GENERAL VERRILLI: Well, one big
3 difference --

4 JUSTICE ALITO: What's the difference?

5 GENERAL VERRILLI: One big difference,
6 Justice Alito, is the -- you don't have the cost
7 shifting to other market participants. Here --

8 JUSTICE ALITO: Sure you do, because if you
9 don't have money, then the State is going to pay for it
10 or some --

11 GENERAL VERRILLI: But that's different.

12 JUSTICE ALITO: A family member is going to
13 pay for it.

14 GENERAL VERRILLI: That's a difference, and
15 it's a significant difference. That in this situation,
16 one of the economic effects Congress is addressing is
17 that the -- there -- the many billions of dollars of
18 uncompensated costs are transferred directly to other
19 market participants. It's transferred directly to other
20 market participants because health care providers charge
21 higher rates in order to cover the cost of uncompensated
22 care, and insurance companies reflect those higher rates
23 in higher premiums, which Congress found translates to a
24 thousand dollars per family in additional health
25 insurance costs.

1 JUSTICE ALITO: But isn't that really a
2 small part of what the mandate is doing? You can
3 correct me if these figures are wrong, but it appears to
4 me that the CBO has estimated that the average premium
5 for a single insurance policy in the non-group market
6 would be roughly \$5,800 in -- in 2016.

7 Respondents -- the economists who have
8 supported the Respondents estimate that a young, healthy
9 individual targeted by the mandate on average consumes
10 about \$854 in health services each year. So the mandate
11 is forcing these people to provide a huge subsidy to the
12 insurance companies for other purposes that the Act
13 wishes to serve, but isn't -- if those figures are
14 right, isn't it the case that what this mandate is
15 really doing is not requiring the people who are subject
16 to it to pay for the services that they are going to
17 consume? It is requiring them to subsidize services
18 that will be received by somebody else.

19 GENERAL VERRILLI: No, I think that -- I do
20 think that's what the Respondents argue. It's just not
21 right. I think it -- it really gets to a fundamental
22 problem with their argument.

23 JUSTICE GINSBURG: If you're going to have
24 insurance, that's how insurance works.

25 GENERAL VERRILLI: A, it is how insurance

1 works, but, B, the problem that they -- that they are
2 identifying is not that problem. The guaranteed issue
3 and community rating reforms do not have the effect of
4 forcing insurance companies to take on lots of
5 additional people who they then can't afford to cover
6 because they're -- they tend to be the sick, and that
7 is -- in fact, the exact opposite is what happens here.

8 The -- when you enact guaranteed issue and
9 community rating reforms, and you do so in the absence
10 of a minimum coverage provision, it's not that insurance
11 companies take on more and more people and then need a
12 subsidy to cover it, it's that fewer and fewer people
13 end up with insurance because their rates are not
14 regulated. Insurance companies, when -- when they have
15 to offer guaranteed issue and community rating, they are
16 entitled to make a profit. They charge rates sufficient
17 to cover only the sick population because health --

18 JUSTICE KENNEDY: Could you help -- help me
19 with this. Assume for the moment -- you may disagree.
20 Assume for the moment that this is unprecedented, this
21 is a step beyond what our cases have allowed, the
22 affirmative duty to act to go into commerce. If that is
23 so, do you not have a heavy burden of justification?

24 I understand that we must presume laws are
25 constitutional, but, even so, when you are changing the

1 relation of the individual to the government in this,
2 what we can stipulate is, I think, a unique way, do you
3 not have a heavy burden of justification to show
4 authorization under the Constitution?

5 GENERAL VERRILLI: So two things about that,
6 Justice Kennedy. First, we think this is regulation of
7 people's participation in the health care market, and
8 all -- all this minimum coverage provision does is say
9 that, instead of requiring insurance at the point of
10 sale, that Congress has the authority under the commerce
11 power and the necessary and proper power to ensure that
12 people have insurance in advance of the point of sale
13 because of the unique nature of this market, because
14 this is a market in which -- in which you -- although
15 most of the population is in the market most of the
16 time -- 83 percent visit a physician every year; 96
17 percent over a five-year period -- so virtually
18 everybody in society is in this market.

19 And you've got to pay for the health care
20 you get, the predominant way in which it's -- in which
21 it's paid for is insurance, and -- and the Respondents
22 agree that Congress could require that you have
23 insurance in order to get health care or forbid health
24 care from being provided --

25 JUSTICE SCALIA: Why do you -- why do you

1 define the market that broadly? Health care. It may
2 well be that everybody needs health care sooner or
3 later, but not everybody needs a heart transplant, not
4 everybody needs a liver transplant. Why --

5 GENERAL VERRILLI: That's correct, Justice
6 Scalia, but you never know whether you're going to be
7 that person.

8 JUSTICE SCALIA: Could you define the
9 market -- everybody has to buy food sooner or later, so
10 you define the market as food, therefore, everybody is
11 in the market; therefore, you can make people buy
12 broccoli.

13 GENERAL VERRILLI: No, that's quite
14 different. That's quite different. The food market,
15 while it shares that trait that everybody's in it, it is
16 not a market in which your participation is often
17 unpredictable and often involuntary. It is not a market
18 in which you often don't know before you go in what you
19 need, and it is not a market in which, if you go in
20 and -- and seek to obtain a product or service, you will
21 get it even if you can't pay for it. It doesn't have --

22 JUSTICE SCALIA: Is that a principled basis
23 for distinguishing this from other situations? I mean,
24 you know, you can also say, well, the person subject to
25 this has blue eyes. That would indeed distinguish it

1 from other situations. Is it a principled basis? I
2 mean, it's -- it's a basis that explains why the
3 government is doing this, but is it -- is it a basis
4 which shows that this is not going beyond what -- what
5 the -- the system of enumerated powers allows the
6 government to do.

7 GENERAL VERRILLI: Yes, for two reasons.
8 First, this -- the test, as this Court has articulated
9 it, is: Is Congress regulating economic activity with a
10 substantial effect on interstate commerce?

11 The way in which this statute satisfies the
12 test is on the basis of the factors that I have
13 identified. If --

14 JUSTICE GINSBURG: Mr. Verrilli, I thought
15 that your main point is that, unlike food or any other
16 market, when you made the choice not to buy insurance,
17 even though you have every intent in the world to
18 self-insure, to save for it, when disaster strikes, you
19 may not have the money. And the tangible result of it
20 is -- we were told there was one brief that Maryland
21 Hospital Care bills 7 percent more because of these
22 uncompensated costs, that families pay a thousand
23 dollars more than they would if there were no
24 uncompensated costs.

25 I thought what was unique about this is it's

1 not my choice whether I want to buy a product to keep me
2 healthy, but the cost that I am forcing on other people
3 if I don't buy the product sooner rather than later.

4 GENERAL VERRILLI: That is -- and that is
5 definitely a difference that distinguishes this market
6 and justifies this as a regulation.

7 JUSTICE BREYER: All right. So if that is
8 your difference -- if that is your difference, I'm
9 somewhat uncertain about your answers to -- for example,
10 Justice Kennedy asked, can you, under the Commerce
11 Clause, Congress create commerce where previously none
12 existed.

13 Well, yes, I thought the answer to that was,
14 since McCulloch versus Maryland, when the Court said
15 Congress could create the Bank of the United States
16 which did not previously exist, which job was to create
17 commerce that did not previously exist, since that time
18 the answer has been, yes. I would have thought that
19 your answer -- can the government, in fact, require you
20 to buy cell phones or buy burials that, if we propose
21 comparable situations, if we have, for example, a
22 uniform United States system of paying for every burial
23 such as Medicare Burial, Medicaid Burial, Ship Burial,
24 ERISA Burial and Emergency Burial beside the side of the
25 road, and Congress wanted to rationalize that system,

1 wouldn't the answer be, yes, of course, they could.

2 GENERAL VERRILLI: So --

3 JUSTICE BREYER: And the same with the
4 computers, or the same with the -- the cell phones, if
5 you're driving by the side of the highway and there is a
6 federal emergency service just as you say you have to
7 buy certain mufflers for your car that don't hurt the
8 environment, you could -- I mean, see, doesn't it depend
9 on the situation?

10 GENERAL VERRILLI: It does, Justice Breyer,
11 and if Congress were to enact laws like that, we --

12 JUSTICE BREYER: Would be up here defending
13 it --

14 GENERAL VERRILLI: It would be my
15 responsibility to then defend them, and I would defend
16 them on a rationale like that, but I do think that we
17 are advancing a narrower rationale.

18 JUSTICE KENNEDY: Well, then your question
19 is whether or not there are any limits on the Commerce
20 Clause. Can you identify for us some limits on the
21 Commerce Clause?

22 GENERAL VERRILLI: Yes. The -- the
23 rationale purely under the Commerce Clause that we're
24 advocating here would not justify forced purchases of
25 commodities for the purpose of stimulating demand.

1 We -- the -- it would not justify purchases of insurance
2 for the purposes -- in situations in which insurance
3 doesn't serve as the method of payment for service --

4 JUSTICE KENNEDY: But why not? If
5 Congress -- if Congress says that the interstate
6 commerce is affected, isn't, according to your view,
7 that the end of the analysis.

8 GENERAL VERRILLI: No. The -- we think that
9 in a -- when -- the difference between those situations
10 and this situation is that in those situations, Your
11 Honor, Congress would be moving to create commerce.
12 Here Congress is regulating existing commerce, economic
13 activity that is already going on, people's
14 participation in the health care market, and is
15 regulating to deal with existing effects of existing
16 commerce.

17 CHIEF JUSTICE ROBERTS: That, it seems to
18 me, is -- and it's a passage in your reply brief that I
19 didn't quite grasp. It's the same point. You say
20 health insurance is not purchased for its own sake, like
21 a car or broccoli; it is a means of financing health
22 care consumption and covering universal risks. Well, a
23 car or broccoli aren't purchased for their own sake,
24 either.

25 They're purchased for the sake of

1 transportation or, in broccoli, covering the need for
2 food.

3 GENERAL VERRILLI: No --

4 CHIEF JUSTICE ROBERTS: I don't understand
5 that distinction.

6 GENERAL VERRILLI: The difference, Mr. Chief
7 Justice, is that health insurance is the means of
8 payment for health care, and broccoli is --

9 CHIEF JUSTICE ROBERTS: Well, now that's a
10 significant -- I'm sorry.

11 GENERAL VERRILLI: And broccoli is not the
12 means of payment for anything else. And an automobile
13 is not --

14 CHIEF JUSTICE ROBERTS: It's the means of
15 satisfying a basic human need --

16 GENERAL VERRILLI: But --

17 CHIEF JUSTICE ROBERTS: -- just as insurance
18 is the means of satisfying --

19 GENERAL VERRILLI: But I do think that's the
20 difference between existing commerce, activity in the
21 market already occurring -- the people in the health
22 care market purchasing, obtaining health care
23 services -- and the creation of commerce. And the
24 principle that we're advocating here under the Commerce
25 Clause does not take the step of justifying the creation

1 of commerce.

2 JUSTICE GINSBURG: General Verrilli, can
3 we --

4 GENERAL VERRILLI: This is a regulation of
5 existing commerce.

6 JUSTICE GINSBURG: Can we go back to --
7 Justice Breyer asked a question, and it kind of
8 interrupted your answer to my question. And tell me if
9 I'm wrong about this, but I thought a major, major point
10 of your argument was that the people who don't
11 participate in this market are making it much more
12 expensive for the people who do; that is, they will
13 get -- a goodly number of them will get services that
14 they can't afford at the point when they need them, and
15 the result is that everybody else's premiums get raised.

16 So, you're not -- it's not your free choice
17 just to do something for yourself. What you do is going
18 to affect others, affect them in a major way.

19 GENERAL VERRILLI: That -- that absolutely
20 is a justification for Congress's action here. That is
21 existing economic activity that Congress is regulating
22 by means of this rule.

23 JUSTICE SCALIA: Mr. Verrilli, you could say
24 that about buying a car. If people don't buy cars, the
25 price that those who do buy cars pay will have to be

1 higher. So, you could say in order to bring the price
2 down, you're hurting these other people by not buying a
3 car.

4 GENERAL VERRILLI: That is not what we're
5 saying, Justice Scalia.

6 JUSTICE SCALIA: That's not -- that's not
7 what you're saying.

8 GENERAL VERRILLI: That's not -- not --

9 JUSTICE SCALIA: I thought it was. I
10 thought you're saying other people are going to have to
11 pay more for insurance because you're not buying it.

12 GENERAL VERRILLI: No. It's because you're
13 going -- in the health care market, you're going into
14 the market without the ability to pay for what you get,
15 getting the health care service anyway as a result of
16 the social norms that allow -- that -- to which we've
17 obligated ourselves so that people get health care.

18 JUSTICE SCALIA: Well, don't obligate
19 yourself to that. Why -- you know?

20 GENERAL VERRILLI: Well, I can't imagine
21 that that -- that the Commerce Clause would -- would
22 forbid Congress from taking into account this deeply
23 embedded social norm.

24 JUSTICE SCALIA: You could do it. But does
25 that expand your ability to issue mandates to -- to the

1 people?

2 GENERAL VERRILLI: I -- this is not a
3 purchase mandate. This is a -- this is a law that
4 regulates the method of paying for a service that the
5 class of people to whom it applies are either
6 consuming --

7 JUSTICE SOTOMAYOR: General --

8 GENERAL VERRILLI: -- or inevitably will
9 consume.

10 JUSTICE SOTOMAYOR: General, I see or have
11 seen three strands of arguments in your briefs, and one
12 of them is echoed today. The first strand that I've
13 seen is that Congress can pass any necessary laws to
14 effect those powers within its rights, i.e., because it
15 made a decision that to effect -- to effect mandatory
16 issuance of insurance, that it could also obligate the
17 mandatory purchase of it.

18 The second strand I see is self-insurance
19 affects the market; and so, the government can regulate
20 those who self-insure.

21 And the third argument -- and I see all of
22 them as different -- is that what the government is
23 doing -- and I think it's the argument you're making
24 today -- that what the -- what the government is saying
25 is if you pay for -- if you use health services, you

1 have to pay with insurance, because only insurance will
2 guarantee that whatever need for health care that you
3 have will be covered, because virtually no one, perhaps
4 with the exception of 1 percent of the population, can
5 afford the massive cost if the unexpected happens.

6 This third argument seems to be saying what
7 we're regulating is health care, and when you go for
8 health services, you have to pay for insurance, and
9 since insurance won't issue at the moment that you
10 consume the product, we can reasonably, necessarily tell
11 you to buy it ahead of time, because you can't buy it at
12 the moment that you need it.

13 Is that -- which of these three is your
14 argument? Are all of them your argument? I'm just not
15 sure what the --

16 GENERAL VERRILLI: So, let me try to state
17 it this way: The Congress enacted reforms of the
18 insurance market, the guaranteed-issue and
19 community-rating reforms. It did so to deal with a very
20 serious problem that results in 40 million people not
21 being able to get insurance and therefore not access to
22 the health care environment. Everybody agrees in this
23 case that those are within Congress's Article I powers.

24 The minimum coverage provision is necessary
25 to carry those provisions into execution, because

1 without them, without those provisions, without minimum
2 coverage, guaranteed issue and community rating will, as
3 the experience in the States showed, make matters worse,
4 not better. There will be fewer people covered; it will
5 cost more. Now, the --

6 JUSTICE SOTOMAYOR: So, on that ground --

7 GENERAL VERRILLI: So --

8 JUSTICE SOTOMAYOR: -- you're answering
9 affirmatively to my colleagues that have asked you the
10 question, can the government force you into commerce?

11 GENERAL VERRILLI: So -- no. No.

12 JUSTICE SOTOMAYOR: And there's no limit to
13 that power.

14 GENERAL VERRILLI: No, because that's --
15 that's the first part of our argument.

16 The second part of our argument is that the
17 means here that Congress has chosen, the minimum
18 coverage provision, is a means that regulates the --
19 that regulates economic activity, namely your
20 transaction in the health care market, with substantial
21 effects on interstate commerce; and it is the
22 conjunction of those two that we think provides the
23 particularly secure foundation for this statute under
24 the commerce power.

25 JUSTICE KAGAN: General, you've talked on --

1 a couple of times about other alternatives that Congress
2 might have had, other alternatives that the Respondents
3 suggest to deal with this problem, in particular, the
4 alternative of mandating insurance at the point at which
5 somebody goes to a hospital or an emergency room and
6 asks for care.

7 Did Congress consider those alternatives?
8 Why did it reject them? How should we think about the
9 question of alternative ways of dealing with these
10 problems?

11 GENERAL VERRILLI: I do think, Justice
12 Kagan, that the point of difference between my friends
13 on the other side and the United States is about one of
14 timing. They've agreed that Congress has Article I
15 authority to impose an insurance requirement or other --
16 or other penalty at the point of sale, and they have
17 agreed that Congress has the authority to do that to
18 achieve the same objectives that the minimum coverage
19 provision in the Affordable Care Act is designed to
20 achieve.

21 This is a situation in which we are talking
22 about means. Congress gets a substantial deference in
23 the choice of means, and if one thinks about the
24 difference between the means they say Congress should
25 have chosen and the means Congress did choose, I think

1 you can see why it was eminently more sensible for
2 Congress to choose the means that it chose.

3 JUSTICE KENNEDY: I'm not sure which way it
4 cuts, if the Congress has alternate means. Let's assume
5 that it could use the tax power to raise revenue and to
6 just have a national health service, single payer. How
7 does that factor into our analysis? In one sense, it
8 can be argued that this is what the government is doing;
9 it ought to be honest about the power that it's using
10 and use the correct power.

11 On the other hand, it means that since the
12 Court can do it anyway -- Congress can do it anyway, we
13 give a certain amount of latitude. I'm not sure which
14 the way the argument goes.

15 GENERAL VERRILLI: Let me try to answer that
16 question, Justice Kennedy, and get back to the question
17 you asked me earlier. The -- the -- I do think one
18 striking feature of the argument here that this is a
19 novel exercise of power is that what Congress chose to
20 do was to rely on market mechanisms and efficiency and a
21 method that has more choice than would the traditional
22 Medicare/Medicaid type model. And so, it seems a little
23 ironic to suggest that that counts against it.

24 But beyond that, in the sense that it's
25 novel, this provision is novel in the same way, or

1 unprecedented in the same way, that the Sherman Act was
2 unprecedented when the Court upheld it in the Northern
3 Securities case; or the Packers and Stockyards Act was
4 unprecedented when the Court upheld it, or the National
5 Labor Relations Act was unprecedented when the Court
6 upheld it in Jones & Laughlin; or the dairy price
7 supports in Wrightwood Dairy and Rock Royal. And --

8 JUSTICE SCALIA: Oh, no, it's not. They all
9 involved commerce. There was no doubt that what was
10 being regulated was commerce. And here you're
11 regulating somebody who isn't covered.

12 By the way, I don't agree with you that the
13 relevant market here is health care. You're not
14 regulating health care. You're regulating insurance.
15 It's the insurance market that you're addressing and
16 you're saying that some people who are not in it must be
17 in it, and that's -- that's different from regulating in
18 any manner commerce that already exists out there.

19 GENERAL VERRILLI: Well, to the extent that
20 we are looking at the comprehensive scheme, Justice
21 Scalia, it is regulating commerce that already exists
22 out there. And the means in which that regulation is
23 made effective here, the minimum coverage provision, is
24 a regulation of the way in which people participate, the
25 method of their payment in the health care market. That

1 is what it is.

2 And I do think, Justice Kennedy, getting
3 back to the question you asked before, what -- what
4 matters here is whether Congress is choosing a tool
5 that's reasonably adapted to the problem that Congress
6 is confronting. And that may mean that the tool is
7 different from a tool that Congress has chosen to use in
8 the past. That's not something that counts against the
9 provision in a Commerce Clause analysis.

10 JUSTICE SCALIA: Wait. That's -- it's both
11 "Necessary and Proper." What you just said addresses
12 what's necessary. Yes, has to be reasonably adapted.
13 Necessary does not mean essential, just reasonably
14 adapted. But in addition to being necessary, it has to
15 be proper. And we've held in two cases that something
16 that was reasonably adapted was not proper, because it
17 violated the sovereignty of the States, which was
18 implicit in the constitutional structure.

19 The argument here is that this also is -- may be
20 necessary, but it's not proper, because it violates an
21 equally evident principle in the Constitution, which is
22 that the Federal Government is not supposed to be a
23 government that has all powers; that it's supposed to be
24 a government of limited powers. And that's what all
25 this questioning has been about. What -- what is left?

1 If the government can do this, what -- what else can it
2 not do?

3 GENERAL VERRILLI: This does not violate the
4 norm of proper as this Court articulated it in Printz or
5 in New York because it does not interfere with the
6 States as sovereigns. This is a regulation that -- this
7 is a regulation --

8 JUSTICE SCALIA: No, that wasn't my point.
9 That is not the only constitutional principle that
10 exists.

11 GENERAL VERRILLI: But it --

12 JUSTICE SCALIA: An equally evident
13 constitutional principle is the principle that the
14 Federal Government is a government of enumerated powers
15 and that the vast majority of powers remain in the
16 States and do not belong to the Federal Government. Do
17 you acknowledge that that's a principle?

18 GENERAL VERRILLI: Of course we do, Your
19 Honor.

20 JUSTICE SCALIA: Okay. That's what we are
21 talking about here.

22 GENERAL VERRILLI: And the way in which this
23 Court in its cases has policed the boundary that -- of
24 what's in the national sphere and what's in the local
25 sphere is to ask whether Congress is regulating economic

1 activity with a substantial effect on interstate
2 commerce.

3 And here I think it's really impossible, in
4 view of our history, to say that Congress is invading
5 the State sphere. This is a -- this is a market in
6 which 50 percent of the people in this country get their
7 health care through their employer. There is a massive
8 Federal tax subsidy of \$250 billion a year that makes
9 that much more affordable. ERISA and HIPAA regulate
10 that to ensure that the kinds of bans on pre-existing
11 condition discrimination and pricing practices that
12 occur in the individual market don't occur.

13 JUSTICE SCALIA: I don't understand your
14 point --

15 GENERAL VERRILLI: This is in --

16 JUSTICE SCALIA: Whatever the States have
17 chosen not to do, the Federal Government can do?

18 GENERAL VERRILLI: No, not at all.

19 JUSTICE SCALIA: I mean, the Tenth Amendment
20 says the powers not given to the Federal Government are
21 reserved, not just to the States, but to the States and
22 the people. And the argument here is that the people
23 were left to decide whether they want to buy insurance
24 or not.

25 GENERAL VERRILLI: But this -- but, Your

1 Honor, this is -- what the Court has said, and I think
2 it would be a very substantial departure from what the
3 Court has said, is that when Congress is regulating
4 economic activity with a substantial effect on
5 interstate commerce, that will be upheld. And that is
6 what is going on here. And to embark on -- I would
7 submit with all due respect, to embark on the kind of
8 analysis that my friends on the other side suggest the
9 Court ought to embark on is to import Lochner-style
10 substantive due process --

11 CHIEF JUSTICE ROBERTS: The key in Lochner
12 is that we were talking about regulation of the States,
13 right, and the States are not limited to enumerated
14 powers. The Federal Government is. And it seems to me
15 it's an entirely different question when you ask
16 yourself whether or not there are going to be limits on
17 the Federal power, as opposed to limits on the States,
18 which was the issue in Lochner.

19 GENERAL VERRILLI: I agree, except,
20 Mr. Chief Justice, that what the Court has said, as I
21 read the Court's cases, is that the way in which you
22 ensure that the Federal Government stays in its sphere
23 and the sphere reserved for the States is protected is
24 by policing the boundary. Is the national government
25 regulating economic activity with a substantial effect

1 on interstate commerce?

2 JUSTICE KENNEDY: But the reason, the reason
3 this is concerning is because it requires the individual
4 to do an affirmative act. In the law of torts, our
5 tradition, our law has been that you don't have the duty
6 to rescue someone if that person is in danger. The
7 blind man is walking in front of a car and you do not
8 have a duty to stop him, absent some relation between
9 you. And there is some severe moral criticisms of that
10 rule, but that's generally the rule.

11 And here the government is saying that the
12 Federal Government has a duty to tell the individual
13 citizen that it must act, and that is different from
14 what we have in previous cases, and that changes the
15 relationship of the Federal Government to the individual
16 in a very fundamental way.

17 GENERAL VERRILLI: I don't think so, Justice
18 Kennedy, because it is predicated on the participation
19 of these individuals in the market for health care
20 services. Now, it happens to be that this is a market
21 in which, aside from the groups that the statute
22 excludes, virtually everybody participates. But it is a
23 regulation of their participation in that market.

24 CHIEF JUSTICE ROBERTS: Well, but it's
25 critical how you define the market. If I understand the

1 law, the policies that you're requiring people to
2 purchase involve -- must contain provision for maternity
3 and newborn care, pediatric services, and substance use
4 treatment. It seems to me that you cannot say that
5 everybody is going to need substance use treatment --
6 substance use treatment or pediatric services, and yet
7 that is part of what you require them to purchase.

8 GENERAL VERRILLI: Well, it's part of what
9 the statute requires the insurers to offer. And I think
10 the reason is because it's trying to define minimum
11 essential coverage because the problem --

12 CHIEF JUSTICE ROBERTS: But your theory is
13 that there is a market in which everyone participates
14 because everybody might need a certain range of health
15 care services, and yet you're requiring people who are
16 not -- never going to need pediatric or maternity
17 services to participate in that market.

18 GENERAL VERRILLI: The -- with respect to
19 what insurance has to cover, Your Honor, I think
20 Congress is entitled the latitude of making the
21 judgments of what the appropriate scope of coverage is.
22 And the problem here in this market is that for -- you
23 may think you're perfectly healthy and you may think
24 that you're not -- that you're being forced to subsidize
25 somebody else, but this is not a market in which you can

1 say that there is a immutable class of healthy people
2 who are being forced to subsidize the unhealthy. This
3 is a market in which you may be healthy one day and you
4 may be a very unhealthy participant in that market the
5 next day, and that is a fundamental difference, and
6 you're not going to know in which --

7 CHIEF JUSTICE ROBERTS: I think you're
8 posing the question I was posing, which is that doesn't
9 apply to a lot of what you're requiring people to
10 purchase. Pediatric services, maternity services. You
11 cannot say that everybody is going to participate in the
12 substance use treatment market and yet you require
13 people to purchase insurance coverage for that.

14 GENERAL VERRILLI: Congress has got --
15 Congress is enacting economic regulation here. It has
16 latitude to define essential -- the attributes of
17 essential coverage. That doesn't -- that doesn't seem
18 to me to implicate the question of whether Congress is
19 engaging in economic regulation and solving an economic
20 problem here, and that is what Congress is doing.

21 JUSTICE ALITO: Are you denying this? If
22 you took the group of people who are subject to the
23 mandate and you calculated the amount of health care
24 services this whole group would consume and figured out
25 the cost of an insurance policy to cover the services

1 that group would consume, the cost of that policy would
2 be much, much less than the kind of policy that these
3 people are now going to be required to purchase under
4 the Affordable Care Act?

5 GENERAL VERRILLI: Well, while they are
6 young and healthy, that would be true. But they are not
7 going to be young and healthy forever. They are going
8 to be on the other side of that actuarial equation at
9 some point. And of course, you don't know which among
10 that group is the person who's going to be hit by the
11 bus or get the definitive diagnosis. And that --

12 JUSTICE ALITO: The point is -- no, you take
13 into account that some people in that group are going to
14 be hit by a bus, some people in that group are going to
15 unexpectedly contract or be diagnosed with a disease
16 that -- that is very expensive to treat. But if you
17 take their costs and you calculate that, that's a lot
18 less than the amount that they are going to be required
19 to pay.

20 So that you can't just justify this on the
21 basis of their trying to shift their costs off to other
22 people, can you?

23 GENERAL VERRILLI: Well, no, the people in
24 that class get benefits, too, Justice Alito. They get
25 the guaranteed-issue benefit that they would not

1 otherwise have, which is an enormously valuable benefit.

2 And in terms of the -- the subsidy
3 rationale, I don't think -- I think it's -- it would be
4 unusual to say that it's an illegitimate exercise of the
5 commerce power for some people to subsidize others.
6 Telephone rates in this country for a century were set
7 via the exercise of the commerce power in a way in which
8 some people paid rates that were much higher than their
9 costs in order to subsidize --

10 JUSTICE SCALIA: Only if you make phone
11 calls.

12 GENERAL VERRILLI: Well, right. But -- but
13 everybody -- to live in the modern world, everybody
14 needs a telephone. And the same thing with respect to
15 the -- you know, the dairy price supports that -- that
16 the Court upheld in Wrightwood Dairy and Rock Royal.
17 You can look at those as disadvantageous contracts, as
18 forced transfers, that -- you know, I suppose it's
19 theoretically true that you could raise your kids
20 without milk, but the reality is you've got to go to the
21 store and buy milk. And the commerce power -- as a
22 result of the exercise of the commerce power, you're
23 subsidizing somebody else --

24 JUSTICE KAGAN: And this is especially true,
25 isn't it, General --

1 GENERAL VERRILLI: -- because that's a
2 judgment Congress has made.

3 JUSTICE KAGAN: -- Verrilli, because in this
4 context, the subsidizers eventually become the
5 subsidized?

6 GENERAL VERRILLI: Well, that was the point
7 I was trying to make, Justice Kagan, that you're young
8 and healthy one day, but you don't stay that way, and
9 the system works over time. And so, I just don't think
10 it's a fair characterization of it. And it does get
11 back to, I think, a problem I think is important to
12 understand --

13 JUSTICE SCALIA: These people not stupid.
14 They're going to buy insurance later. They're young and
15 need the money now.

16 GENERAL VERRILLI: But that's --

17 JUSTICE SCALIA: When they think they have a
18 substantial risk of incurring high medical bills,
19 they'll buy insurance, like the rest of us.

20 GENERAL VERRILLI: But that's -- that's --

21 JUSTICE SCALIA: I don't know why you think
22 that they're never going to buy it.

23 GENERAL VERRILLI: That's the problem,
24 Justice Scalia. That's -- and that's exactly the
25 experience that the States had that made the imposition

1 of guaranteed issue and community rating not only be
2 ineffectual but be highly counterproductive. Rates, for
3 example, in New Jersey doubled or tripled, went from
4 180,000 people covered in this market down to 80,000
5 people covered in this market. In Kentucky, virtually
6 every insurer left the market.

7 And the reason for that is because when
8 people have that guarantee of -- that they can get
9 insurance, they're going to make that calculation that
10 they won't get it until they're sick and they need it.
11 And so, the pool of people in the insurance market gets
12 smaller and smaller. The rates you have to charge to
13 cover them get higher and higher. It helps fewer and
14 fewer -- insurance covers fewer and fewer people until
15 the system ends.

16 This is not a situation in which you're
17 conscripting -- you're forcing insurance companies to
18 cover very large numbers of unhealthy people --

19 JUSTICE SCALIA: You could solve that
20 problem by simply not requiring the insurance company to
21 sell it to somebody who has a condition that is going to
22 require medical treatment, or at least not -- not
23 require them to sell it to him at a rate that he sells
24 it to healthy people.

25 But you don't want to do that.

1 GENERAL VERRILLI: But that seems to me to
2 say, Justice Scalia, that Congress -- that's the problem
3 here. And that seems to me --

4 JUSTICE SCALIA: It's a self-created
5 problem.

6 GENERAL VERRILLI: -- to say that Congress
7 cannot solve the problem through standard economic
8 regulation, and that -- and I do not think that can be
9 the premise of our understanding of the Commerce Clause.

10 JUSTICE SCALIA: Whatever --

11 GENERAL VERRILLI: This is an economic
12 problem.

13 JUSTICE SCALIA: -- problems Congress's
14 economic regulation produces, whatever they are, I think
15 Congress can do something to counteract them. Here,
16 requiring somebody to enter -- to enter the insurance
17 market.

18 GENERAL VERRILLI: This is not a -- it's not
19 a problem of Congress's creation. The problem is that
20 you have 40 million people who cannot get affordable
21 insurance through the means that the rest of us get
22 affordable insurance. Congress, after long study and
23 careful deliberation, and viewing the experiences of the
24 States and the way they tried to handle this problem,
25 adopted a package of reforms. Guaranteed issue and

1 community rating and subsidies and the minimum coverage
2 provision are a package of reforms that solve that
3 problem.

4 I don't -- I think it's highly artificial to
5 view this as a problem of Congress's own creation.

6 CHIEF JUSTICE ROBERTS: Is your argument
7 limited to insurance or means of paying for health care?

8 GENERAL VERRILLI: Yes. It's limited to
9 insurance.

10 CHIEF JUSTICE ROBERTS: Well, now, why is
11 that? Congress could -- once you -- once you establish
12 that you have a market for health care, I would suppose
13 Congress's power under the Commerce Clause meant they
14 had a broad scope in terms of how they regulate that
15 market. And it would be -- it would be going back to
16 *Lochner* if we were put in the position of saying, no,
17 you can use your commerce power to regulate insurance,
18 but you can't use your commerce power to regulate this
19 market in other ways. I think that would be a very
20 significant intrusion by the Court into Congress's
21 power.

22 So, I don't see how we can accept your --
23 it's good for you in this case to say, oh, it's just
24 insurance. But once we say that there is a market and
25 Congress can require people to participate in it, as

1 some would say, or as you would say, that people are
2 already participating in it, it seems to me that we
3 can't say there are limitations on what Congress can do
4 under its commerce power, just like in any other area --
5 given significant deference that we accord to Congress
6 in this area, all bets are off, and you could regulate
7 that market in any rational way.

8 GENERAL VERRILLI: But this is insurance as
9 a method of payment for health care services. And that
10 --

11 CHIEF JUSTICE ROBERTS: Exactly. You're
12 worried --

13 GENERAL VERRILLI: And that's --

14 CHIEF JUSTICE ROBERTS: That's the area that
15 Congress has chosen to regulate. There's this health
16 care market. Everybody's in it. So, we can regulate
17 it, and we're going to look at a particular serious
18 problem, which is how people pay for it. But next year,
19 they can decide everybody's in this market; we're going
20 to look at a different problem now, and this is how
21 we're going to regulate it. And we can compel people to
22 do things -- purchase insurance, in this case; something
23 else in the next case -- because you've -- we've
24 accepted the argument that this is a market in which
25 everybody participates.

1 GENERAL VERRILLI: Mr. Chief Justice, let me
2 answer that, and then if I may, I'd like to move to the
3 tax power argument.

4 JUSTICE SCALIA: Can I tell you what the
5 something else is so -- while you're answering it?

6 (Laughter.)

7 JUSTICE SCALIA: The something else is
8 everybody has to exercise, because there's no doubt that
9 lack of exercise cause -- causes illness, and that
10 causes health care costs to go up. So, the Federal
11 government says everybody has to join a -- an exercise
12 club. That's the something else.

13 GENERAL VERRILLI: No. The position we're
14 taking here would not justify that rule, Justice Scalia,
15 because health club membership is not a means of payment
16 for -- for consumption of anything in a market. And --

17 CHIEF JUSTICE ROBERTS: Right. Right.
18 That's exactly right, but it doesn't seem responsive to
19 my concern that there's no reason -- once we say this is
20 within Congress's commerce power, there's no reason
21 other than our own arbitrary judgment to say all they
22 can regulate is the method of payment. They can
23 regulate other things that affect this now-conceded
24 interstate market in health care in which everybody
25 participates.

1 GENERAL VERRILLI: But I think it's common
2 ground between us and the Respondents that this is an
3 interstate market in which everybody participates.

4 CHIEF JUSTICE ROBERTS: Right.

5 GENERAL VERRILLI: And they agree that
6 Congress could impose the insurance requirement at the
7 point of sale. And this is just a question of timing
8 and whether Congress's -- whether the necessary and
9 proper authority gives Congress, because of the
10 particular features of this market, the ability to
11 impose the -- the insurance, the need for insurance, the
12 maintenance of insurance before you show up to get
13 health care, rather than at the moment you get up to --

14 CHIEF JUSTICE ROBERTS: Right. No, I think
15 you're just --

16 GENERAL VERRILLI: -- show up to get health
17 care. And that --

18 CHIEF JUSTICE ROBERTS: Unless I'm missing
19 something, I think you're just repeating the idea that
20 this is the regulation of the method of payment. And I
21 understand that argument. And it may be --

22 GENERAL VERRILLI: And it is --

23 CHIEF JUSTICE ROBERTS: It may be a good
24 one. But what I'm concerned about is, once we accept
25 the principle that everybody is in this market, I don't

1 see why Congress's power is limited to regulating the
2 method of payment and doesn't include as it does in any
3 other area.

4 What other area have we said Congress can
5 regulate this market but only with respect to prices,
6 but only with respect to means of travel? No. Once
7 you're -- once you're in the interstate commerce and can
8 regulate it, pretty much all bets are off.

9 GENERAL VERRILLI: But we agree Congress can
10 regulate this market. ERISA regulates this market.
11 HIPAA regulates this market. The market is regulated at
12 the Federal level in very significant ways already. So,
13 I don't think that's the question, Mr. Chief Justice.
14 The question is, is there a limit to the authority that
15 we're advocating here under the commerce power? And the
16 answer is yes, because we are not advocating for a power
17 that would allow Congress to compel purchases.

18 JUSTICE ALITO: Could you just --

19 GENERAL VERRILLI: Yes.

20 JUSTICE ALITO: Before you move on, could
21 you express your limiting principle as succinctly as you
22 possibly can? Congress can force people to purchase a
23 product where the failure to purchase the product has a
24 substantial effect on interstate commerce, if what? If
25 this is part of a larger regulatory scheme?

1 GENERAL VERRILLI: We've got --

2 JUSTICE ALITO: Is that it?

3 GENERAL VERRILLI: We've got --

4 JUSTICE ALITO: Is there anything more?

5 GENERAL VERRILLI: We got two and they
6 are -- they are different. Let me state them. First,
7 with respect to the comprehensive scheme. When Congress
8 is regulating -- is enacting a comprehensive scheme that
9 it has the authority to enact that the Necessary and
10 Proper Clause gives it the authority to include
11 regulation, including a regulation of this kind, if it
12 is necessary to counteract risks attributable to the
13 scheme itself that people engage in economic activity
14 that would undercut the scheme. It's like -- it's very
15 much like Wickard in that respect. Very much like Raich
16 in that respect.

17 With respect to the -- with respect to
18 the -- considering the Commerce Clause alone and not
19 embedded in the comprehensive scheme, our position is
20 that Congress can regulate the method of payment by
21 imposing an insurance requirement in advance of the time
22 in which the -- the service is consumed when the class
23 to which that requirement applies either is or virtually
24 most certain to be in that market when the timing of
25 one's entry into that market and what you will need when

1 you enter that market is uncertain and when -- when you
2 will get the care in that market, whether you can afford
3 to pay for it or not and shift costs to other market
4 participants.

5 So those -- those are our views as to --
6 those are the principles we are advocating for and it's,
7 in fact, the conjunction of the two of them here that
8 makes this, we think, a strong case under the Commerce
9 Clause.

10 JUSTICE SOTOMAYOR: General, could you turn
11 to the tax clause?

12 GENERAL VERRILLI: Yes.

13 JUSTICE SOTOMAYOR: I have looked for a case
14 that involves the issue of whether something denominated
15 by Congress as a penalty was nevertheless treated as a
16 tax, except in those situations where the code itself or
17 the statute itself said treat the penalty as a tax.

18 Do you know of any case where we've done
19 that?

20 GENERAL VERRILLI: Well, I think I would
21 point the Court to the License Tax Case, where it was --
22 was denominated a fee and nontax, and the Court upheld
23 it as an exercise of the taxing power, in a situation in
24 which the structure of the law was very much like the
25 structure of this law, in that there was a separate

1 stand-alone provision that set the predicate and then a
2 separate provision imposing --

3 JUSTICE SCALIA: But fees, you know, license
4 fees, fees for a hunting license, everybody knows those
5 are taxes. I mean, I don't think there is as much of a
6 difference between a fee and a tax as there is between a
7 penalty and a tax.

8 GENERAL VERRILLI: And that, and -- and I
9 think in terms of the tax power, I think it's useful to
10 separate this into two questions. One is a question of
11 characterization. Can this be characterized as a tax;
12 and second, is it a constitutional exercise of the
13 power?

14 With respect to the question of
15 characterization, the -- this is -- in the Internal
16 Revenue Code, it is administered by the IRS, it is paid
17 on your Form 1040 on April 15th, I think --

18 JUSTICE GINSBURG: But yesterday you told
19 me -- you listed a number of penalties that are enforced
20 through the tax code that are not taxes and they are not
21 penalties related to taxes.

22 GENERAL VERRILLI: They may still be
23 exercise of the tax -- exercises of the taxing power,
24 Justice Ginsburg, as this is, and I think there isn't a
25 case in which the Court has, to my mind, suggested

1 anything that bears this many indicia of a tax can't be
2 considered as an exercise of the taxing power.

3 In fact, it seems to me the License Tax
4 Cases point you in the opposite direction. And beyond
5 that your -- it seems to me the right way to think about
6 this question is whether it is capable of being
7 understood as an exercise of the tax --

8 JUSTICE SCALIA: The President said it
9 wasn't a tax, didn't he?

10 GENERAL VERRILLI: Well, Justice Scalia,
11 what the -- two things about that. First, as it seems
12 to me, what matters is what power Congress was
13 exercising. And they were -- and I think it's clear
14 that the -- they were exercising the tax power as well
15 as --

16 JUSTICE SCALIA: You're making two
17 arguments. Number one, it's a tax; and number two, even
18 if it isn't a tax, it's within the taxing power. I'm
19 just addressing the first.

20 GENERAL VERRILLI: What the President
21 said --

22 JUSTICE SCALIA: Is it a tax or not a tax?
23 The President didn't think it was.

24 GENERAL VERRILLI: The President said it
25 wasn't a tax increase because it ought to be understood

1 as an incentive to get people to have insurance. I
2 don't think it's fair to infer from that anything about
3 whether that is an exercise of the tax power or not.

4 JUSTICE GINSBURG: A tax is to raise
5 revenue, tax is a revenue-raising device, and the
6 purpose of this exaction is to get people into the
7 health care risk -- risk pool before they need medical
8 care. And so it will be successful, if it doesn't raise
9 any revenue, if it gets people to buy the insurance,
10 that's -- that's what this penalty is -- this penalty is
11 designed to affect conduct.

12 The conduct is buy health protection, buy
13 health insurance before you have a need for medical
14 care. That's what the penalty is designed to do, not to
15 raise revenue.

16 GENERAL VERRILLI: That -- that is true,
17 Justice Ginsburg. That is also true of the marijuana
18 tax that was upheld in Sanchez. That's commonly true of
19 penalties under the code. They do -- if they raise
20 revenue, they are exercises of the taxing power, but
21 their purpose is not to raise revenue. Their purpose is
22 to discourage behavior.

23 I mean, the mortgage deduction works that
24 way. When the mortgage deduction is -- it's clearly an
25 exercise of the taxing power. When it's successful, it

1 raises less revenue for the Federal Government. It's
2 still an exercise of the taxing power. So, I don't --

3 JUSTICE KAGAN: I suppose, though, General,
4 one question is whether the determined efforts of
5 Congress not to refer to this as a tax make a
6 difference. I mean, you're suggesting we should just
7 look to the practical operation. We shouldn't look at
8 labels. And that seems right, except that here we have
9 a case in which Congress determinedly said, this is not
10 a tax, and the question is why should that be
11 irrelevant?

12 GENERAL VERRILLI: I don't think that that's
13 a fair characterization of the actions of Congress here,
14 Justice Kagan. On the -- December 23rd, a point of
15 constitutional order was called, too, in fact, with
16 respect to this law. The floor sponsor, Senator Baucus,
17 defended it as an exercise of the taxing power. In his
18 response to the point of order, the Senate voted 60 to
19 39 on that proposition.

20 The legislative history is replete with
21 members of Congress explaining that this law is
22 constitutional as an exercise of the taxing power. It
23 was attacked as a tax by its opponents. So I don't
24 think this is a situation where you can say that
25 Congress was avoiding any mention of the tax power.

1 It would be one thing if Congress explicitly
2 disavowed an exercise of the tax power. But given that
3 it hasn't done so, it seems to me that it's -- not only
4 is it fair to read this as an exercise of the tax power,
5 but this Court has got an obligation to construe it as
6 an exercise of the tax power, if it can be upheld on
7 that basis.

8 CHIEF JUSTICE ROBERTS: Why didn't Congress
9 call it a tax, then?

10 GENERAL VERRILLI: Well --

11 CHIEF JUSTICE ROBERTS: You're telling me
12 they thought of it as a tax, they defended it on the tax
13 power. Why didn't they say it was a tax?

14 GENERAL VERRILLI: They might have thought,
15 Your Honor, that calling it a penalty as they did would
16 make it more effective in accomplishing its objectives.
17 But it is in the Internal Revenue Code, it is collected
18 by the IRS on April 15th. I don't think this is a
19 situation in which you can say --

20 CHIEF JUSTICE ROBERTS: Well, that's the
21 reason. They thought it might be more effective if they
22 called it a penalty.

23 GENERAL VERRILLI: Well, I -- you know, I
24 don't -- there is nothing that I know of that
25 illuminates that, but certainly --

1 JUSTICE SOTOMAYOR: General, the problem
2 goes back to the limiting principle. Is this simply
3 anything that raises revenue, Congress can do?

4 GENERAL VERRILLI: No. There are certain
5 limiting principles under the --

6 JUSTICE SOTOMAYOR: So there has to be a
7 limiting principle as to when --

8 GENERAL VERRILLI: -- taxing power, and
9 they -- and I think, of course, the Constitution imposes
10 some, got to be uniform, can't be taxed on exports, if
11 it's a direct tax, it's got to be apportioned. Beyond
12 that, the limiting principle, as the Court has
13 identified from Drexel Furniture to Kurth Ranch, is that
14 it can't be punishment, punitive in the guise of a tax.
15 And there are three factors the Court has identified to
16 look at that.

17 The first is the sanction and how
18 disproportionate it is to the conduct; the second is
19 whether there is scienter; and the third is whether
20 there is an administrative apparatus out there to
21 enforce the tax.

22 Now, in Bailey against Drexel Furniture, for
23 example, the tax was 10 percent of the company's
24 profits, even if they had only one child laborer for one
25 day. There was a scienter requirement, and it was

1 enforced by the Department of Labor. It wasn't just
2 collected by the Internal Revenue Service.

3 Here you don't have any of those things.
4 This -- the penalty is calculated to be no more than, at
5 most, the equivalent of what one would have paid for
6 insurance if you forgone. There is no scienter
7 requirement, there is no enforcement apparatus out
8 there. So, certain --

9 JUSTICE ALITO: Can the -- can the mandate
10 be viewed as a tax if it does impose a requirement on
11 people who are not subject to the penalty or the tax?

12 GENERAL VERRILLI: I think it could, for the
13 reasons I -- I discussed yesterday. I don't think it
14 can or should be read that way. But if there is any
15 doubt about that, Your Honor, if there is -- if it is
16 the view of the Court that it can't be, then I think
17 the right way to handle this case is by analogy to New
18 York against United States, in which the -- the Court
19 read the shall provision, shall handle low level
20 radioactive waste as setting the predicate, and then the
21 other provisions were merely incentives to get the
22 predicate met, and so --

23 JUSTICE SCALIA: You're saying that all the
24 discussion we had earlier about how this is one big
25 uniform scheme and the Commerce Clause, blah, blah,

1 blah, it really doesn't matter. This is a tax and the
2 Federal Government could simply have said, without all
3 of the rest of this legislation, could simply have said,
4 everybody who doesn't buy health insurance at a certain
5 age will be taxed so much money, right?

6 GENERAL VERRILLI: It -- it used its powers
7 together to solve the problem of the market not --

8 JUSTICE SCALIA: Yes, but you didn't need
9 that.

10 GENERAL VERRILLI -- providing affordable
11 coverage --

12 JUSTICE SCALIA: You didn't need that. If
13 it's a tax, it's only -- raising money is enough.

14 GENERAL VERRILLI: It is justifiable under
15 its tax power.

16 JUSTICE SCALIA: Okay. Extraordinary.

17 GENERAL VERRILLI: If I may reserve the
18 balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, General.
20 We'll take a pause for a minute or so,
21 Mr. Clement.

22 (Pause.)

23 CHIEF JUSTICE ROBERTS: All right. Why
24 don't we get started again.

25 Mr. Clement.

1 ORAL ARGUMENT OF PAUL D. CLEMENT
2 ON BEHALF OF THE RESPONDENTS FLORIDA, ET AL.

3 MR. CLEMENT: Mr. Chief Justice, and may it
4 please the Court. The mandate represents an
5 unprecedented effort by Congress to compel individuals
6 to enter commerce in order to better regulate commerce.

7 The Commerce Clause gives Congress the power
8 to regulate existing commerce. It does not give
9 Congress the far greater power to compel people to enter
10 commerce, to create commerce essentially in the first
11 place.

12 Now, Congress when it passed the statute did
13 make findings about why it thought it could regulate the
14 commerce here, and it justified the mandate as a
15 regulation of the economic decision to forgo the
16 purchase of health insurance. That is a theory without
17 any limiting principle.

18 JUSTICE SOTOMAYOR: Do you accept here the
19 General's position that you have conceded that Congress
20 could say, if you're going to consume health services,
21 you have to pay by way of insurance?

22 MR. CLEMENT: That's right,
23 Justice Sotomayor. We say, consistent with 220 years of
24 this Court's jurisprudence, that if you regulate the
25 point of sale, you regulate commerce, that's within

1 Congress's commerce power.

2 JUSTICE SOTOMAYOR: All right. So, what do
3 you do with the impossibility of buying insurance at the
4 point of consumption. Virtually, you force insurance
5 companies to sell it to you?

6 MR. CLEMENT: Well, Justice, I think there's
7 two points to make on that. One is a lot of the
8 discussion this morning so far has proceeded on the
9 assumption that the only thing that's at issue here is
10 emergency room visits, and the only thing that's being
11 imposed is catastrophic care coverage. But, as the
12 Chief Justice indicated earlier, a lot of the insurance
13 that's being covered is for ordinary preventive care,
14 ordinary office visits, and those are the kinds of
15 things that one can predict.

16 So, there's a big part of the market that's
17 regulated here that wouldn't pose the problem that
18 you're suggesting; but, even as to emergency room
19 visits, it certainly would be possible to regulate at
20 that point. You could simply say, through some sort of
21 mandate on the insurance companies, you have to provide
22 people that come in -- this will be a high-risk pool,
23 and maybe you'll have to share it amongst yourself or
24 something, but people simply have to sign up at that
25 point, and that would be regulating at the point of

1 sale.

2 JUSTICE KAGAN: Well, Mr. Clement, now it
3 seems as though you're just talking about a matter of
4 timing, that Congress can regulate the transaction. And
5 the question is when does it make best sense to regulate
6 that transaction?

7 And Congress surely has it within its
8 authority to decide, rather than at the point of sale,
9 given an insurance-based mechanism, it makes sense to
10 regulate it earlier. It's just a matter of timing.

11 MR. CLEMENT: Well, Justice Kagan, we don't
12 think it's a matter of timing alone, and we think it has
13 very significant substantive effects, because if
14 Congress tried to regulate at the point of sale, the one
15 group that it wouldn't capture at all are the people who
16 don't want to purchase health insurance and also have no
17 plans of using health care services in the near term.
18 And Congress very much wanted to capture those people.
19 I mean, those people are essentially the golden geese
20 that pay for the entire lowering of the premium --

21 JUSTICE KENNEDY: Is the government's
22 argument this -- and maybe I won't state it accurately.
23 It is true that the noninsured young adult is, in fact,
24 an actuarial reality insofar as our allocation of health
25 services, insofar as the way health insurance companies

1 figure risks. That person who is sitting at home in his
2 or her living room doing nothing is an actuarial reality
3 that can and must be measured for health service
4 purposes; is that their argument?

5 MR. CLEMENT: Well, I don't know,
6 Justice Kennedy, but, if it is, I think there's at least
7 two problems with it.

8 One is, as Justice Alito's question
9 suggested earlier -- I mean, somebody who is not in the
10 insurance market is sort of irrelevant as an actuarial
11 risk. I mean, we could look at the people not in the
12 insurance market, and what we'd find is that they're
13 relatively young, relatively healthy, and they would
14 have a certain pool of actuarial risks that would
15 actually lead to lower premiums.

16 The people that would be captured by
17 guaranteed rating and community issue -- guaranteed
18 issue and community rating would presumably have a
19 higher risk profile, and there would be higher premiums.

20 And one of the things, one of the things,
21 Congress sought to accomplish here was to force
22 individuals into the insurance market to subsidize those
23 that are already in it to lower the rates. And that's
24 just not my speculation, that's Finding (I) at 43a of
25 the Government's brief that -- it has the statute. And

1 that's one of the clear findings.

2 JUSTICE GINSBURG: Mr. Clement, doesn't that
3 work -- that work the way Social Security does?

4 Let me put it this way: Congress, in the
5 '30s, saw a real problem of people needing to have old
6 age and survivor's insurance. And, yes, they did it
7 through a tax, but they said everybody has got to be in
8 it because if we don't have the healthy in it, there's
9 not going to be the money to pay for the ones who become
10 old or disabled or widowed. So, they required everyone
11 to contribute.

12 There was a big fuss about that in the
13 beginning because a lot of people said -- maybe some
14 people still do today -- I could do much better if the
15 government left me alone. I'd go into the private
16 market, I'd buy an annuity, I'd make a great investment,
17 and they're forcing me to paying for this Social
18 Security that I don't want.

19 But that's constitutional. So, if Congress
20 could see this as a problem when we need to have a group
21 that will subsidize the ones who are going to get the
22 benefits, it seems to me you're saying the only way that
23 could be done is if the government does it itself; it
24 can't involve the private market, it can't involve the
25 private insurers. If it wants to do this, Social

1 Security is its model. The government has to do --
2 there has to be government takeover. We can't have the
3 insurance industry in it. Is that your position?

4 MR. CLEMENT: No. I don't think it is,
5 Justice Ginsburg. I think there are other options that
6 are available.

7 The most straightforward one would be to
8 figure out what amount of subsidy to the insurance
9 industry is necessary to pay for guaranteed issue and
10 community rating. And once we calculate the amount of
11 that subsidy, we could have a tax that's spread
12 generally through everybody to raise the revenue to pay
13 for that subsidy. That's the way we pay for most
14 subsidies.

15 JUSTICE SOTOMAYOR: Could we have an
16 exemption? Could the government say everybody pays a
17 shared health care responsibility payment to offset all
18 the money that we're forced to spend on health care, we
19 the government; but anybody who has an insurance policy
20 is exempt from that tax? Could the government do that?

21 MR. CLEMENT: The government might be able
22 to do that. I think it might raise some issues about
23 whether or not that would be a valid exercise of the
24 taxing power.

25 JUSTICE SOTOMAYOR: Under what theory

1 wouldn't it be?

2 MR. CLEMENT: Well, I do think that --

3 JUSTICE SOTOMAYOR: We get tax credits for
4 having solar-powered homes. We get tax credits for
5 using fuel-efficient cars. Why couldn't we get a tax
6 credit for having health insurance and saving the
7 government from caring for us.

8 MR. CLEMENT: Well, I think it would depend
9 a little bit on how it was formulated, but my concern
10 would be -- the constitutional concern would be that it
11 would just be a disguised impermissible direct tax. And
12 I do think -- you know, I mean, I don't want to suggest
13 we get to the taxing power too soon, but I do think it's
14 worth realizing that the taxing power is limited in the
15 ability to impose direct taxes.

16 And the one thing I think the Framers would
17 have clearly identified as a direct tax is a tax on not
18 having something. I mean, the framing generation was
19 divided over whether a tax on carriages was a direct tax
20 or not. Hamilton thought that was an indirect tax;
21 Madison thought it was a direct tax. I have little
22 doubt that both of them would have agreed that a tax on
23 not having a carriage would have clearly been a direct
24 tax. I also think they would have thought it clearly
25 wasn't a valid regulation of the market in carriages.

1 And, you know, I mean, if you look at Hylton
2 v. The United States, that's this Court's first direct
3 tax case.

4 JUSTICE BREYER: Let me ask -- can I go back
5 for a step? Because I don't want to get into a
6 discussion of whether this is a good bill or not. Some
7 people think it's going to save a lot of money. Some
8 people think it won't.

9 So, I'm focusing just on the Commerce
10 Clause; not on the Due Process Clause, the Commerce
11 Clause. And I look back into history, and I think if we
12 look back into history, we see sometimes Congress can
13 create commerce out of nothing. That's the national
14 bank, which was created out of nothing to create other
15 commerce out of nothing.

16 I look back into history, and I see it seems
17 pretty clear that if there are substantial effects on
18 interstate commerce, Congress can act.

19 And I look at the person who's growing
20 marijuana in her house, or I look at the farmer who is
21 growing wheat for home consumption. This seems to have
22 more substantial effects.

23 Is this commerce? Well, it seems to me more
24 commerce than marijuana. I mean, is it, in fact, a
25 regulation? Well, why not? If creating a bank is, why

1 isn't this?

2 And then you say, ah, but one thing here out
3 of all those things is different, and that is you're
4 making somebody do something.

5 I say, hey, can't Congress make people drive
6 faster than 45 -- 40 miles an hour on a road? Didn't
7 they make that man growing his own wheat go into the
8 market and buy other wheat for his -- for his cows?
9 Didn't they make Mrs. -- if she married somebody who had
10 marijuana in her basement, wouldn't she have to go and
11 get rid of it? Affirmative action?

12 I mean, where does this distinction come
13 from? It sounds like sometimes you can, and sometimes
14 you can't.

15 So what is argued here is there is a large
16 group of -- what about a person that we discover that
17 there are -- a disease is sweeping the United States,
18 and 40 million people are susceptible, of whom 10
19 million will die; can't the Federal Government say all
20 40 million get inoculation?

21 So here, we have a group of 40 million, and
22 57 percent of those people visit emergency care or other
23 care, which we are paying for. And 22 percent of those
24 pay more than \$100,000 for that. And Congress says they
25 are in the midst of this big thing. We just want to

1 rationalize this system they are already in.

2 So, there, you got the whole argument, and I
3 would like you to tell me --

4 JUSTICE SCALIA: Answer those questions in
5 inverse order.

6 JUSTICE BREYER: Well, no, it's one
7 question. It's looking back at that -- looking back at
8 that history.

9 The thing I can see that you say to some
10 people, go buy. Why does that make a difference in
11 terms of the Commerce Clause?

12 MR. CLEMENT: Well, Justice Breyer, let me
13 start at the beginning of your question with McCulloch.
14 McCulloch was not a commerce power case.

15 JUSTICE BREYER: It was both?

16 MR. CLEMENT: No, the bank was not justified
17 and the corporation was not justified as an exercise of
18 commerce power. So that is not a case that says that
19 it's okay to conjure up the bank as an exercise of the
20 commerce power.

21 And what, of course, the Court didn't say,
22 and I think the Court would have had a very different
23 reaction to, is, you know, we are not just going to have
24 the bank, because that wouldn't be necessary and proper,
25 we are going to force the citizenry to put all of their

1 money in the bank, because, if we do that, then we know
2 the Bank of the United States will be secure.

3 I think the framers would have identified
4 the difference between those two scenarios, and I don't
5 think that the great Chief Justice would have said that
6 forcing people to put their deposits in the Bank of the
7 United States was necessary and proper.

8 Now, if you look through all the cases you
9 mentioned, I do not think you will find a case like
10 this. And I think it's telling that you won't. I mean,
11 the regulation of the wheat market in Wickard against
12 Filburn, all this effort to address the supply side and
13 what producers could do, what Congress was trying to do
14 was support the price of wheat. It would have been much
15 more efficient to just make everybody in America buy 10
16 loaves of bread. That would have had a much more direct
17 effect on the price of wheat in the prevailing market.

18 But we didn't do that. We didn't say when
19 we had problems in the automobile industry that we are
20 not just going to give you incentives, not just cash for
21 clunkers, we are going to actually have everybody over
22 100,000 dollars has to buy a new car --

23 CHIEF JUSTICE ROBERTS: Well, Mr. Clement,
24 the key to the government's argument to the contrary is
25 that everybody is in this market. It's all right to

1 regulate Wickard -- again, in Wickard against Filburn,
2 because that's a particular market in which the farmer
3 had been participating.

4 Everybody is in this market, so that makes
5 it very different than the market for cars or the other
6 hypotheticals that you came up with, and all they're
7 regulating is how you pay for it.

8 MR. CLEMENT: Well, with respect, Mr. Chief
9 Justice, I suppose the first thing you have to say is
10 what market are we talking about? Because the
11 government -- this statute undeniably operates in the
12 health insurance market. And the government can't say
13 that everybody is in that market. The whole problem is
14 that everybody is not in that market, and they want to
15 make everybody get into that market.

16 JUSTICE KAGAN: Well, doesn't that seem a
17 little bit, Mr. Clement, cutting the baloney thin? I
18 mean, health insurance exists only for the purpose of
19 financing health care. The two are inextricably
20 interlinked. We don't get insurance so that we can
21 stare at our insurance certificate. We get it so that
22 we can go and access health care.

23 MR. CLEMENT: Well, Justice Kagan, I'm not
24 sure that's right. I think what health insurance does
25 and what all insurance does is it allows you to

1 diversify risk. And so it's not just a matter of I'm
2 paying now instead of paying later. That's credit.
3 Insurance is different than credit. Insurance
4 guarantees you an upfront, locked-in payment, and you
5 won't have to pay any more than that even if you incur
6 much great expenses.

7 And in every other market that I know of for
8 insurance, we let people basically make the decision
9 whether they are relatively risk averse, whether they
10 are relatively non-risk averse, and they can make the
11 judgment based on --

12 JUSTICE SOTOMAYOR: But we don't in car
13 insurance, meaning we tell people, buy car -- not we,
14 the States do, although you're going to -- I'll ask you
15 the question, do you think that if some States decided
16 not to impose an insurance requirement, that the Federal
17 Government would be without power to legislate and
18 require every individual to buy car insurance?

19 MR. CLEMENT: Well, Justice Sotomayor, let
20 me say this, which is to say -- you're right in the
21 first point to say that it's the States that do it,
22 which makes it different right there. But it's also --

23 JUSTICE SOTOMAYOR: Well, that goes back to
24 the substantive due process question. Is this a Lochner
25 era argument that only the States can do this, even

1 though it affects commerce? Cars indisputably affect
2 commerce. So are you arguing that because the States
3 have done it all along, the Federal Government is no
4 longer permitted to legislate in this area?

5 MR. CLEMENT: No. I think you might make a
6 different argument about cars than you would make about
7 health insurance, unless you tried to say -- but, you
8 know, we're --

9 JUSTICE SOTOMAYOR: Health insurance -- I
10 mean, I've never gotten into an accident, thankfully,
11 and I hope never. The vast majority of people have
12 never gotten into an accident where they have injured
13 others; yet, we pay for it dutifully every year on the
14 possibility that at some point, we might get into that
15 accident.

16 MR. CLEMENT: But, Justice Sotomayor, what I
17 think is different is there is lots of people in
18 Manhattan, for example, that don't have car insurance
19 because they don't have cars. And so they have the
20 option of withdrawing from that market. It's not a
21 direct imposition from the government.

22 So even the car market is difference from
23 this market, where there is no way to get outside of the
24 regulatory web. And that's, I think, one of the real
25 problems with this because, I mean, we take as a

1 given --

2 JUSTICE SOTOMAYOR: But you're -- but the
3 given is that virtually everyone, absent some
4 intervention from above, meaning that someone's life
5 will be cut short in a fatal way, virtually everyone
6 will use health care.

7 MR. CLEMENT: At some point, that's right,
8 but all sorts of people will not, say, use health care
9 in the next year, which is the relevant period for the
10 insurance.

11 JUSTICE BREYER: But do you think you can,
12 better than the actuaries or better than the members of
13 Congress who worked on it, look at the 40 million people
14 who are not insured and say which ones next year will or
15 will not use, say, emergency care?

16 Can you do that any better than if we knew
17 that 40 million people were suffering, about to suffer a
18 contagious disease, and only 10 million would get
19 sick --

20 MR. CLEMENT: Of course not --

21 JUSTICE BREYER: -- and we don't know which?

22 MR. CLEMENT: Of course not, Justice Breyer,
23 but the point is that once Congress decides it's going
24 to regulate extant commerce, it is going to get all
25 sorts of latitude to make the right judgments about

1 actuarial predictions, which actuarial to rely on, which
2 one not to rely on.

3 The question that's a proper question for
4 this Court, though, is whether or not, for the first
5 time ever in our history, Congress also has the power to
6 compel people into commerce, because, it turns out, that
7 would be a very efficient things for purposes of
8 Congress's optimal regulation of that market.

9 JUSTICE KAGAN: But, Mr. Clement, this goes
10 back to the Chief Justice's question. But, of course,
11 the theory behind, not just the government's case, but
12 the theory behind this law is that people are in this
13 market right now, and they are in this market because
14 people do get sick, and because when people get sick, we
15 provide them with care without making them pay.

16 And it would be different, you know, if you
17 were up here saying, I represent a class of Christian
18 Scientists. Then you might be able to say, look, you
19 know, why are they bothering me. But absent that,
20 you're in this market. You're an economic actor.

21 MR. CLEMENT: Well, Justice Kagan, once
22 again, it depends on which market we're talking about.
23 If we're talking about the health care insurance
24 market --

25 JUSTICE KAGAN: Well, we are talking about

1 the health insurance market, which is designed to access
2 the health care market.

3 MR. CLEMENT: And with respect to the health
4 insurance market that's designed to have payment in the
5 health care market, everybody is not in the market. And
6 that's the premise of the statute, and that's the
7 problem Congress is trying to solve.

8 And if it tried to solve it through
9 incentives, we wouldn't be here; but, it's trying to
10 solve it in a way that nobody has ever tried to solve an
11 economic problem before, which is saying, you know, it
12 would be so much more efficient if you were just in this
13 market --

14 JUSTICE KENNEDY: But they are in the market
15 in the sense that they are creating a risk that the
16 market must account for.

17 MR. CLEMENT: Well, Justice Kennedy, I don't
18 think that's right, certainly in any way that
19 distinguishes this from any other context. When I'm
20 sitting in my house deciding I'm not going to buy a car,
21 I am causing the labor market in Detroit to go south. I
22 am causing maybe somebody to lose their job, and for
23 everybody to have to pay for it under welfare. So, the
24 cost shifting that the government tries to uniquely
25 associate with this market -- it's everywhere.

1 And even more to the point, the rationale
2 that they think ultimately supports this legislation,
3 that, look, it's an economic decision; once you make the
4 economic decision, we aggregate the decision; there's
5 your substantial effect on commerce. That argument
6 works here. It works in every single industry.

7 JUSTICE BREYER: Of course, we do know that
8 there are a few people, more in New York City than there
9 are in Wyoming, who never will buy a car. But we also
10 know here, and we don't like to admit it, that because
11 we are human beings, we all suffer from the risk of
12 getting sick, and we also all know that we'll get
13 seriously sick. And we also know that we can't predict
14 when. And we also know that when we do, there will be
15 our fellow taxpayers through the Federal Government who
16 will pay for this. If we do not buy insurance, we will
17 pay nothing. And that happens with a large number of
18 people in this group of 40 million, none of whom can be
19 picked out in advance.

20 Now, that's quite different from the car
21 situation, and it's different in only this respect: It
22 shows there is a national problem, and it shows there is
23 a national problem that involves money, cost, insurance.
24 So, if Congress could do this, should there be a disease
25 that strikes the United States and they want every one

1 inoculated even though 10 million will be hurt, it's
2 hard for me to decide why that isn't interstate
3 commerce, even more so where we know it affects
4 everybody.

5 MR. CLEMENT: Well, Justice Breyer, there
6 are other markets that affect every one --
7 transportation, food, burial services -- though we don't
8 like to talk about that either. There also are
9 situations where there are many economic effects from
10 somebody's failure to purchase a product.

11 And if I could -- if I could talk about the
12 difference between the health insurance market and the
13 health care market, I mean, ultimately I don't want you
14 to leave here with the impression that anything turns on
15 that. Because if the government decided tomorrow that
16 they've come up with a great -- somebody -- some private
17 company has come up with a great new wonder drug that
18 would be great for everybody to take, it would have huge
19 health benefits for everybody; and by the way, also, if
20 everybody had to buy it, it would facilitate economies
21 of scale, and the production would be great, and the
22 price would be cheaper -- and force everybody in the
23 health care market, the actual health care market, to
24 buy the wonder drug, I'd be up here making the same
25 argument.

1 I'd be saying that's not a power that's
2 within the commerce power of the Federal Government. It
3 is something much greater. And it would have been much
4 more controversial. That's one of the important things.
5 In Federalist 45, Madison says the commerce power --
6 that's a new power, but it's not one anyone has any
7 apprehension about.

8 The reason they didn't have any apprehension
9 about it is because it's a power that only operated once
10 people were already in commerce. You see that from the
11 text of the clause. The first kind of commerce Congress
12 gets to regulate is commerce with foreign nations. Did
13 anybody think the fledgling Republic had the power to
14 compel some other nation into commerce with us? Of
15 course not. And in the same way, I think if the Framers
16 had understood the commerce power to include the power
17 to compel people to engage in commerce --

18 JUSTICE KAGAN: Well, once again, though,
19 who's in commerce and when are they in commerce?

20 If the effect of all these uninsured people
21 is to raise everybody's premiums, not just when they get
22 sick, if they get sick, but right now in the aggregate,
23 and Wickard and Raich tell us we should look at the
24 aggregate, and the aggregate of all these uninsured
25 people are increasing the normal family premium,

1 Congress says, by a thousand dollars a year -- those
2 people are in commerce. They are making decisions that
3 are affecting the price that everybody pays for this
4 service.

5 MR. CLEMENT: Justice Kagan, again, with all
6 due respect, I don't think that's a limiting principle.
7 My unwillingness to buy an electric car is forcing up
8 the price of an electric car. If only more people
9 demanded an electric car, there would be economies of
10 scale, and the price would go down.

11 JUSTICE KAGAN: No, this is very different,
12 Mr. Clement, and it's different because of the nature of
13 the health care service, that you are entitled to health
14 care when you go to an emergency room, when you go to a
15 doctor, even if you can't pay for it. So, the
16 difference between your hypotheticals and the real case
17 is the problem of uncompensated care, which --

18 MR. CLEMENT: Justice Kagan, first of all, I
19 do think there -- this is not the only place where
20 there's uncompensated care. If some -- if I don't buy a
21 car and somebody goes on welfare, I'm going to end up
22 paying for that as well.

23 But let me also say that there's a real
24 disconnect then between that focus on what makes this
25 different and the statute that Congresses passed. If

1 all we were concerned about is the cost sharing that
2 took place because of uncompensated care in emergency
3 rooms, presumably we'd have before us a statute that
4 only addressed emergency care and catastrophic insurance
5 coverage. But it covers everything, soup to nuts, and
6 all sorts of other things.

7 And that gets at the idea that there's two
8 kinds of cost shifting that are going on here. One is
9 the concern about emergency care and that somehow
10 somebody who gets sick is going to shift costs back to
11 other policy areas -- holders. But there's a much
12 bigger cost shifting going on here, and that's the cost
13 shifting that goes on when you force healthy people into
14 an insurance market precisely because they're healthy,
15 precisely because they're not likely to go to the
16 emergency room, precisely because they're not likely to
17 use the insurance they're forced to buy in the health
18 care insurance. That creates a huge windfall. It
19 lowers the price of premiums.

20 And, again, this isn't just some lawyer up
21 here telling you that's what it does and trying to
22 second-guess the congressional economic decisions. This
23 is Congress's findings, Findings (I) on page 43a of the
24 appendix to the Government's brief.

25 JUSTICE BREYER: All right. But all that

1 sounds like you're debating the merits of the bill. You
2 asked really for limiting principles so we don't get
3 into a matter that I think has nothing to do with this
4 case: broccoli. Okay?

5 And the limiting principles -- you've heard
6 three. First, the Solicitor General came up with a
7 couple joined, very narrow ones. You've seen in Lopez
8 this Court say that we cannot -- Congress cannot get
9 into purely local affairs, particularly where they are
10 noncommercial. And, of course, the greatest limiting
11 principle of all, which not too many accept, so I'm not
12 going to emphasize that, is the limiting principle
13 derived from the fact that members of Congress are
14 elected from States and that 95 percent of the law of
15 the United States is State law. That is a principle,
16 though enforced by the legislature. The other two are
17 principles, one written into Lopez and one you just
18 heard.

19 It seems to me all of those eliminate the
20 broccoli possibility, and none of them eliminates the
21 possibility that we're trying to take the 40 million
22 people who do have the medical cost, who do affect
23 interstate commerce, and provide a system that you may
24 like or not like.

25 MR. CLEMENT: Well, Justice Breyer, let me

1 take them turn.

2 JUSTICE BREYER: That's where we are in
3 limiting principles.

4 MR. CLEMENT: Let me take them in turn. I
5 would encourage this Court not to Garcia-ize the
6 Commerce Clause and just simply say it's up to Congress
7 to police the Commerce Clause. So, I don't think that
8 is a limiting principle.

9 Second of all --

10 JUSTICE SOTOMAYOR: But that's exactly what
11 Justice Marshall said in Gibbons. He said that it is
12 the power to regulate; the power like all others vested
13 in Congress is complete in itself, may be exercised to
14 its utmost extent, and acknowledges no limitations other
15 than those prescribed in the Constitution. But there is
16 no conscription in the -- set forth in the Constitution
17 --

18 MR. CLEMENT: I agree --

19 JUSTICE SOTOMAYOR: -- with respect to
20 regulating commerce.

21 MR. CLEMENT: I agree 100 percent, and I
22 think that was the Chief Justice's point, which was once
23 you open the door to compelling people into commerce
24 based on the narrow rationales that exist in this
25 industry, you are not going to be able to stop that

1 process.

2 JUSTICE SOTOMAYOR: Well, see, that's the --

3 JUSTICE SCALIA: I would like hear you

4 address Justice Breyer's other two principles.

5 MR. CLEMENT: Well, the other two principles
6 are Lopez -- and this case really is not -- I mean, you
7 know, Lopez is a limit on the affirmative exercise of
8 people who are already in commerce. The question is, is
9 there any other limit to people who aren't in commerce?
10 And so, I think this is the case that really asks that
11 question.

12 And then the first point which was -- I take
13 it to be the Solicitor General's point, is, with all due
14 respect, simply a description of the insurance market.
15 It's not a limiting principle, because the justification
16 for why this is a valid regulation of commerce is in no
17 way limited to this market. It simply says these are
18 economic decisions; they have effect on other people; my
19 failure to purchase in this market has a direct effect
20 on others who are already in the market. That's true of
21 virtually every other market under the sun.

22 CHIEF JUSTICE ROBERTS: And now maybe return
23 to Justice Sotomayor's question.

24 MR. CLEMENT: I'd be delighted to, which is
25 -- I mean, I -- you're absolutely right. Once you're in

1 the commerce power, there -- this Court is not going to
2 police that subject maybe to the Lopez limit. And
3 that's exactly why I think it's very important for this
4 Court to think seriously about taking an unprecedented
5 step of saying that the commerce power not only includes
6 the power to regulate, prescribe the rule by which
7 commerce is governed, the rule of *Gibbons v. Ogden*; but
8 to go further and say it's not just prescribing the rule
9 for commerce that exists but is the power to compel
10 people to enter into commerce in the first place.

11 I'd like to say two very brief things about
12 the taxing power, if I could. There are lots of reasons
13 why this isn't a tax. It wasn't denominated a tax.
14 It's not structured as a tax. If it's any tax at all,
15 though, it is a direct tax. Article I, section 9,
16 clause 4 -- the Framers would have had no doubt that a
17 tax on not having something is not an excise tax but a
18 forbidden direct tax. That's one more reason why this
19 is not proper legislation, because it violates that.

20 The second thing is I would urge you to read
21 the license tax case which the Solicitor General says is
22 his best case for why you ignore the fact that a tax is
23 denominated into something other. Because that's a case
24 where the argument was that because the Federal
25 Government had passed a license, not a tax, that somehow

1 that allowed people to take actions that would have been
2 unlawful under State law, that this was some special
3 Federal license to do something that was forbidden by
4 State law. This Court looked beyond the label in order
5 to preserve federalism there.

6 What the Solicitor General and the
7 government ask you to do here is exactly the opposite,
8 which is to look past labels in order to up-end our
9 basic federalist system. In this --

10 JUSTICE SOTOMAYOR: Could you tell me, do
11 you think the States could pass this mandate?

12 MR. CLEMENT: I represent 26 States. I do
13 think the States could pass this mandate, but I --

14 JUSTICE SOTOMAYOR: Is there any other area
15 of commerce, business, where we have held that there
16 isn't concurrent power between the State and the Federal
17 Government to protect the welfare of commerce?

18 MR. CLEMENT: Well, Justice Sotomayor, I
19 have to resist your premise, because I didn't answer
20 yes, the States can do it because it would be a valid
21 regulation of intrastate commerce. I said yes, the
22 States can do it because they have a police power, and
23 that is the fundamental difference between the States on
24 the one hand and the limited, enumerated Federal
25 Government on the other.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Clement.

3 Mr. Carvin.

4 ORAL ARGUMENT OF MICHAEL A. CARVIN
5 ON BEHALF OF THE RESPONDENTS NFIB, ET AL.

6 MR. CARVIN: Thank you, Mr. Chief Justice;
7 may it please the Court:

8 I'd like to begin with the Solicitor
9 General's main premise, which is that they can compel
10 the purchase of health insurance in order to promote
11 commerce in the health market because it will reduce
12 uncompensated care. If you accept that argument, you
13 have to fundamentally alter the text of the Constitution
14 and give Congress plenary power.

15 It simply doesn't matter whether or not this
16 regulation will promote health care commerce by reducing
17 uncompensated care. All that matters is whether the
18 activity actually being regulated by the act negatively
19 affects Congress or negatively affects commerce
20 regulation, so that it's within the commerce power. If
21 you agree with us that this is -- exceeds commerce
22 power, the law doesn't somehow become redeemed because
23 it has beneficial policy effects in the health care
24 market.

25 In other words, Congress does not have the

1 power to promote commerce. Congress has -- Congress has
2 the power to regulate commerce. And if the power
3 exceeds their permissible regulatory authority, then the
4 law is invalid.

5 CHIEF JUSTICE ROBERTS: Well, surely --

6 MR. CARVIN: I'm sorry.

7 CHIEF JUSTICE ROBERTS: Well, surely
8 regulation includes the power to promote. Since the New
9 Deal we've said that regulation in -- there is a market
10 in agricultural products; Congress has the power to
11 subsidize, to limit production, all sorts of things.

12 MR. CARVIN: Absolutely, Chief Justice, and
13 that's the distinction I'm trying to draw. When they
14 are acting within their enumerated power, then obviously
15 they are promoting commerce.

16 But the Solicitor General wants to turn it
17 into a different power. He wants to say we have the
18 power to promote commerce, to regulate anything to
19 promote commerce. And if they have the power to promote
20 commerce, then they have the power to regulate
21 everything, right? Because --

22 CHIEF JUSTICE ROBERTS: I don't -- I don't
23 think you're addressing their main point, which is that
24 they are not creating commerce in -- in health care.
25 It's already there, and we are all going to need some

1 kind of health care; most of us will at some point.

2 MR. CARVIN: I'd -- I'd like to address that
3 in two ways, if I could, Mr. Chief Justice. In the
4 first place, they keep playing mix and match with the
5 statistics. They say 95 percent of us are in the health
6 care market, okay? But that's not the relevant
7 statistic, even as the government frames the issue. No
8 one in Congress and the Solicitor General is arguing
9 that going to the doctor and fully paying him creates a
10 problem. The problem is uncompensated care, and they
11 say the uncompensated care arises if you have some kind
12 of catastrophe -- hit by a bus, have some prolonged
13 illness. Well, what is the percentage of the uninsured
14 that have those sorts of catastrophes? We know it has
15 got to be a relative small fraction. So in other words,
16 the relevant --

17 CHIEF JUSTICE ROBERTS: Yet we don't know
18 who they are.

19 MR. CARVIN: We don't, no, and we don't know
20 in advance, and -- and -- but that doesn't change the
21 basic principle, that you are nonetheless forcing people
22 for paternalistic reasons to go into the insurance
23 market to insure against risk that they have made the
24 voluntary decision that they are not -- have decided not
25 to. But even --

1 JUSTICE GINSBURG: But the problem is -- the
2 problem is that they are making the rest of us pay for
3 it, because as much as they say, well, we are not in the
4 market, we don't know when the -- the timing when they
5 will be.

6 MR. CARVIN: Which is --

7 JUSTICE GINSBURG: And the -- the figures of
8 how much more families are paying for insurance because
9 people get sick, they may have intended to self-insure,
10 they haven't been able to meet the bill for -- for
11 cancer, and the rest of us end up paying because these
12 people are getting cost-free health care, and the only
13 way to prevent that is to have them pay sooner rather
14 than later, pay up front.

15 MR. CARVIN: Yes, but my point is this.
16 That, with respect, Justice Ginsburg, conflicts the
17 people who do result in uncompensated care, the free
18 riders. Those are people who default on their health
19 care payments. That is an entirely different group of
20 people, an entirely different activity than being
21 uninsured.

22 So the question is whether or not you can
23 regulate activity because it has a statistical
24 connection to an activity that harms Congress. And my
25 basic point to you is this: the Constitution only gives

1 Congress the power to regulate things that negatively
2 affect commerce or commerce regulation. It doesn't give
3 them the power to regulate things that are statistically
4 connected to things that negatively affect the
5 commerce --

6 JUSTICE KAGAN: Well, Mr. Carvin --

7 MR. CARVIN: Because -- I'm sorry.

8 JUSTICE KAGAN: Please.

9 MR. CARVIN: I was just going to say,
10 because if they have that power, then they obviously
11 have the power to regulate everything, because
12 everything in the aggregate is statistically connected
13 to something that negatively affects commerce, and every
14 compelled purchase promotes commerce.

15 JUSTICE BREYER: So in your view, right
16 there -- in your view right there --

17 MR. CARVIN: Justice Breyer --

18 JUSTICE BREYER: Can I just --

19 MR. CARVIN: I'm sorry.

20 JUSTICE BREYER: I'm just picking on
21 something. I'd like to just -- if it turned out there
22 was some terrible epidemic sweeping the United States,
23 and we couldn't say that more than 40 or 50 percent -- I
24 can make the number as high as I want -- but the -- the
25 -- you'd say the Federal Government doesn't have the

1 power to get people inoculated, to require them to be
2 inoculated, because that's just statistical.

3 MR. CARVIN: Well, in all candor, I think
4 Morrison must have decided that issue, right? Because
5 people who commit violence against --

6 JUSTICE BREYER: Is your answer to that yes
7 or no?

8 MR. CARVIN: Oh, I'm sorry. My answer is
9 no, they couldn't do it, because Morrison --

10 JUSTICE BREYER: No, they could not do it?

11 MR. CARVIN: Yes.

12 JUSTICE BREYER: They cannot require people,
13 even if this disease is sweeping the country, to be
14 inoculated. The Federal Government has no power, and if
15 there's -- okay, fine. Go ahead.

16 MR. CARVIN: May --

17 JUSTICE BREYER: Please turn to Justice
18 Kagan.

19 MR. CARVIN: May I just please explain why?

20 JUSTICE BREYER: Yes.

21 MR. CARVIN: Violence against women
22 obviously creates the same negative impression on fellow
23 citizens as this communicable disease, but the -- and
24 it has huge effects on the health care of our country.
25 Congress found that it increased health care costs by --

1 JUSTICE BREYER: I agree with you that --

2 MR. CARVIN: Well, but --

3 JUSTICE BREYER: -- that it had big effects,
4 but the majority thought that was a local matter.

5 JUSTICE SCALIA: I think that's his point.

6 (Laughter.)

7 MR. CARVIN: I -- I don't know why having a
8 disease is any more local than -- that beating up a
9 woman. But -- but -- my basic point is, is that
10 notwithstanding its very profound effect on the health
11 care market, this Court said the activity being
12 regulated, i.e., violence against women, is outside the
13 Commerce Clause power. So regardless of whether it has
14 beneficial downstream effects, we must say no, Congress
15 doesn't have that power. Why not? Because everything
16 has downstream effects on commerce and every compelled
17 purchase promotes commerce. It by definition helps the
18 sellers of existing --

19 JUSTICE ALITO: Mr. Carvin, isn't there this
20 difference between Justice Breyer's hypothetical and the
21 law that we have before us here? In his hypothetical
22 the harm to other people from the communicable disease
23 is the result of the disease. It is not the result of
24 something that the government has done, whereas here the
25 reason why there is cost-shifting is because the

1 government has mandated that. It has required hospitals
2 to provide emergency treatment and, instead of paying
3 for that through a tax which would be born by everybody,
4 it has required -- it has set up a system in which the
5 cost is surreptitiously shifted to people who have
6 health insurance and who pay their bills when they go to
7 the hospital.

8 MR. CLEMENT: Justice Alito, that is exactly
9 the government's argument. It's an extraordinarily
10 illogical argument.

11 JUSTICE BREYER: Fine. Then if that's so,
12 is -- let me just change my example under pressure --

13 (Laughter.)

14 JUSTICE BREYER: -- and say that in fact it
15 turns out that 90 percent of all automobiles driving
16 interstate without certain equipment put up pollution,
17 which travels interstate -- not 100 percent, maybe only
18 60 percent. Does the EPA have the power then to say
19 you've got to have an antipollution device? It's
20 statistical.

21 MR. CARVIN: What they can't do -- yes, if
22 you have a car, they can require you to have an
23 anti-pollution --

24 JUSTICE BREYER: Then you're not going on
25 statistics; you're going on something else, which is

1 what I'd like to know what it is.

2 MR. CARVIN: It's this. They can't require
3 you to buy a car with an anti-pollution device. Once
4 you've entered the market and made a decision, they can
5 regulate the terms and conditions of the car that you
6 do, and they can do it for all sorts of reasons. What
7 they can't do it compel you to enter the market.

8 JUSTICE BREYER: Now we -- now you've
9 changed the ground of argument, which I accept as -- as
10 totally legitimate. And then the question is when you
11 are born and you don't have insurance and you will in
12 fact get sick and you will in fact impose costs, have
13 you perhaps involuntarily -- perhaps simply because you
14 are a human being -- entered this particular market,
15 which is a market for health care?

16 MR. CARVIN: If being born is entering the
17 market, then I can't think of a more plenary power
18 Congress can have, because that literally means they can
19 regulate every human activity from cradle to grave. I
20 thought that's what distinguished the plenary police
21 power from the very limited commerce power.

22 I don't disagree that giving the Congress
23 plenary power to mandate property transfers from A to B
24 would be a very efficient way of helping B and of
25 accomplishing Congress's objectives. But the framers --

1 JUSTICE BREYER: I see the point. You can
2 go back to, go back to Justice Kagan. Don't forget her
3 question.

4 JUSTICE KAGAN: I've forgotten my question.
5 (Laughter.)

6 MR. CARVIN: I -- I was facing the same
7 dilemma, Justice Kagan.

8 JUSTICE GINSBURG: Let me -- let me ask a
9 question I asked Mr. Clement. It just seems --

10 JUSTICE KAGAN: See what it means to be the
11 junior justice?

12 (Laughter.)

13 JUSTICE GINSBURG: It just seems very
14 strange to me that there's no question we can have a
15 Social Security system besides all the people who say:
16 I'm being forced to pay for something I don't want. And
17 this it seems to me, to try to get care for the ones who
18 need it by having everyone in the pool, but is also
19 trying to preserve a role for the private sector, for
20 the private insurers. There's something very odd about
21 that, that the government can take over the whole thing
22 and we all say, oh, yes, that's fine, but if the
23 government wants to get -- to preserve private insurers,
24 it can't do that.

25 MR. CARVIN: Well I don't think the test of

1 a law's constitutionality is whether it more adheres to
2 the libertarian principles of the Cato Institute or the
3 statist principles of someone else. I think the test of
4 a law's constitutionality is not those policy questions;
5 it's whether or not the law is regulating things that
6 negatively affect commerce or don't.

7 And since obviously the failure to purchase
8 an item doesn't create the kind of effects on supply and
9 demand that the market participants in Wickard and Raich
10 did and doesn't in any way interfere with regulation of
11 the insurance companies, I don't think it can pass the
12 basic --

13 JUSTICE GINSBURG: I thought -- I thought
14 that Wickard was you must buy; we are not going to let
15 you use the home-grown wheat. You have got to go out in
16 the market and buy that wheat that you don't want.

17 MR. CARVIN: Oh, but let's be careful about
18 what they were regulating in Wickard, Justice Ginsburg.
19 What they were regulating was the supply of wheat. It
20 didn't in any way imply that they could require every
21 American to go out and buy wheat. And yes, one of the
22 consequences of regulating local market participants is
23 it'll affect the supply and the demand for the product.
24 That's why you can regulate them, because those local
25 market participants have the same effect on the

1 interstate market that a black market has on a legal
2 market.

3 But none of that is true -- in other words,
4 you can regulate local bootleggers, but that doesn't
5 suggest you can regulate teetotalers, people who stay
6 out of the liquor market, because they don't have any
7 negative effect on the existing market participants or
8 on regulation of those market participants.

9 JUSTICE KAGAN: That's why I suggested, Mr.
10 Carvin, that it might be different if you were raising
11 an as-applied challenge and presenting a class of people
12 whom you could say clearly would not be in the health
13 care market. But you're raising a facial challenge and
14 we can't really know which, which of the many, many,
15 people that this law addresses in fact will not
16 participate in the health care market and in fact will
17 not impose costs on all the rest of us.

18 So the question is can Congress respond to
19 those facts, that we have no crystal ball, that we can't
20 tell who is and isn't going to be in the health
21 insurance market, and say most of these people will be
22 and most of these people will thereby impose costs on
23 the rest of us and that's a problem that we can deal
24 with on a class-wide basis?

25 MR. CARVIN: No again. The people who

1 impose the costs on the rest of us are people who engage
2 in a different activity at a different time, which is
3 defaulting on their health care payments. It's not the
4 uninsured. Under your theory you could regulate anybody
5 if they have got a statistical connection to a problem.
6 You could say, since we could regulate people who enter
7 into the mortgage market and impose mortgage insurance
8 on them, we can simply impose the requirement to buy
9 private mortgage insurance on everybody before they have
10 entered the market because we are doing it in this
11 prophylactic way before it develops.

12 CHIEF JUSTICE ROBERTS: No, no, that's not
13 -- I don't think that's fair, because not everybody is
14 going to enter the mortgage market. The government's
15 position is that almost everybody is going to enter the
16 health care market.

17 MR. CARVIN: Two points, one of which
18 Mr. Clement's already made, which is the health
19 insurance market is different than the health care
20 market. But let me take it on full-stride. I think
21 everybody is in the milk market. I think everybody is
22 in the wheat product market. But that doesn't suggest
23 that the government compel you to buy five gallons of
24 meat or five bushels of wheat because they are not
25 regulating commerce.

1 Whether you're a market participant or not,
2 they are still requiring you to make a purchase that you
3 don't want to do, and to get back to your facial
4 example --

5 JUSTICE SOTOMAYOR: I mean, but that's true
6 of almost every product.

7 MR. CARVIN: I've sorry?

8 JUSTICE SOTOMAYOR: It's true of almost
9 every product, directly or indirectly by government
10 regulation. The government says, borrowing my
11 colleague's example, you can't buy a car without
12 emission control. I don't want a car with emission
13 control. It's less efficient in terms of the
14 horsepower. But I'm forced to do something I don't want
15 to do by government regulation.

16 MR. CARVIN: You are not forced to buy a
17 product you don't want. And I agree with you that since
18 the government regulates all markets there is no
19 limiting principle on their compelled purchase. When
20 they put these environmental controls on the --

21 JUSTICE SOTOMAYOR: They force me to buy --

22 MR. CARVIN: I'm sorry.

23 JUSTICE SOTOMAYOR: They forced me to buy if
24 I need unpasteurized foods, goods that don't have
25 certain pesticides but have others. There is government

1 compulsion in almost every economic decision because the
2 government regulates so much. It's a condition of life
3 that some may rail against, but --

4 MR. CARVIN: Let's think about it this way.
5 Yes, when you've entered the marketplace they can impose
6 all sorts of restrictions on you, and they can impose,
7 for example, all kinds of restrictions on States after
8 they have enacted laws. They can wipe out the laws.
9 They can condition them.

10 But what can't they do? They can't compel
11 States to enact laws. They can't compel States to carry
12 out Federal law. And I am arguing for precisely the
13 same distinction, because everyone intuitively
14 understands that regulating participants after A and B
15 have entered into a contract is fundamentally less
16 intrusive than requiring the contract.

17 JUSTICE SOTOMAYOR: We let the government
18 regulate the manufacturing process whether or not the
19 goods will enter into interstate commerce, merely
20 because they might statistically. We -- there is all
21 sorts of government regulation of manufacturing plants,
22 of agricultural farms, of all sorts of activity that
23 will be purely intrastate because it might affect
24 interstate activity.

25 MR. CARVIN: I fully agree with you, Justice

1 Sotomayor. But I think --

2 JUSTICE SOTOMAYOR: So how is that different
3 from saying you are self-insuring today, you're
4 foregoing insurance? Why isn't that a predecessor to
5 the need that you're eventually going to have?

6 MR. CARVIN: The cases you referred to I
7 think effectively eliminated the distinction between
8 participants in the intrastate market vis-à-vis
9 participants in the interstate market. None of those
10 cases suggest that you can regulate people who are
11 outside of the market on both an intrastate and
12 interstate level by compelling them to enter into the
13 market. And that --

14 JUSTICE BREYER: What about -- the simplest
15 counter-example for me to suggest is you've undoubtedly
16 read Judge Sutton's concurring opinion. He has about
17 two pages, it seemed to me, of examples where everyone
18 accepts the facts that under these kinds of regulations
19 the government can compel people to buy things they
20 don't otherwise want to buy.

21 For example, he gives, even in that farm
22 case, the farmer who was being forced to go out and buy
23 grain to feed to his animals because he couldn't raise
24 it at home. You know and he goes through one example
25 after another. So what -- what is your response to

1 that, which you've read?

2 MR. CARVIN: Judge Sutton is wrong in each
3 and every example. There was no -- there was no
4 compulsion in Raich for him to buy wheat. He could have
5 gotten wheat substitutes or he could have not sold
6 wheat, which is actually what he was doing. There is a
7 huge difference between conditioning regulation, i.e.,
8 conditioning access to the health care market and saying
9 you must buy a product, and forcing you to buy a
10 product. And that, that -- I'm sorry.

11 JUSTICE GINSBURG: I thought it was common
12 ground that the requirement that the insurers -- what
13 was it, the community-based one and they have to insure
14 you despite your health status; they can't refuse
15 because of preexisting conditions. The government tells
16 us and the Congress determined that those two won't work
17 unless you have a pool that will include the people who
18 are now healthy. But so -- well, first, do you agree
19 with your colleague that the community-based -- and
20 what's the name that they give to the other?

21 MR. CARVIN: The guaranteed-issue.

22 JUSTICE GINSBURG: Yes. That that is
23 legitimate Commerce Clause legislation?

24 MR. CARVIN: Oh, sure. And that's why --
25 but we don't in any way impede that sort of regulation.

1 These nondiscrimination regulations will apply to every
2 insurance company just as Congress intended whether or
3 not we buy insurance.

4 JUSTICE GINSBURG: Well then, what about the
5 determination that they can't possibly work if people
6 don't have to buy insurance until they are -- their
7 health status is such that the insurance company just
8 dealt with them on its -- as it will? They'd say, I
9 won't insure you because you're -- you're already sick.

10 MR. CARVIN: It depends what you mean by
11 "work." It'll work just fine in ensuring that no sick
12 people are discriminated against. What -- what -- but
13 when you do that -- Congress --

14 JUSTICE GINSBURG: But the sick people, why
15 would they insure early if they had to be protected if
16 they get insurance late?

17 MR. CARVIN: Yes. Well, that's -- see, this
18 is the government's very illogical argument. They seem
19 to be saying, look, we couldn't just force people to buy
20 insurance to lower health insurance premiums. That
21 would be no good. But we can do it because we've
22 created the problem. We, Congress, have driven up the
23 health insurance premiums, and since we've created that
24 problem, this somehow gives us authority that we
25 wouldn't otherwise have. That can't possibly be right.

1 That would --

2 JUSTICE SOTOMAYOR: Do you think that
3 there's -- what percentage of the American people who
4 took their son or daughter to an emergency room and that
5 child was turned away because the parent didn't have
6 insurance -- do you think there's a large percentage of
7 the American population who would stand for the death of
8 that child --

9 MR. CARVIN: One of the most --

10 JUSTICE SOTOMAYOR: -- if they had an
11 allergic reaction and a simple shot would have saved the
12 child?

13 MR. CARVIN: One of the more pernicious,
14 misleading impressions that the government has made is
15 that we are somehow advocating that people could get
16 thrown out of emergency rooms, or that this alternative
17 that they've hypothesized is going to be enforced by
18 throwing people out of emergency rooms. This
19 alternative, i.e., you condition access to health care
20 on buying health insurance, is enforced in precisely the
21 same way that the Act does. You either buy health
22 insurance or you pay a penalty of \$695. You don't have
23 doctors throwing people out on the street. And -- and
24 so the only --

25 JUSTICE SOTOMAYOR: I'm sorry. Did you say

1 the penalty's okay but not the mandate? I'm sorry.
2 Maybe I've misheard you.

3 MR. CARVIN: No, no, no. I was -- they
4 create this strawman that says: Look, the only
5 alternative to doing it the way we've done it, if we
6 condition access to health care on buying health
7 insurance, the only way you can enforce that is making
8 sick people not get care. I'm saying no, no. There's a
9 perfectly legitimate way they could enforce their
10 alternative, i.e., requiring you to buy health insurance
11 when you access health care, which is the same penalty
12 structure that's in the Act.

13 There is no moral dilemma between having
14 people have insurance and denying them emergency
15 service. Congress has made a perfectly legitimate value
16 judgment that they want to make sure that people get
17 emergency care. Since the founding, whenever Congress
18 has imposed that public responsibility on private
19 actors, it has subsidized it from the Federal Treasury.
20 It has not conscripted a subset of the citizenry and
21 made them subsidize the actors who are being hurt, which
22 is what they're doing here.

23 They're making young, healthy people
24 subsidize insurance premiums for the cost that the
25 nondiscrimination provisions have put on insurance

1 premiums and insurance companies.

2 JUSTICE SOTOMAYOR: So the --

3 MR. CARVIN: And that is the fundamental
4 problem here.

5 JUSTICE SOTOMAYOR: So the -- I -- I want to
6 understand the choices you're saying Congress has.
7 Congress can tax everybody and set up a public health
8 care system.

9 MR. CARVIN: Yes.

10 JUSTICE SOTOMAYOR: That would be okay?

11 MR. CARVIN: Yes. Tax power is --

12 JUSTICE SOTOMAYOR: Okay.

13 MR. CARVIN: I would accept that.

14 JUSTICE SOTOMAYOR: Congress can -- are you
15 taking the same position as your colleague, Congress
16 can't say we're going to set up a public health system,
17 but you can get a tax credit if you have private health
18 insurance because you won't access the public system.
19 Are you taking the same position as your colleague?

20 MR. CARVIN: There may have been some
21 confusion in your prior colloquy. I fully agree with my
22 brother Clement that a direct tax would be
23 unconstitutional. I don't think he means to suggest,
24 nor do I, that a tax credit that incentivizes you to buy
25 insurance creates a problem. Congress incentivizes all

1 kinds of activities. If they gave us a tax credit for
2 buying insurance, then it would be our choice whether or
3 not that makes economic sense, even though --

4 JUSTICE SOTOMAYOR: So how is this different
5 than this Act, which says if a taxpayer fails to meet
6 the requirement of having minimum coverage, then they
7 are responsible for paying the shared responsibility
8 payment?

9 MR. CARVIN: The difference is that the
10 taxpayer is not given a choice. It's the difference
11 between banning cigarettes and saying I'm going to
12 enforce that legal ban through a \$5 a pack penalty, and
13 saying, look, if you want to sell cigarettes, fine; I'm
14 going to charge you a tax of \$5 a pack. And that's --

15 JUSTICE SOTOMAYOR: I think -- I think
16 that's what's happening, isn't it?

17 MR. CARVIN: No. Not --

18 JUSTICE SOTOMAYOR: We're paying -- I
19 thought that everybody was paying, what is it, \$10 a
20 pack now? I don't even know the price. It's pretty
21 high.

22 MR. CARVIN: Right. And everyone would --

23 JUSTICE SOTOMAYOR: I think everybody
24 recognizes that it's all taxation for the purposes of
25 dissuading you to buy it.

1 MR. CARVIN: That's precisely my point. And
2 everyone intuitively understands that that system is
3 dramatically different than saying cigarettes tomorrow
4 are illegal.

5 JUSTICE BREYER: It is different. It is
6 different. It is different. I agree with that. But
7 you pointed out, and I agree with you on this, that the
8 government set up these emergency room laws. The
9 government set up Medicaid. The government set up
10 Medicare. The government set up CHIP, and there are 40
11 million people who don't have the private insurance.

12 In that world, the government has set up
13 commerce. It's all over the United States. And in that
14 world, of course, the decision by the 40 million not to
15 buy the insurance affects that commerce and
16 substantially so.

17 So I thought the issue here is not whether
18 it's a violation of some basic right or something to
19 make people buy things they don't want, but simply
20 whether those decisions of that group of 40 million
21 people substantially affect the interstate commerce that
22 has been set up in part through these other programs.

23 So that's the part of your argument I'm not
24 hearing.

25 MR. CARVIN: Let me --

1 JUSTICE BREYER: Please.

2 MR. CARVIN: It is clear that the failure to
3 buy health insurance doesn't affect anyone. Defaulting
4 on your payments to your health care provider does.
5 Congress chose, for whatever reason, not to regulate the
6 harmful activity of defaulting on your health care
7 provider. They used the 20 percent or whoever among the
8 uninsured as a leverage to regulate the 100 percent of
9 the uninsured.

10 JUSTICE KENNEDY: I agree -- I agree that
11 that's what's happening here.

12 MR. CARVIN: Okay.

13 JUSTICE KENNEDY: And the government tells
14 us that's because the insurance market is unique. And
15 in the next case, it'll say the next market is unique.
16 But I think it is true that if most questions in life
17 are matters of degree, in the insurance and health care
18 world, both markets -- stipulate two markets -- the
19 young person who is uninsured is uniquely proximately
20 very close to affecting the rates of insurance and the
21 costs of providing medical care in a way that is not
22 true in other industries.

23 That's my concern in the case.

24 MR. CARVIN: And, Your -- I may be
25 misunderstanding you, Justice Kennedy. I hope I'm not.

1 Sure, it would be perfectly fine if they
2 allowed -- you do actuarial risk for young people on the
3 basis of their risk for disease, just like you judge
4 flood insurance on the homeowner's risk of flood. One
5 of the issues here is not only that they're compelling
6 us to enter into the marketplace, they're not -- they're
7 prohibiting us from buying the only economically
8 sensible product that we would want, catastrophic
9 insurance.

10 Everyone agrees the only potential problem
11 that a 30-year-old, as he goes from the healthy 70
12 percent of the population to the unhealthy 5 percent --
13 and yet Congress prohibits anyone over 30 from buying
14 any kind of catastrophic health insurance. And the
15 reason they do that is because they needed this massive
16 subsidy.

17 Justice Alito, it's not our numbers. CBO
18 said that injecting my clients into the risk pool lowers
19 premiums by 15 to 20 percent.

20 So, Justice Kennedy, even if we were going
21 to create exceptions for people that are outside of
22 commerce and inside of commerce, surely we'd make
23 Congress do a closer nexus and say, look, we're really
24 addressing this problem; We want these 30-year-olds to
25 get catastrophic health insurance.

1 And not only did they -- they deprived them
2 of that option. And I think that illustrates the
3 dangers of giving Congress these plenary powers, because
4 they can always leverage them. They can always come up
5 with some public policy rationale that converts the
6 power to regulate commerce into the power to promote
7 commerce, which, as I was saying before, is the one that
8 I think is plenary.

9 JUSTICE KAGAN: Mr. Carvin, a large part of
10 this argument has concerned the question of whether
11 certain kinds of people are active participants in a
12 market or not active participants in a market. And your
13 test, which is a test that focuses on this
14 activity/inactivity distinction, would force one to
15 confront that problem all the time.

16 Now, if you look over the history of the
17 Commerce Clause, what you see is that there were sort of
18 unhappy periods when the Court used tests like this,
19 direct versus indirect, commerce versus manufacturing.
20 I think most people would say that those things didn't
21 really work. And the question is, why should this test,
22 inactive versus active, work any better?

23 MR. CARVIN: The problem you identify is
24 exactly the problem you would create if you bought the
25 government's bogus limiting principles. You'd have to

1 draw a distinction between the insurance industry and
2 the car industry and all of that, returning to the
3 Commerce Clause jurisprudence that bedeviled the Court
4 before the 1930s, where they were drawing all these
5 kinds of distinctions among industries, whereas our test
6 is really very simple. Are you buying the product or is
7 Congress compelling you to buy the product? I can't
8 think of a brighter line.

9 And again, if Congress has the power to
10 compel you to buy this product, then obviously they have
11 got the power to provide you -- to compel you to buy any
12 product, because any purchase is going to benefit
13 commerce, and this Court is never going to second-guess
14 Congress's policy judgments on how important it is this
15 product versus that product.

16 JUSTICE ALITO: Do you think that drawing a
17 line between commerce and everything else that is not
18 commerce is drawing an artificial line, like drawing a
19 line between commerce and manufacturing?

20 MR. CARVIN: The words "inactivity" and
21 "activity" are not in the Constitution. The words
22 "commerce" and "noncommerce" are. And again, it's a
23 distinction that comes, Justice Kagan, directly from the
24 text of the Constitution.

25 The Framers consciously gave Congress the

1 ability to regulate commerce, because that's not a
2 particularly threatening activity that deprives you of
3 individual freedom.

4 If you were required, if you were authorized
5 to require A to transfer property to B, you have, as the
6 early cases put it, a monster in legislation which is
7 against all reason and justice, because everyone
8 intuitively understands that regulating people who
9 voluntarily enter into contracts in setting changing
10 conditions does not create the possibility of Congress
11 compelling wealth transfers among the citizenry. And
12 that is precisely why the Framers denied them the power
13 to compel commerce and precisely why they didn't give
14 them plenary power.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Carvin.

17 General Verrilli, you have 4 minutes
18 remaining.

19 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,
20 ON BEHALF OF THE PETITIONERS

21 GENERAL VERRILLI: Thank you, Mr. Chief
22 Justice:

23 Congress confronted a grave problem when it
24 enacted the Affordable Care Act: The 40 million
25 Americans who can't get health insurance and suffered

1 often very terrible consequences. Now, we agree, I
2 think, everyone arguing this case agrees, that Congress
3 could remedy that problem by imposing an insurance
4 requirement at the point of sale.

5 That won't work. The reason it won't work
6 is because people will still show up at the hospital or
7 at their physician's office seeking care without
8 insurance, causing the cost-shifting problem. And
9 Mr. Clement's suggestion that they can be signed up for
10 a high risk pool at that point is utterly unrealistic.

11 Think about how much it would cost to get
12 the insurance when you are at the hospital or at the
13 doctor. It would be -- it would be unfathomably high.
14 That will never work. Congress understood that. It
15 chose the means that will work, the means that it saw
16 worked in the States and in the State of Massachusetts,
17 and that -- and that it had every reason to think would
18 work on a national basis.

19 That is the kind of choice of means that
20 McCulloch says that the Constitution leaves to the
21 democratically accountable branches of government.
22 There is no temporal limitation in the Commerce Clause.
23 Everyone subject to this regulation is in or will be in
24 the health care market. They are just being regulated
25 in advance. That's exactly the kind of thing that ought

1 to be left to the judgment of Congress and the
2 democratically accountable branches of government.

3 And I think this is actually a paradigm
4 example of the kind of situation that Chief Justice
5 Marshall envisioned in *McCulloch* itself, that the
6 provisions of the Constitution needed to be interpreted
7 in a manner that would allow them to be effective in
8 addressing the great crises of human affairs that the
9 Framers could not even envision.

10 But if there is any doubt about that under
11 the Commerce Clause, then I urge this Court to uphold
12 the minimum coverage provision as an exercise of the
13 taxing power.

14 Under *New York v. United States*, this is
15 precisely a parallel situation. If the Court thinks
16 there is any doubt about the ability of Congress to
17 impose the requirement in 5000A(a), it can be treated as
18 simply the predicate to which the tax incentive of
19 5000A(b) seeks accomplishment.

20 And the Court, as the Court said in *New*
21 *York*, has a solemn obligation to respect the judgments
22 of the democratically accountable branches of
23 government, and because this statute can be construed in
24 a manner that allows it to be upheld in that way, I
25 respectfully submit that it is this Court's duty to do

1 so.

2 CHIEF JUSTICE ROBERTS: Thank you, General.
3 Counsel, we'll see you tomorrow.

4 (Whereupon, at 12:02 p.m., the case in the
5 above-entitled matter was submitted.)

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