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IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HEALTH AND :

HUMAN SERVICES, ET AL., :

Petitioners : No. 11-398

v. :

FLORIDA, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, March 27, 2012

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

APPEARANCES:

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioners.

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of Respondents Florida, et al.

MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf of Respondents NFIB, et al.

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P R O C E E D I N G S

(10:00 a.m.)

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

General Verrilli.

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

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

The Affordable Care Act addresses a fundamental and enduring problem in our health care system and our economy. Insurance has become the predominant means of paying for health care in this country. Insurance has become the predominant means of paying for health care in this country.

For most Americans, for more than 80 percent of Americans, the insurance system does provide effective access. Excuse me. But for more than 40 million Americans who do not have access to health insurance either through their employer or through government programs such as Medicare or Medicaid, the system does not work. Those individuals must resort to the individual market, and that market does not provide affordable health insurance.

1           It does not do so because, 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 is  
16   purchased. That is the way this Act works.

17           Under the Commerce Clause, what, what  
18   Congress has done is to enact reforms of the insurance  
19   market, directed at the individual insurance market,  
20   that 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 are 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: 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 enter  
23 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. You don't know when you're going  
4 to need it; you're not sure that you will. But the same  
5 is true for health care. You don't know if you're going  
6 to need a heart transplant or if you ever will. So  
7 there is a market there. To -- in some extent, we all  
8 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. Well, when you need police assistance  
3 or fire assistance or ambulance assistance, the  
4 government is going to make sure to the best extent it  
5 can that you get it -- get it.

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

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

14 GENERAL VERRILLI: For burial services?

15 JUSTICE ALITO: Yes.

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

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

1 going to shift the cost to somebody else."

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

4           GENERAL VERRILLI: No, that --

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

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

21           JUSTICE ALITO: I don't see the difference.  
22 You can get burial insurance. You can get health  
23 insurance. Most people are going to need health care.  
24 Almost everybody. Everybody is going to be buried or  
25 cremated at some point. What's the difference?



1                   GENERAL VERRILLI: Well, one big difference,  
2 one big difference, Justice Alito, is the -- you don't  
3 have the cost shifting to other market participants.

4 Here --

5                   JUSTICE ALITO: Sure you do, because if you  
6 don't have money then the State is going to pay for it.

7 Or some --

8                   GENERAL VERRILLI: That's different.

9                   JUSTICE ALITO: Or a family member is going  
10 to pay.

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

23                  JUSTICE ALITO: But isn't that a very small  
24 part of what the mandate is doing? You can correct me  
25 if these figures are wrong, but it appears to me that

1 the CBO has estimated that the average premium for a  
2 single insurance policy in the non-group market would be  
3 roughly \$5,800 in -- in 2016.

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

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

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

22 GENERAL VERRILLI: A, it is how insurance  
23 works, but, B, the problem that they -- that they are  
24 identifying is not that problem. The -- the guaranteed  
25 issue and community rating reforms do not have the

1 effect of forcing insurance companies to take on lots of  
2 additional people who they then can't afford to cover  
3 because they're -- they tend to be the sick, and that  
4 is -- in fact, the exact opposite is what happens here.

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

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

22           I understand that we must presume laws are  
23 constitutional, but, even so, when you are changing the  
24 relation of the individual to the government in this,  
25 what we can stipulate is, I think, a unique way, do you

1 not have a heavy burden of justification to show  
2 authorization under the Constitution?

3           GENERAL VERRILLI: So two things about that,  
4 Justice Kennedy. First, we think this is regulation of  
5 people's participation in the health care market, and  
6 all -- all this minimum coverage provision does is say  
7 that, instead of requiring insurance at the point of  
8 sale, that Congress has the authority under the commerce  
9 power and the necessary proper power to ensure that  
10 people have insurance in advance of the point of sale  
11 because of the unique nature of this market, because  
12 this is a market in which -- in which you -- although  
13 most of the population is in the market most of the  
14 time -- 83 percent visit a physician every year; 96  
15 percent over a five-year period -- so virtually  
16 everybody in society is in this market, and you've got  
17 to pay for the health care you get, the predominant way  
18 in which it's -- in which it's paid for is insurance,  
19 and -- and the Respondents agree that Congress could  
20 require that you have insurance in order to get health  
21 care or forbid health care from being provided --

22           JUSTICE SCALIA: Why do you -- why do you  
23 define the market that broadly? Health care. It may  
24 well be that everybody needs health care sooner or  
25 later, but not everybody needs a heart transplant, not

1 everybody needs a liver transplant. Why --

2 GENERAL VERRILLI: That's correct, Justice  
3 Scalia, but you never know whether you're going to be  
4 that person.

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

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

19 JUSTICE SCALIA: Is that a principal basis  
20 for distinguishing this from other situations? I mean,  
21 you know, you can also say, well, the person subject to  
22 this has blue eyes. That would indeed distinguish it  
23 from other situations. Is it a principle basis? I  
24 mean, it's -- it's a basis that explains why the  
25 government is doing this, but is it -- is it a basis

1 which shows that this is not going beyond what -- what  
2 the -- the system of enumerated powers allows the  
3 government to do.

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

8           The way in which this statute satisfies the  
9 test is on the basis of the factors that I have  
10 identified. If --

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

22           I thought what was unique about this is it's  
23 not my choice whether I want to buy a product to keep me  
24 healthy, but the cost that I am forcing on other people  
25 if I don't buy the product sooner rather than later.

1           GENERAL VERRILLI: That is -- and that is  
2 definitely a difference that distinguishes this market  
3 and justifies this as a regulation.

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

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

24           GENERAL VERRILLI: So --

25           JUSTICE BREYER: And the same with the

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

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

9 JUSTICE BREYER: We would be -- or --

10 GENERAL VERRILLI: My responsibility -- and  
11 I would defend them on a rationale like that, but I do  
12 think that we are advancing a narrower rationale.

13 JUSTICE KENNEDY: Well, then your question  
14 is whether or not there are any limits on the Commerce  
15 Clause. Can you identify for us some limits on the  
16 Commerce Clause?

17 GENERAL VERRILLI: Yes. The -- the  
18 rationale purely under the Commerce Clause that we're  
19 advocating here would not justify forced purchases of  
20 commodities for the purpose of stimulating demand. We  
21 -- the -- it would not justify purchases of insurance  
22 for the purposes -- in situations in which insurance  
23 doesn't serve as the method of payment for service --

24 JUSTICE KENNEDY: But why not? If  
25 Congress -- if Congress says that the interstate



1 commerce is affected, isn't, according to your view,  
2 that the end of the analysis.

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

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

22 GENERAL VERRILLI: The difference, Mr. Chief  
23 Justice, is that health insurance is the means of  
24 payment for health care and broccoli is --

25 CHIEF JUSTICE ROBERTS: Well, now that's a

1 significant -- I'm sorry.

2 GENERAL VERRILLI: And -- and broccoli is  
3 not the means of payment for anything else. And an  
4 automobile is not --

5 CHIEF JUSTICE ROBERTS: It's the means of  
6 satisfying a basic human need, just as your insurance is  
7 a means of satisfying --

8 GENERAL VERRILLI: But I do think that's the  
9 difference between existing commerce activity in the  
10 market already occurring -- the people in the health  
11 care market purchasing, obtaining health care  
12 services -- and the creation of commerce. And the  
13 principle that we are advocating here under the Commerce  
14 Clause does not take the step of justifying the creation  
15 of commerce. It's a regulation of the existing  
16 commerce.

17 JUSTICE GINSBURG: General Verrilli, can we  
18 - can we go back to, Justice Breyer asked a question,  
19 and it kind of interrupted your answer to my question.  
20 And tell me if I'm wrong about this, but I thought a  
21 major, major point of your argument was that the people  
22 who don't participate in this market are making it much  
23 more expensive for the people who do; that is, they --  
24 they will get, a good number of them will get services  
25 that they can't afford at the point where they need

1 them, and the result is that everybody else's premiums  
2 get raised. So you're not -- it's not your -- your free  
3 choice just to do something for yourself. What you do  
4 is going to affect others, affect them in -- in a major  
5 way.

6 GENERAL VERRILLI: That -- that absolutely  
7 is a justification for Congress's action here. That is  
8 existing economic activity that Congress is regulating  
9 by means of this rule.

10 JUSTICE SCALIA: General Verrilli, you --  
11 you could say that about buying a car. If -- if people  
12 don't buy cars, the price that those who do buy cars pay  
13 will have to be higher. So you could say in order to  
14 bring the price down, you are hurting these other people  
15 by not buying a car.

16 GENERAL VERRILLI: That is not what we are  
17 saying, Justice Scalia.

18 JUSTICE SCALIA: That's not -- that's not  
19 what you're saying.

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

21 JUSTICE SCALIA: I thought it was. I  
22 thought you were saying other people are going to have  
23 to pay more for insurance because you're not buying it.

24 GENERAL VERRILLI: No. It's because you're  
25 going -- in the health care market, you're going into

1 the market without the ability to pay for what you get,  
2 getting the health care service anyway as a result of  
3 the social norms that allow -- that -- to which we've  
4 obligated ourselves so that people get health care.

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

7 GENERAL VERRILLI: Well, I can't imagine  
8 that that -- that the Commerce Clause would --would  
9 forbid Congress from taking into account this deeply  
10 embedded social norm.

11 JUSTICE SCALIA: You -- you could do it.  
12 But -- but does that expand your ability to, to issue  
13 mandates to -- to the people?

14 GENERAL VERRILLI: I -- I -- this is not a  
15 purchase mandate. This is a -- this is a law that  
16 regulates the method of paying for a service that the  
17 class of people to whom it applies are either  
18 consuming --

19 JUSTICE SOTOMAYOR: General --

20 GENERAL VERRILLI: -- or -- or inevitably  
21 will consume.

22 JUSTICE SOTOMAYOR: General, I see or have  
23 seen three strands of arguments in your briefs, and one  
24 of them is echoed today. The first strand that I have  
25 seen is that Congress can pass any necessary laws to

1 effect those powers within its rights, i.e., because it  
2 made a decision that to effect, to effect mandatory  
3 issuance of insurance, that it could also obligate the  
4 mandatory purchase of it.

5 The second strand I see is self-insurance  
6 affects the market, and so the government can regulate  
7 those who self-insure.

8 And the third argument -- and I see all of  
9 them as different -- is that what the government is  
10 doing, and I think it's the argument you're making  
11 today -- that what the -- what the government is saying  
12 is if you pay for -- if you use health services, you  
13 have to pay with insurance. Because only insurance will  
14 guarantee that whatever need for health care that you  
15 have will be covered. Because virtually no one, perhaps  
16 with the exception of 1 percent of the population, can  
17 afford the massive cost if the unexpected happens.

18 This third argument seems to be saying what  
19 we are regulating is health care, and when you go for  
20 health services, you have to pay for insurance, and  
21 since insurance won't issue at the moment that you  
22 consume the product, we can reasonably, necessarily tell  
23 you to buy it ahead of time, because you can't buy it at  
24 the moment that you need it.

25 Is that -- which of these three is your

1 argument? Are all of them your argument? I'm just not  
2 sure what the --

3 GENERAL VERRILLI: So, let me try to state  
4 it this way. The Congress enacted reforms of the  
5 insurance market, the guaranteed-issue and  
6 community-rating reforms. It did so to deal with a very  
7 serious problem that results in 40 million people not  
8 being able to get insurance and therefore not access to  
9 the health care environment. Everybody agrees in this  
10 case that those are within Congress's Article I powers.

11 The minimum coverage provision is necessary  
12 to carry those provisions into -- into execution;  
13 because without them, without those provisions, without  
14 minimum coverage, guaranteed issue and community rating  
15 will, as the experience in the States showed, make  
16 matters worse, not better. There will be fewer people  
17 covered; it will cost more. Now the -- so --

18 JUSTICE SOTOMAYOR: So on that ground,  
19 you're answering affirmatively to my colleagues that  
20 have asked you the question, can the government force  
21 you into commerce.

22 GENERAL VERRILLI: So -- no.

23 JUSTICE SOTOMAYOR: And there is no limit to  
24 that power.

25 GENERAL VERRILLI: No. No. Because that's

1 -- that's the first part of our argument.

2           The second part of our argument is that the  
3 means here that the Congress has chosen, the minimum  
4 coverage provision, is a means that regulates the --  
5 that regulates economic activity, namely your  
6 transaction in the health care market, with substantial  
7 effects on interstate commerce; and it is the  
8 conjunction of those two that we think provides the  
9 particularly secure foundation for this statute under  
10 the commerce power.

11           JUSTICE KAGAN: General, you've talked on --  
12 a couple of times about other alternatives that Congress  
13 might have had, other alternatives that the Respondents  
14 suggest to deal with this problem, in particular, the  
15 alternative of mandating insurance at the point at which  
16 somebody goes to a hospital or an emergency room and  
17 asks for care.

18           Did Congress consider those alternatives?  
19 Why did it reject them? How should we think about the  
20 question of alternative ways of dealing with these  
21 problems?

22           GENERAL VERRILLI: I do think, Justice  
23 Kagan, that the point of difference between my friends  
24 on the other side and the United States is about one of  
25 timing. They have agreed that Congress has Article I

1 authority to impose an insurance requirement or other --  
2 or other penalty at the point of sale, and they have  
3 agreed that Congress has the authority to do that to  
4 achieve the same objectives that the minimum coverage  
5 provision of the Affordable Care Act is designed to  
6 achieve. This is a situation if which we are talking  
7 about means. Congress gets a substantial deference in  
8 the choice of means, and if one thinks about the  
9 difference between the means they say Congress should  
10 have chosen and the means Congress did choose, I think  
11 you can see why it was eminently more sensible for  
12 Congress to choose the means that it chose.

13 JUSTICE KENNEDY: I'm not sure which way it  
14 cuts. If the Congress has alternate means, let's assume  
15 it can use the tax power to raise revenue and to just  
16 have a national health service, single payer. How does  
17 that factor into our analysis? In the one sense, it can  
18 be argued that this is what the government is doing; it  
19 ought to be honest about the power that it's using and  
20 use the correct power. On the other hand, it means that  
21 since the Court can do it anyway -- Congress can do it  
22 anyway, we give a certain amount of latitude. I'm not  
23 sure which the way the argument goes.

24 GENERAL VERRILLI: Let me try to answer that  
25 question, Justice Kennedy, and get back to the question



1 you asked me earlier. The, the -- I do think one  
2 striking feature of the argument here that this is a  
3 novel exercise of power is that what Congress chose to  
4 do was to rely on market mechanisms and efficiency and a  
5 method that has more choice than would the traditional  
6 Medicare/Medicaid type model; and so it seems a little  
7 ironic to suggest that that counts against it.

8 But beyond that, in the sense that it's  
9 novel, this provision is novel in the same way, or  
10 unprecedented in the same way, that the Sherman Act was  
11 unprecedented when the Court upheld it in the Northern  
12 Securities case; or the Packers and Stockyards Act was  
13 unprecedented when the Court upheld it, or the National  
14 Labor Relations Act was unprecedented when the Court  
15 upheld it in Jones and Laughlin; or the -- the dairy  
16 price supports in Wrightwood Dairy and Rock Royal --

17 JUSTICE SCALIA: Oh, no, it's not. They all  
18 involved commerce. There was no doubt that was what  
19 regulated was commerce. And here you're regulating  
20 somebody who isn't covered.

21 By the way, I don't agree with you that the  
22 relevant market here is health care. You're not  
23 regulating health care. You're regulating insurance.  
24 It's the insurance market that you're addressing and  
25 you're saying that some people who are not in it must be

1 in it and that's -- that's difference from regulating in  
2 any manner commerce that already exists out there.

3 GENERAL VERRILLI: Well, to the extent that  
4 we are looking at the comprehensive scheme, Justice  
5 Scalia, it is regulating commerce that already exists  
6 out there. And the means in which that regulation is  
7 made effective here, the minimum coverage provision, is  
8 a regulation of the way in which people participate, the  
9 method of their payment in the health care market. That  
10 is what it is.

11 And I do think, Justice Kennedy, getting  
12 back to the question you asked before, what -- what  
13 matters here is whether Congress is choosing a tool  
14 that's reasonably adapted to the problem that Congress  
15 is confronting. And that may mean that the tool is  
16 different from a tool that Congress has chosen to use in  
17 the past. That's not something that counts against the  
18 provision in a Commerce Clause analysis.

19 JUSTICE SCALIA: Wait. That's -- that's --  
20 it's both "Necessary and Proper." What you just said  
21 addresses what's necessary. Yes, has to be reasonably  
22 adapted. Necessary does not mean essential, just  
23 reasonably adapted. But in addition to being necessary,  
24 it has to be proper. And we've held in two cases that  
25 something that was reasonably adapted was not proper

1 because it violated the sovereignty of the States, which  
2 was implicit in the constitutional structure.

3 The argument here is that this also is -- may be  
4 necessary, but it's not proper because it violates an  
5 equally evident principle in the Constitution, which is  
6 that the Federal Government is not supposed to be a  
7 government that has all powers; that it's supposed to be  
8 a government of limited powers. And that's what all  
9 this questioning has been about. What -- what is left?  
10 If the government can do this, what, what else can it  
11 not do?

12 GENERAL VERRILLI: This does not violate the  
13 norm of proper as this Court articulated it in Printz or  
14 in New York because it does not interfere with the  
15 States as sovereigns. This is a regulation that -- this  
16 is a regulation --

17 JUSTICE SCALIA: No, that wasn't my point.  
18 That is not the only constitutional principle that  
19 exists.

20 GENERAL VERRILLI: But it --

21 JUSTICE SCALIA: An equally evident  
22 constitutional principle is the principle that the  
23 Federal Government is a government of enumerated powers  
24 and that the vast majority of powers remain in the  
25 States and do not belong to the Federal Government. Do

1 you acknowledge that that's a principle?

2 GENERAL VERRILLI: Of course we do, Your  
3 Honor.

4 JUSTICE SCALIA: Okay. That's what we are  
5 talking about here.

6 GENERAL VERRILLI: And the way in which this  
7 Court in its cases has policed the boundary that -- of  
8 what's in the national sphere and what's in the local  
9 sphere is to ask whether Congress is regulating economic  
10 activity with a substantial effect on interstate  
11 commerce. And here I think it's really impossible, in  
12 view of our history, to say that Congress is invading  
13 the State sphere. This is a -- this is a market in  
14 which 50 percent of the people in this country get their  
15 health care through their employer. There is a massive  
16 Federal tax subsidy of \$250 billion a year that makes  
17 that much more affordable. ERISA and HIPAA regulate  
18 that to ensure that the kinds of bans on pre-existing  
19 condition discrimination and pricing practices that  
20 occur in the individual market don't occur.

21 JUSTICE SCALIA: I don't understand your --

22 GENERAL VERRILLI: This is in --

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

25 GENERAL VERRILLI: No, not at all.

1                   JUSTICE SCALIA: I mean, the Tenth Amendment  
2 says the powers not given to the Federal Government are  
3 reserved, not just to the States, but to the States and  
4 the people. And the argument here is that the people  
5 were left to decide whether they want to buy insurance  
6 or not.

7                   GENERAL VERRILLI: But this -- but, Your  
8 Honor, this is -- what the Court has said, and I think  
9 it would be a very substantial departure from what the  
10 Court has said, is that when Congress is regulating  
11 economic activity with a substantial effect on  
12 interstate commerce that will be upheld. And that is  
13 what is going on here, and to embark on -- I would  
14 submit with all due respect, to embark on the kind of  
15 analysis that my friends on the other side suggest the  
16 Court ought to embark on is to import Lochner-style  
17 substantive due process --

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

1                   GENERAL VERRILLI: I agree, except,  
2 Mr. Chief Justice, that what the Court has said as I  
3 read the Court's cases is that the way in which you  
4 ensure that the Federal Government stays in its sphere  
5 and the sphere reserved for the States is protected is  
6 by policing the boundary: Is the national government  
7 regulating economic activity with a substantial effect  
8 on interstate commerce?

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

18                   And here the government is saying that the  
19 Federal Government has a duty to tell the individual  
20 citizen that it must act, and that is different from  
21 what we have in previous cases and that changes the  
22 relationship of the Federal Government to the individual  
23 in the very fundamental way.

24                   GENERAL VERRILLI: I don't think so, Justice  
25 Kennedy, because it is predicated on the participation

1 of these individuals in the market for health care  
2 services. Now, it happens to be that this is a market  
3 in which, aside from the groups that the statute  
4 excludes, virtually everybody participates. But it is a  
5 regulation of their participation in that market.

6 CHIEF JUSTICE ROBERTS: Well, but it's  
7 critical how you define the market. If I understand the  
8 law, the policies that you're requiring people to  
9 purchase involve -- must contain provision for maternity  
10 and newborn care, pediatric services, and substance use  
11 treatment. It seems to me that you cannot say that  
12 everybody is going to need substance use treatment,  
13 substance use treatment or pediatric services, and yet  
14 that is part of what you require them to purchase.

15 GENERAL VERRILLI: Well, it's part of what  
16 the statute requires the insurers to offer. And I think  
17 the reason is because it's trying to define minimum  
18 essential coverage because the problem --

19 CHIEF JUSTICE ROBERTS: But your theory is  
20 that there is a market in which everyone participates  
21 because everybody might need a certain range of health  
22 care services, and yet you're requiring people who are  
23 not -- never going to need pediatric or maternity  
24 services to participate in that market.

25 GENERAL VERRILLI: The -- with respect to

1 what insurance has to cover, Your Honor, I think  
2 Congress is entitled the latitude of making the  
3 judgments of what the appropriate scope of coverage is.  
4 And the problem here in this market is that for -- you  
5 may think you're perfectly healthy and you may think  
6 that you're not -- that you're being forced to subsidize  
7 somebody else, but this is not a market in which you can  
8 say that there is a immutable class of healthy people  
9 who are being forced to subsidize the unhealthy. This  
10 is a market in which you may be healthy one day and you  
11 may be a very unhealthy participant in that market the  
12 next day and that is a fundamental difference, and  
13 you're not going to know in which --

14 CHIEF JUSTICE ROBERTS: I think you're  
15 posing the question I was posing, which is that doesn't  
16 apply to a lot of what you're requiring people to  
17 purchase: Pediatric services, maternity services. You  
18 cannot say that everybody is going to participate in the  
19 substance use market and yet you require people to  
20 purchase insurance coverage for that.

21 GENERAL VERRILLI: Congress has got --  
22 Congress is enacting economic regulation here. It has  
23 latitude to define essential, the attributes of  
24 essential coverage. That doesn't -- that doesn't seem  
25 to me to implicate the question of whether Congress is



1 engaging in economic regulation and solving an economic  
2 problem here, and that is what Congress is doing.

3 JUSTICE ALITO: Are you denying this? If  
4 you took the group of people who are subject to the  
5 mandate and you calculated the amount of health care  
6 services this whole group would consume and figured out  
7 the cost of an insurance policy to cover the services  
8 that group would consume, the cost of that policy would  
9 be much, much less than the kind of policy that these  
10 people are now going to be required to purchase under  
11 the Affordable Care Act?

12 GENERAL VERRILLI: Well, while they are  
13 young and healthy that would be true. But they are not  
14 going to be young and healthy forever. They are going  
15 to be on the other side of that actuarial equation at  
16 some point. And of course you don't know which among  
17 that group is the person who's going to be hit by the  
18 bus or get the definitive diagnosis. And that --

19 JUSTICE ALITO: The point is -- no, you take  
20 into account that some people in that group are going to  
21 be hit by a bus, some people in that group are going to  
22 unexpectedly contract or be diagnosed with a disease  
23 that -- that is very expensive to treat. But if you  
24 take their costs and you calculate that, that's a lot  
25 less than the amount that they are going to be required

1 to pay.

2 So that you can't just justify this on the  
3 basis of their trying to shift their costs off to other  
4 people, can you?

5 GENERAL VERRILLI: Well, the -- the people  
6 in that class get benefits, too, Justice Alito. They  
7 get the guaranteed-issue benefit that they would not  
8 otherwise have, which is an enormously valuable benefit.

9 And in terms of the -- the subsidy  
10 rationale, I -- I don't think -- I think it's -- it  
11 would be unusual to say that it's an illegitimate  
12 exercise of the commerce power for some people to  
13 subsidize others. Telephone rates in this country for a  
14 century were set via the exercise of the commerce power  
15 in a way in which some people paid rates that were much  
16 higher than their costs in order to subsidize --

17 JUSTICE SCALIA: Only if you make phone  
18 calls.

19 GENERAL VERRILLI: Well, right. But -- but  
20 everybody -- to live in the modern world, everybody  
21 needs a telephone. And the -- the same thing with  
22 respect to the -- you know, the dairy price supports  
23 that -- that the Court upheld in Wrightwood Dairy and  
24 Rock Royal. You can look at those as disadvantageous  
25 contracts, as forced transfers, that -- you know, I

1 suppose it's theoretically true that you could raise  
2 your kids without milk, but the reality is you've got to  
3 go to the store and buy milk. And the commerce power --  
4 as a result of the exercise of the commerce power,  
5 you're subsidizing somebody else --

6 JUSTICE KAGAN: And this is especially true,  
7 isn't it, General --

8 GENERAL VERRILLI: -- because that's the  
9 judgment Congress has made.

10 JUSTICE KAGAN: -- Verrilli, because in this  
11 context, the subsidizers eventually become the  
12 subsidized?

13 GENERAL VERRILLI: Well, that was the point  
14 I was trying to make, Justice Kagan, that you're young  
15 and healthy one day, but you don't stay that way. And  
16 the -- the system works over time. And so I just don't  
17 think it's a fair characterization of it. And it does  
18 get back to, I think -- a problem I think is important  
19 to understand --

20 JUSTICE SCALIA: We're not stupid. They're  
21 going to buy insurance later. They're young and -- and  
22 need the money now.

23 GENERAL VERRILLI: But that's --

24 JUSTICE SCALIA: When -- when they think  
25 they have a substantial risk of incurring high medical

1 bills, they'll buy insurance, like the rest of us.

2 But --

3 GENERAL VERRILLI: That's -- that's --

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

6 GENERAL VERRILLI: That's the problem,  
7 Justice Scalia. That's -- and that's exactly the  
8 experience that the States had that made the imposition  
9 of guaranteed-issue and community rating not only be  
10 ineffectual but be highly counterproductive. Rates, for  
11 example, in New Jersey doubled or tripled, went from  
12 180,000 people covered in this market down to 80,000  
13 people covered in this market.

14 In Kentucky, virtually every insurer left  
15 the market. And the reason for that is because when  
16 people have that guarantee of -- that they can get  
17 insurance, they're going to make that calculation that  
18 they won't get it until they're sick and they need it,  
19 and so the pool of people in the insurance market gets  
20 smaller and smaller. The rates you have to charge to  
21 cover them get higher and higher. It helps fewer and  
22 fewer -- insurance covers fewer and fewer people until  
23 the system ends.

24 This is not a situation in which you're  
25 conscripting -- you're forcing insurance companies to

1 cover very large numbers of unhealthy people --

2 JUSTICE SCALIA: You could solve that  
3 problem by simply not requiring the insurance company to  
4 sell it to somebody who has a -- a condition that is  
5 going to require medical treatment, or at least not --  
6 not require them to sell it to him at -- at a rate that  
7 he sells it to healthy people.

8 But you don't want to do that.

9 GENERAL VERRILLI: But that seems to me to  
10 say, Justice Scalia, that Congress -- that's the problem  
11 here. And that seems to be --

12 JUSTICE SCALIA: That seems to me a  
13 self-created problem.

14 GENERAL VERRILLI: Congress cannot solve the  
15 problem through standard economic regulation, and  
16 that -- and -- and I do not think that can be the  
17 premise of our understanding of the Commerce Clause --

18 JUSTICE SCALIA: Whatever --

19 GENERAL VERRILLI: -- this is an economic  
20 problem --

21 JUSTICE SCALIA: -- whatever problems  
22 Congress's economic regulation produces, whatever they  
23 are, I think Congress can do something to counteract  
24 them. Here, requiring somebody to enter -- to enter the  
25 insurance market.

1                   GENERAL VERRILLI: This is not a -- it's not  
2 a problem of Congress's creation. The problem is that  
3 you have 40 million people who cannot get affordable  
4 insurance through the means that the rest of us get  
5 affordable insurance. Congress, after a long study and  
6 careful deliberation, and viewing the experiences of the  
7 States and the way they tried to handle this problem,  
8 adopted a package of reforms. Guaranteed-issue and  
9 community rating, and -- and subsidies and the minimum  
10 coverage provision are a package of reforms that solve  
11 that problem.

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

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

16                   GENERAL VERRILLI: Yes. It's limited to  
17 insurance.

18                   CHIEF JUSTICE ROBERTS: Well, now why is  
19 that? Congress could -- once you -- once you establish  
20 that you have a market for health care, I would suppose  
21 Congress's power under the Commerce Clause meant they  
22 had a broad scope in terms of how they regulate that  
23 market. And it would be -- it would be going back to  
24 *Lochner* if we were put in the position of saying no, you  
25 can use your commerce power to regulate insurance, but

1 you can't use your commerce power to regulate this  
2 market in other ways. I think that would be a very  
3 significant intrusion by the Court into Congress's  
4 power.

5           So I don't see how we can accept your --  
6 it's good for you in this case to say oh, it's just  
7 insurance. But once we say that there is a market and  
8 Congress can require people to participate in it, as  
9 some would say -- or as you would say, that people are  
10 already participating in it -- it seems to me that we  
11 can't say there are limitations on what Congress can do  
12 under its commerce power, just like in any other area,  
13 all -- given significant deference that we accord to  
14 Congress in this area, all bets are off, and you could  
15 regulate that market in any rational way.

16           GENERAL VERRILLI: But this is insurance as  
17 a method of payment for health care services --

18           CHIEF JUSTICE ROBERTS: Exactly.

19           GENERAL VERRILLI: And that -- and that  
20 is --

21           CHIEF JUSTICE ROBERTS: And you're  
22 worried -- that's the area that Congress has chosen to  
23 regulate. There's this health care market. Everybody's  
24 in it. So we can regulate it, and we're going to look  
25 at a particular serious problem, which is how people pay

1 for it. But next year, they can decide everybody's in  
2 this market, we're going to look at a different problem  
3 now, and this is how we're going to regulate it. And we  
4 can compel people to do things -- purchase insurance, in  
5 this case. Something else in the next case, because  
6 you've -- we've accepted the argument that this is a  
7 market in which everybody participates.

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

11 JUSTICE SCALIA: Can -- can I tell you what  
12 the something else is so -- while you're answering it?  
13 The something else is everybody has to exercise, because  
14 there's no doubt that lack of exercise cause -- causes  
15 illness, and that causes health care costs to go up.

16 So the Federal government says everybody has  
17 to -- to join a -- an exercise club. That's -- that's  
18 the something else.

19 GENERAL VERRILLI: No. The -- the position  
20 we're taking here would not justify that rule, Justice  
21 Scalia, because health club membership is not a means of  
22 payment for -- for consumption of anything in -- in a  
23 market.

24 CHIEF JUSTICE ROBERTS: Right. Right.  
25 That's -- that's exactly right, but it doesn't seem



1 responsive to my concern that there's no reason -- once  
2 we say this is within Congress's commerce power, there's  
3 no reason other than our own arbitrary judgment to say  
4 all they can regulate is the method of payment. They  
5 can regulate other things that affect this now-conceded  
6 interstate market in health care in which everybody  
7 participates.

8           GENERAL VERRILLI: But I think it's common  
9 ground between us and the Respondents that this is an  
10 interstate market in which everybody participates. And  
11 they agree that -- that Congress could impose the  
12 insurance requirement at the point of sale. And this is  
13 just a question of timing, and whether Congress's --  
14 whether the necessary and proper authority gives  
15 Congress, because of the particular features of this  
16 market, the ability to impose the -- the insurance, the  
17 need for insurance, the maintenance of insurance before  
18 you show up to get health care rather than at the moment  
19 you get up to show --

20           CHIEF JUSTICE ROBERTS: Right. No, I  
21 think --

22           GENERAL VERRILLI: -- show up to get health  
23 care. And that --

24           CHIEF JUSTICE ROBERTS: -- unless I'm  
25 missing something, I think you're just repeating the

1 idea that this is the regulation of the method of  
2 payment. And I understand that argument. And it may be  
3 -- it may be a good one. But what I'm concerned about  
4 is, once we accept the principle that everybody is in  
5 this market, I don't see why Congress's power is limited  
6 to regulating the method of payment and doesn't include  
7 as it does in any other area.

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

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

23 JUSTICE ALITO: Could you just -- before you  
24 move on, could you express your limiting principle as  
25 succinctly as you possibly can? Congress can force

1 people to purchase a product where the failure to  
2 purchase the product has a substantial effect on  
3 interstate commerce -- if what? If this is part of a  
4 larger regulatory scheme? Was that it? Was there  
5 anything more?

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

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

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

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

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

13 GENERAL VERRILLI: Yes.

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

20 Do you know of any case where we've done  
21 that?

22 GENERAL VERRILLI: Well, I think I would  
23 point the Court to the License Tax Case, where it was --  
24 was denominated a fee and nontax, and the Court upheld  
25 it as an exercise of the taxing power, in a situation in

1 which the structure of the law was very much the  
2 structure of this law, in that there was a separate  
3 stand-alone provision that set the predicate and then a  
4 separate provision in closing --

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

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

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

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

24 GENERAL VERRILLI: They may still be  
25 exercise of the tax -- exercises of the taxing power,

1 Justice Ginsburg, as -- as this is, and I think there  
2 isn't a case in which the Court has, to my mind,  
3 suggested anything that bears this many indicia of a tax  
4 can't be considered as an exercise of the taxing power.  
5 In fact, it seems to me the License Tax Cases point you  
6 in the opposite direction. And beyond that your --  
7 the -- it seems to me the right way to think about this  
8 question is whether it is capable of being understood as  
9 an exercise of the tax.

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

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

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

22 GENERAL VERRILLI: If the President said --

23 JUSTICE SCALIA: Is it a tax or not a tax?

24 The President didn't think it was.

25 GENERAL VERRILLI: The President said it

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

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

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

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

24 I mean, the -- the mortgage deduction works  
25 that way. When the mortgage deduction is -- it's

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

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

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

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



1 Congress was avoiding any mention of the tax power.

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

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

11 GENERAL VERRILLI: Well --

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

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

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

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

1 illuminates that, but certainly --

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

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

7 JUSTICE SOTOMAYOR: So there has to be a  
8 limiting principle --

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

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

23 Now in -- in Bailey v. Drexel Furniture, for  
24 example, the tax was 10 percent of the company's  
25 profits, even if they had only one child laborer for one

1 day. There was a scienter requirement, and it was  
2 enforced by the Department of Labor. It wasn't just  
3 collected by the Internal Revenue Service.

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

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

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

24 JUSTICE SCALIA: You're saying that all the  
25 discussion we had earlier about how this is one big

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

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

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

11 GENERAL VERRILLI -- providing for the --

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's justifiable under  
15 its tax power.

16 JUSTICE SCALIA: Extraordinary.

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

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

22 (Pause.)

23 CHIEF JUSTICE ROBERTS: Why don't we get  
24 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 forego the  
16 purchase of health insurance. That is a theory without  
17 any limiting principle.

18 JUSTICE SOTOMAYOR: Do you accept your --  
19 the General's position that you have conceded that  
20 Congress could say, if you're going to consume health  
21 services, 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' 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  
7 is 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 is at issue here is  
10 emergency room visits, and the only thing that's being  
11 imposed is catastrophic care coverage; but, as the Chief  
12 Justice indicated earlier, a lot of the insurance that's  
13 being covered is for ordinary preventive care, ordinary  
14 office visits, and those are the kinds of things that  
15 one can predict.

16 So there is 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 will 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 within its authority  
8 to decide, rather than at the point of sale, given an  
9 insurance-based mechanism, it makes sense to regulate it  
10 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 substantive effects. Because if Congress tried to  
14 regulate at the point of sale, the one group that it  
15 wouldn't capture at all are the people who don't want to  
16 purchase health insurance and also have no plans of  
17 using health care services in the near term. And  
18 Congress very much wanted to capture those people. I  
19 mean, those people are essentially the golden geese that  
20 pay for the entire lowering of the premium.

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

1 insurance companies figure risks?

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

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

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

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

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



1 government's brief that -- it has the statute. And  
2 that's one of the clear findings.

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

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

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

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

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

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

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

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

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

1 JUSTICE SOTOMAYOR: Under what theory  
2 wouldn't it be?

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

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

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

17 And the one thing I think the framers would  
18 have clearly identified as a direct tax is a tax on not  
19 having something.

20 I mean, the framing generation was divided  
21 over whether a tax on carriages was a direct tax or not.  
22 Hamilton thought that was a indirect tax; Madison  
23 thought it was a direct tax. I have little doubt that  
24 both of them would have agreed that a tax on not having  
25 a carriage would have clearly been a direct tax. I also

1 think they would have thought it clearly wasn't a valid  
2 regulation of the market in carriages.

3 And, you know, I mean, if you look at Hilton  
4 against the United States, that's this Court's first  
5 direct tax --

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

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

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

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

25 Is this commerce? Well, it seems to me more

1 commerce than marijuana. I mean, is it, in fact, a  
2 regulation? Well, why not? If creating a bank is, why  
3 isn't this?

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

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

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

17 So what is argued here is there is a large  
18 group of -- what about a person that we discover that  
19 there are -- a disease is sweeping the United States,  
20 and 40 million people are susceptible, of whom 10  
21 million will die; can't the Federal Government say all  
22 40 million get inoculation?

23 So here, we have a group of 40 million, and  
24 57 percent of those people visit emergency care or other  
25 care, which we are paying for. And 22 percent of those

1 pay more than \$100,000 for that. And Congress says they  
2 are in the midst of this big thing. We just want to  
3 rationalize this system they are already in.

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

6 JUSTICE SCALIA: We'll get to those  
7 questions in inverse order.

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

11 The thing I can see that you say to some  
12 people, go buy; why does that make a difference in terms  
13 of the Commerce Clause?

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

17 JUSTICE BREYER: It was both?

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

23 What, of course, the Court didn't say, and I  
24 think the Court would have had a very different reaction  
25 to, is, you know, we are not just going to have the

1 bank, because that wouldn't be necessary and proper, we  
2 are going to force the citizenry to put all of their  
3 money in the bank, because, if we do that, then we know  
4 the Bank of the United States will be secure.

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, Mr. Clement,

1 the key to the government's argument to the contrary is  
2 that everybody is in this market. It's all right to  
3 regulate Wickard -- again, in Wickard against Filburn,  
4 because that's a particular market in which the farmer  
5 had been participating.

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

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

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

25           MR. CLEMENT: Well, Justice Kagan, I'm not



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

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

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

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

25           JUSTICE SOTOMAYOR: Well, that goes back to

1 the substantive due process question. Is this a Lochner  
2 era argument that only the states can do this, even  
3 though it affects commerce? Cars indisputably affect  
4 commerce. So are you arguing that because the states  
5 have done it all along, the Federal Government is no  
6 longer permitted to legislate in this area?

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

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

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

24 So even the car market is difference from  
25 this market, where there is no way to get outside of the

1 regulatory web. And that's, I think, one of the real  
2 problems with this because, I mean, we take as a  
3 given --

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

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

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

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

22 MR. CLEMENT: Of course not --

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

24 MR. CLEMENT: Of course not, Justice Breyer,  
25 but the point is that once Congress decides it's going

1 to regulate extant commerce, it is going to get all  
2 sorts of latitude to make the right judgments about  
3 actuarial predictions, which actuarial to rely on, which  
4 one not to rely on.

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

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

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

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

1 market --

2 JUSTICE KAGAN: Well, we are talking about  
3 the health insurance market, which is designed to access  
4 the health care market.

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

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

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

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

1 cost shifting that the government tries to uniquely to  
2 associate with this market, it is everywhere.

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

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

22 Now, that's quite different from a car  
23 situation, and it's different in only this respect. It  
24 shows there is a national problem, and it shows there is  
25 a national problem that involves money, cost insurance.

1 So if Congress could do this, should there be a disease  
2 that strikes the United States and they want every one  
3 inoculated even though ten million will be hurt, it's  
4 hard for me to decide why that isn't interstate  
5 commerce, even more so where we know it affects  
6 everybody.

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

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

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

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

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

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



1 people are increasing the normal family premium,  
2 Congress says, by a thousand dollars a year. Those  
3 people are in commerce. They are making decisions that  
4 are affecting the price that everybody pays for this  
5 service.

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

12 JUSTICE KAGAN: Not necessarily,  
13 Mr. Clement. And it's different because of the nature  
14 of the health care service, that you are entitled to  
15 health care when you go to an emergency room, when you  
16 go to a doctor, even if you can't pay for it. So the  
17 difference between your hypotheticals and the real case  
18 is the problem of uncompensated care which --

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

24 But let me also say that there is a real  
25 disconnect then between that focus on what makes this

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

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

21           And again, this is not just some lawyer up  
22 here telling you that's what it does and trying to  
23 second-guess the congressional economic decisions. This  
24 is Congress's findings, findings I on page 43 A of the  
25 appendix to the government's --

1 JUSTICE BREYER: All that sounds like you're  
2 debating the merits of the bill. You ask really for  
3 limiting principles so we don't get into a matter that I  
4 think has nothing to do with this 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 into  
9 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.

17 The other two are principles, one written  
18 into Lopez and one you just heard. It seems to me all  
19 of those eliminate the broccoli possibility, and none of  
20 them eliminates the possibility that we are trying to  
21 take the 40 million people who do have the medical cost,  
22 who do affect interstate commerce and provide a system  
23 that you may like or not like.

24 That's where we are in limiting principles.

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

1 take them in turn. I would encourage this Court not to  
2 Garcia-ize the Commerce Clause and just simply say it's  
3 up to Congress to police the Commerce Clause. So I  
4 don't think that is a limiting principle.

5 Second of all --

6 JUSTICE SOTOMAYOR: Yes, but that's exactly  
7 what Justice Marshall said in Gibbons. He said that it  
8 is the power to regulate, the power like all others  
9 vested in Congress is complete in itself, may be  
10 exercised to its utmost extent, and acknowledges no  
11 limitations other than those prescribed in the  
12 Constitution. But there is no conscription in the, set  
13 forth in the Constitution with respect to regulating  
14 commerce.

15 MR. CLEMENT: I agree 100 percent, and I  
16 think that was the Chief Justice's point which was once  
17 you open the door to compelling people into commerce  
18 based on the narrow rationales that exist in this  
19 industry, you are not going to be able to stop that  
20 process.

21 JUSTICE SCALIA: I would like hear you  
22 address Justice Breyer's other, other two principles.

23 MR. CLEMENT: Well, the other two principles  
24 are Lopez -- and this case really is not -- I mean, you  
25 know, Lopez is a limit on the affirmative exercise of

1 people who are already in commerce. The question is, is  
2 there any other limit to people who aren't in commerce?  
3 And so I think this is the case that really asks that  
4 question.

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

15           CHIEF JUSTICE ROBERTS: And now maybe return  
16 to Justice Sotomayor's question.

17           MR. CLEMENT: I'd be delighted to, which is  
18 -- I mean, I -- you are absolutely right. Once you're  
19 in the commerce power, there is not -- this Court is not  
20 going to police that subject maybe to the Lopez limit.  
21 And that's exactly why I think it's very important for  
22 this Court to think seriously about taking an  
23 unprecedented step of saying that the commerce power not  
24 only includes the power to regulate, prescribe the rule  
25 by which commerce is governed, the rule of *Gibbons v.*

1 Ogden. But to go further and say it's not just  
2 prescribing the rule for commerce that exists but is the  
3 power to compel people to enter into commerce in the  
4 first place.

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

14 The second thing is I would urge you to read  
15 the License Tax case which the Solicitor General says is  
16 his best case for why you ignore the fact that a tax is  
17 denominated into something other. Because that is a  
18 case where the argument was that because the Federal  
19 government had passed a license not a tax, that somehow  
20 that allowed people to take actions that would have been  
21 unlawful under State law, that this was some special  
22 Federal license to do something that was forbidden by  
23 State law. This Court looked beyond the label in order  
24 to preserve federalism there. What the Solicitor  
25 General and the government ask you to do here is exactly

1 the opposite, which is to look past labels in order to  
2 up-end our basic federalist system. In this --

3 JUSTICE SOTOMAYOR: Would you tell me, do  
4 you think the States could pass this mandate.

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

7 JUSTICE SOTOMAYOR: Is there any other area  
8 of commerce, business, where we have held that there is  
9 a concurrent power between the State and the Federal  
10 Government to protect the welfare of commerce?

11 MR. CLEMENT: Well, Justice Sotomayor, I  
12 have to resist your premise, because I didn't answer  
13 yes, the States can do it because it would be a valid  
14 regulation of intrastate commerce. I said yes, the  
15 States can do it because they have a police power, and  
16 that is the fundamental difference between the States on  
17 the one hand and the limited, enumerated Federal  
18 Government on the other.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 Mr. Clement.

21 Mr. Carvin.

22 ORAL ARGUMENT OF MICHAEL A. CARVIN

23 ON BEHALF OF THE RESPONDENTS NFIB, ET AL.

24 MR. CARVIN: Thank you, Mr. Chief Justice,  
25 may it please the Court:

1 I'd like to begin with the Solicitor  
2 General's main premise, which is that they can compel  
3 the purchase of health insurance in order to promote  
4 commerce in the health market because it will reduce  
5 uncompensated care. If you accept that argument, you  
6 have to fundamentally alter the text of the Constitution  
7 and give Congress plenary power.

8 It simply doesn't matter whether or not this  
9 regulation will promote health care commerce by reducing  
10 uncompensated care; all that matters is whether the  
11 activity actually being regulated by the act negatively  
12 affects Congress or negatively affects commerce  
13 regulation, so that it's within the commerce power. If  
14 you agree with us that this is -- exceeds commerce  
15 power, the law doesn't somehow become redeemed because  
16 it has beneficial policy effects in the health care  
17 market.

18 In other words, Congress does not have the  
19 power to promote commerce. Congress has -- Congress has  
20 the power to regulate commerce. And if the power  
21 exceeds their permissible regulatory authority, then the  
22 law is invalid.

23 CHIEF JUSTICE ROBERTS: Well, surely --

24 MR. CARVIN: I'm sorry.

25 CHIEF JUSTICE ROBERTS: Well, surely



1 regulation includes the power to promote. Since the New  
2 Deal we've said that regulation in -- there is a market  
3 agricultural products; Congress has the power to  
4 subsidize, to limit production, all sorts of things.

5 MR. CARVIN: Absolutely, Chief Justice, and  
6 that's the distinction I'm trying to draw. When they  
7 are acting within their enumerated power then obviously  
8 they are promoting commerce, but the  
9 Solicitor General wants to turn it into a different  
10 power. He wants to say we have the power to promote  
11 commerce, to regulate anything to promote commerce, and  
12 if they have the power to promote commerce then they  
13 have the power to regulate everything, right?  
14 Because --

15 CHIEF JUSTICE ROBERTS: I don't -- I don't  
16 think you're addressing their main point, which is that  
17 they are not creating commerce in -- in health care.  
18 It's already there, and we are all going to need some  
19 kind of health care; most of us will at some point.

20 MR. CARVIN: I'd -- I'd like to address that  
21 in two ways, if I could, Mr. Chief Justice. In the  
22 first place they keep playing mix and match with the  
23 statistics. They say 95 percent of us are in the health  
24 care market, okay? But that's not the relevant  
25 statistic, even from -- as the government frames the

1 issue. No one in Congress and the Solicitor General is  
2 arguing that going to the doctor and fully paying him  
3 creates a problem. The problem is uncompensated care,  
4 and they say the uncompensated care arises if you have  
5 some kind of catastrophe -- hit by a bus, have some  
6 prolonged illness. Well, what is the percentage of the  
7 uninsured that have those sorts of catastrophes? We  
8 know it has got to be a relative small fraction. So in  
9 other words, the relevant --

10 CHIEF JUSTICE ROBERTS: Yet we don't know  
11 who they are.

12 MR. CARVIN: We don't. No, and we don't  
13 know in advance, and -- and -- but that doesn't change  
14 the basic principle, that you are nonetheless forcing  
15 people for paternalistic reasons to go into the  
16 insurance market to ensure against risk that they have  
17 made the voluntary decision that they are not -- have  
18 decided not to. But even --

19 JUSTICE GINSBURG: But the problem is -- the  
20 problem is this they are making the reinvent of us pay  
21 for it, because as much as they say, well, we are not in  
22 the market, we don't know when the -- the timing when  
23 they will be.

24 MR. CARVIN: Which is --

25 JUSTICE GINSBURG: And the -- the figures

1 that how much more families are paying for insurance  
2 because people get sick, they may have intended to  
3 self-insure, they haven't been able to meet the bill  
4 for -- for cancer, and the rest of us end up paying  
5 because these people are getting cost-free health care,  
6 and the only way to prevent that is to have them pay  
7 sooner rather than later, pay up front.

8 MR. CARVIN: Yes, but my point is this.  
9 That, with respect, Justice Ginsburg, conflicts the  
10 people who do result in uncompensated care, the free  
11 riders. Those are people who default on their health  
12 care payments. That is an entirely different group of  
13 people, an entirely different activity than being  
14 uninsured.

15 So the question is whether or not you can  
16 regulate activity because it has a statistical  
17 connection to an activity that harms Congress. And my  
18 basic point to you is this: the Constitution only gives  
19 Congress the power to regulate things that negatively  
20 affect commerce or commerce regulation. It doesn't give  
21 them the power to regulate things that are statistically  
22 connected to things that negatively affect the  
23 commerce --

24 JUSTICE KAGAN: Well, Mr. Carvin --

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

1 JUSTICE KAGAN: Please.

2 MR. CARVIN: I was just going to say,  
3 because if they have that power, then they obviously  
4 have the power to regulate everything because everything  
5 in the aggregate is statistically connected to something  
6 that negatively affects commerce, and every compelled  
7 purchase promotes commerce.

8 JUSTICE BREYER: In your view, right  
9 there -- in your view right there --

10 MR. CARVIN: Justice Breyer --

11 JUSTICE BREYER: Can I just --

12 MR. CARVIN: I'm sorry.

13 JUSTICE BREYER: I'm just picking on  
14 something. I'd like to just -- if it turned out there  
15 was some terrible epidemic sweeping the United States,  
16 and we couldn't say that more than 40 or 50 percent -- I  
17 can make the number as high as I want -- but the -- the  
18 -- you'd say the Federal Government doesn't have the  
19 power to get people inoculated, to require them to be  
20 inoculated, because that's just statistical.

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

24 JUSTICE BREYER: Is your answer to that yes  
25 or no?

1 MR. CARVIN: Oh, I'm sorry; my answer is no,  
2 they couldn't do it, because Morrison --

3 JUSTICE BREYER: No, they could not do it.

4 MR. CARVIN: Yes.

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

9 MR. CARVIN: May --

10 JUSTICE BREYER: Please turn to Justice  
11 Kagan.

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

13 JUSTICE BREYER: Yes.

14 MR. CARVIN: Violence against women  
15 obviously creates the same negative impression on fellow  
16 citizens as this communicable disease, but the -- and  
17 it has huge effects on the health care of our country.  
18 Congress found that it increased health care costs by --

19 JUSTICE BREYER: I agree with you that --

20 MR. CARVIN: Well, but --

21 JUSTICE BREYER: -- that it had huge  
22 negative effects but the majority thought that was a  
23 local matter.

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

25 (Laughter.)

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

13           JUSTICE ALITO: Mr. Carvin, isn't there this  
14 difference between Justice Breyer's hypothetical and the  
15 law that we have before us here? In his hypothetical  
16 harm to other people from the communicable disease is  
17 the result of the disease. It is not the result of  
18 something that the government has done, whereas here the  
19 reason why there is cost shifting is because the  
20 government has mandated that. It has required hospitals  
21 to provide emergency treatment, and instead of paying  
22 for that through a tax which would be born by everybody,  
23 it has required -- it has set up a system in which the  
24 cost is surreptitiously shifted to people who have  
25 health insurance and who pay their bills when they go to

1 the hospital.

2 MR. CLEMENT: Justice Alito, that is exactly  
3 the government's argument. It's an extraordinarily  
4 illogical argument.

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

7 (Laughter.)

8 JUSTICE BREYER: -- and say that in fact it  
9 turns out that 90 percent of all automobiles driving  
10 interstate without certain equipment put up pollution,  
11 which travels interstate -- not 100 percent, maybe only  
12 60 percent. Does the EPA have the power then to say  
13 you've got to have an antipollution device? It's  
14 statistical.

15 MR. CARVIN: What they can't do -- yes, if  
16 you have a car, they can require you to have an  
17 anti-pollution --

18 JUSTICE BREYER: Then you're not going on  
19 statistics; you're going on something else which is what  
20 I'd like to know what it is.

21 MR. CARVIN: It's this. They can't require  
22 you to buy a car with an anti-pollution device. Once  
23 you've entered the market and made a decision they can  
24 regulate the terms and conditions of the car that you  
25 do, and they can do it for all sorts of reasons. What

1 they can't do it compel you to enter the market.

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

10 MR. CARVIN: If being born is entering the  
11 market, then I can't think of a more plenary power  
12 Congress can have, because that literally means they can  
13 regulate every human activity from cradle to grave. I  
14 thought that's what distinguished the plenary police  
15 power from the very limited commerce power.

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

20 JUSTICE BREYER: I see the point. You can  
21 go back to, go back to Justice Kagan. Don't forget her  
22 question.

23 JUSTICE KAGAN: I've forgotten my question.

24 (Laughter.)

25 MR. CARVIN: I -- I was facing the same



1 dilemma, Justice Kagan.

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

4 JUSTICE KAGAN: See what it means to be the  
5 junior justice?

6 (Laughter.)

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

19 MR. CARVIN: Well I don't think the test of  
20 a law's constitutionality is whether it more adheres to  
21 the libertarian principles of the Cato Institute or the  
22 statist principles of someone else. I think the test of  
23 a law's constitutionality is not those policy questions;  
24 it's whether or not the law is regulating things that  
25 negatively affect commerce or don't.

1                   And since obviously the failure to purchase  
2 an item doesn't create the kind of effects on supply and  
3 demand that the market participants in Wickard and Raich  
4 did and doesn't in any way interfere with regulation of  
5 the insurance companies, I don't think it can pass the  
6 basic --

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

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

22                  But none of that is true -- in other words,  
23 you can regulate local bootleggers, but that doesn't  
24 suggest you can regulate teetotalers, people who stay  
25 out of the liquor market, because they don't have any

1 negative effect on the existing market participants or  
2 on regulation of those market participants.

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

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

19 MR. CARVIN: No again. The people who  
20 impose the costs on the rest of us are people who engage  
21 in a different activity at a different time, which is  
22 defaulting on their health care payments. It's not the  
23 uninsured. Under your theory you could regulate anybody  
24 if they have got a statistical connection to a problem.  
25 You could say, since we could regulate people who enter

1 into the mortgage market and impose mortgage insurance  
2 on them, we can simply impose the requirement to buy  
3 private mortgage insurance on everybody before they have  
4 entered the market because we are doing it in this  
5 prophylactic way before it develops.

6 CHIEF JUSTICE ROBERTS: No, no, that's not  
7 -- I don't think that's fair, because not everybody is  
8 going to enter the mortgage market. The government's  
9 position is that almost everybody is going to enter the  
10 health care market.

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

20 Whether you're a market participant or not,  
21 they are still requiring you to make a purchase that you  
22 don't want to do, and to get back to your facial  
23 example --

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

1 MR. CARVIN: I've sorry?

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

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

15 JUSTICE SOTOMAYOR: They force me to buy --

16 MR. CARVIN: I'm sorry.

17 JUSTICE SOTOMAYOR: They forced me to buy if  
18 I need unpasteurized foods, goods that don't have  
19 certain pesticides but have others. There is government  
20 compulsion in almost every economic decision because the  
21 government regulates so much. It's a condition of life  
22 that some may rail against, but --

23 MR. CARVIN: Let's think about it this way.  
24 Yes, when you've entered the marketplace they can impose  
25 all sorts of restrictions on you, and they can impose,

1 for example, all kinds of restrictions on States after  
2 they have enacted laws. They can wipe out the laws.  
3 They can condition them.

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

11 JUSTICE SOTOMAYOR: We let the government  
12 regulate the manufacturing process whether or not the  
13 goods will enter into interstate commerce, merely  
14 because they might statistically. We -- there is all  
15 sorts of government regulation of manufacturing plants,  
16 of agricultural farms, of all sorts of activity that  
17 will be purely intrastate because it might affect  
18 interstate activity.

19 MR. CARVIN: I fully agree with you, Justice  
20 Sotomayor. But I think --

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

25 MR. CARVIN: The cases you referred to I

1 think effectively eliminated the distinction between  
2 participants in the intrastate market vis-à-vis  
3 participants in the interstate market. None of those  
4 cases suggest that you can regulate people who are  
5 outside of the market on both an intrastate and  
6 interstate level by compelling them to enter into the  
7 market. And that --

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

15 For example, he gives, even in that farm  
16 case, the farmer who was being forced to go out and buy  
17 grain to feed to his animals because he couldn't raise  
18 it at home. You know and he goes through one example  
19 after another. So what -- what is your response to  
20 that, which you've read?

21 MR. CARVIN: Judge Sutton is wrong in each  
22 and every example. There was no -- there was no  
23 compulsion in Raich for him to buy wheat. He could have  
24 gotten wheat substitutes or he could have not sold  
25 wheat, which is actually what he was doing. There is a

1 huge difference between conditioning regulation, i.e.,  
2 conditioning access to the health care market and saying  
3 you must buy a product, and forcing you to buy a  
4 product. And that, that -- I'm sorry.

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

15 MR. CARVIN: The guaranteed-issue.

16 JUSTICE GINSBURG: Yes. That that is  
17 legitimate Commerce Clause legislation?

18 MR. CARVIN: Oh, sure. And that's why --  
19 but we don't in any way impede that sort of regulation.  
20 These nondiscrimination regulations will apply to every  
21 insurance company just as Congress intended whether or  
22 not we buy insurance.

23 JUSTICE GINSBURG: Well then, what about the  
24 determination that they can't possibly work if people  
25 don't have to buy insurance until they are -- their



1 health status is such that the insurance company just  
2 dealt with them on its -- as it will? I won't insure  
3 you because you're -- you're already sick.

4 MR. CARVIN: It depends what you mean by  
5 "work." It'll work just fine in ensuring that no sick  
6 people are discriminated against. What -- what -- but  
7 when you do that -- Congress --

8 JUSTICE GINSBURG: But the sick people, why  
9 would they insure early if they had to be protected if  
10 they get insurance late?

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

21 JUSTICE SOTOMAYOR: Do you think that  
22 there's -- what percentage of the American people who  
23 took their son or daughter to an emergency room and that  
24 child was turned away because the parent didn't have  
25 insurance -- do you think there's a large percentage of

1 the American population who would stand for the death of  
2 that child --

3 MR. CARVIN: One of the most --

4 JUSTICE SOTOMAYOR: They had an allergic  
5 reaction and a simple shot would have saved the child?

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

18 JUSTICE SOTOMAYOR: I'm sorry, did you say  
19 the penalty's okay but not the mandate? I'm sorry.  
20 Maybe I've misheard you.

21 MR. CARVIN: No. No. I was -- they create  
22 this strawman that says look, the only alternative to  
23 doing it the way we've done it, if we condition access  
24 to health care on buying health insurance, the only way  
25 you can enforce that is making sick people not get care.

1 I'm saying no, no. There's a perfectly legitimate way  
2 they could enforce their alternative; i.e. requiring you  
3 to buy health insurance when you access health care,  
4 which is the same penalty structure that's in the Act.

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

15           They're making young healthy people  
16 subsidize insurance premiums for the cost that the  
17 nondiscrimination provisions have put on insurance  
18 premiums and insurance companies.

19           JUSTICE SOTOMAYOR: So the --

20           MR. CARVIN: -- and that -- that is the  
21 fundamental problem here.

22           JUSTICE SOTOMAYOR: So the -- I -- I want to  
23 understand the choices you're saying Congress has.  
24 Congress can tax everybody and set up a public health  
25 care system.

1 MR. CARVIN: Yes.

2 JUSTICE SOTOMAYOR: That would be okay.

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

4 JUSTICE SOTOMAYOR: Okay.

5 MR. CARVIN: I would accept that.

6 JUSTICE SOTOMAYOR: Congress can -- you're  
7 taking the same position as your colleague, Congress  
8 can't say we're going to set up a public health system,  
9 but you can get a tax credit if you have private health  
10 insurance because you won't access the public system.

11 Are you taking the same position as your  
12 colleague?

13 MR. CARVIN: There may have been some  
14 confusion in prior colloquy. I fully agree with my  
15 brother Clement that a direct tax would be  
16 unconstitutional. I don't think he means to suggest,  
17 nor do I, that a tax credit that incentivizes you to buy  
18 insurance creates problems. Congress incentivizes all  
19 kinds of activities. If they gave us a tax credit for  
20 buying insurance, then it would be our choice whether or  
21 not that makes economic sense, even though --

22 JUSTICE SOTOMAYOR: So how is this different  
23 than this Act which says if a taxpayer fails to meet the  
24 requirement of having minimum coverage, then they are  
25 responsible for paying the shared responsibility

1 payment?

2 MR. CARVIN: The difference is that the  
3 taxpayer is not given a choice. It's the difference  
4 between banning cigarettes and saying I'm going to  
5 enforce that legal ban through a \$5 a pack penalty, and  
6 saying look, if you want to sell cigarettes, fine. I'm  
7 going to charge you a tax of \$5 a pack. And that's --

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

10 MR. CARVIN: No. Not --

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

15 MR. CARVIN: Right. And everyone  
16 understands --

17 JUSTICE SOTOMAYOR: I think everybody  
18 recognizes that it's all taxation for the purposes of  
19 dissuading you to buy it.

20 MR. CARVIN: That's precisely my point. And  
21 everyone intuitively understands that that system is  
22 dramatically different than saying cigarettes tomorrow  
23 are illegal. It is different.

24 JUSTICE BREYER: It is different. It is  
25 different. I agree with that. But you pointed out, and

1 I agree with you on this, that the government set up  
2 these emergency room laws. The government set up  
3 Medicaid. The government set up Medicare. The  
4 government set up CHIP, and there are 40 million people  
5 who don't have the private insurance. In that world,  
6 the government has set up commerce. It's all over the  
7 United States. And in that world, of course, the  
8 decision by the 40 million not to buy the insurance  
9 affects that commerce, and substantially so.

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

16 So that's the part of your argument I'm not  
17 hearing.

18 MR. CARVIN: Let me --

19 JUSTICE BREYER: Please.

20 MR. CARVIN: It is clear that the failure to  
21 buy health insurance doesn't affect anyone. Defaulting  
22 on your payments to your health care provider does.  
23 Congress chose for whatever reason not to regulate the  
24 harmful activity of defaulting on your health care  
25 provider. They used the 20 percent or whoever among the

1 uninsured as a leverage to regulate the 100 percent of  
2 the uninsured.

3 JUSTICE KENNEDY: I agree -- I agree that  
4 that's what's happening here.

5 MR. CARVIN: Okay.

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

16 That's my concern in the case.

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

19 Sure. It would be perfectly fine if they  
20 allowed -- you do actuarial risk for young people on the  
21 basis of their risk for disease, just like you judge  
22 flood insurance on the homeowner's risk of flood. One  
23 of the issues here is not only that they're compelling  
24 us to enter into the marketplace, they're not -- they're  
25 prohibiting us from buying the only economically

1 sensible product that we would want. Catastrophic  
2 insurance.

3 Everyone agrees the only potential problem  
4 that a 30-year-old, as he goes from the healthy 70  
5 percent of the population to the unhealthy 5 percent.  
6 And yet Congress prohibits anyone over 30 from buying  
7 any kind of catastrophic health insurance. And the  
8 reason they do that is because they needed this massive  
9 subsidy.

10 Justice Alito, it's not our numbers. CBO  
11 said that injecting my clients into the risk pool lowers  
12 premiums by 15 to 20 percent. So, Justice Kennedy, even  
13 if we were going to create exceptions for people that  
14 are outside of commerce and inside of commerce, surely  
15 we'd make Congress do a closer nexus and say look, we're  
16 really addressing this problem. We want these  
17 30-year-olds to get catastrophic health insurance.

18 And not only did they -- they deprived them  
19 of that option. And I think that illustrates the  
20 dangers of giving Congress these plenary powers, because  
21 they can always leverage them. They can always come up  
22 with some public policy rationale that converts the  
23 power to regulate commerce into the power to promote  
24 commerce, which, as I was saying before, is the one that  
25 I think is plenary.



1                   JUSTICE KAGAN: Mr. Carvin, a large part of  
2 this argument has concerned the question of whether  
3 certain kinds of people are active participants in a  
4 market or not active participants in a market. In your  
5 test, which is a test that focuses on this  
6 activity/inactivity distinction, would force one to  
7 confront that problem all the time.

8                   Now, if you look over the history of the  
9 Commerce Clause, what you see is that there were sort of  
10 unhappy periods when the Court used tests like this --  
11 direct versus indirect, commerce versus manufacturing.  
12 I think most people would say that those things didn't  
13 really work. And the question is, why should this test,  
14 inactive versus active, work any better?

15                   MR. CARVIN: The problem you identify is  
16 exactly the problem you would create if you bought the  
17 government's bogus limiting principles. You'd have to  
18 draw distinctions between the insurance industry and the  
19 car industry and all of that.

20                   We turn you to the Commerce Clause  
21 jurisprudence that bedeviled the Court before the 1930s,  
22 where they were drawing all these kinds of distinctions  
23 among industries; whereas our test is really very  
24 simple. Are you buying the product or is Congress  
25 compelling you to buy the product? I can't think of a

1 brighter line.

2           And again, if Congress has the power to  
3 compel you to buy this product, then obviously, they  
4 have got the power to provide you -- to compel you to  
5 buy any product, because any purchase is going to  
6 benefit commerce, and this Court is never going to  
7 second-guess Congress's policy judgments on how  
8 important it is this product versus that product.

9           JUSTICE ALITO: Do you think they are  
10 drawing a line between commerce and everything else that  
11 is not commerce is drawing an artificial line, drawing a  
12 line between Congress and manufacturing?

13           MR. CARVIN: The words "inactivity" and  
14 "activity" are not in the Constitution. The words  
15 "commerce" and "noncommerce" are. And again, it's a  
16 distinction that comes, Justice Kagan, directly from the  
17 text of the Constitution.

18           The Framers consciously gave Congress the  
19 ability to regulate commerce, because that's not a  
20 particularly threatening activity that deprives you of  
21 individual freedom. If you were required, if you were  
22 authorized to require A to transfer property to B, you  
23 have, as the early cases put it, a monster in  
24 legislation which is against all reason in justice,  
25 because everyone intuitively understands that regulating

1 people who voluntarily enter into contracts in setting  
2 changing conditions does not create the possibility of  
3 Congress compelling wealth transfers among the  
4 citizenry. And that is precisely why the Framers denied  
5 them the power to compel commerce, and precisely why  
6 they didn't give them plenary power.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 Mr. Carvin.

9 General Verrilli, you have four minutes  
10 remaining.

11 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
12 ON BEHALF OF THE PETITIONERS

13 GENERAL VERRILLI: Thank you, Mr. Chief  
14 Justice.

15 Congress confronted a grave problem when it  
16 enacted the Affordable Care Act. The 40 million  
17 Americans who can't get health insurance and suffered  
18 often very terrible consequences. Now, we agree, I  
19 think -- everyone arguing this case agrees that Congress  
20 could remedy that problem by imposing the insurance  
21 requirement at the point of sale.

22 That won't work. The reason it won't work  
23 is because people will still show up at the hospital or  
24 at their physician's office seeking care without  
25 insurance, causing the cost shifting problem. And

1 Mr. Clement's suggestion that they can be signed up for  
2 a high risk pool at that point is utterly unrealistic.

3 Think about how much it would cost to get  
4 the insurance when you are at the hospital or at the  
5 doctor. It would be -- it would be unfathomably high,  
6 that will never work. Congress understood that. It  
7 chose a means that will work. The means that it saw  
8 work in the States and in the State of Massachusetts and  
9 that, and that it had every reason to think would work  
10 on a national basis.

11 That is the kind of choice of means that  
12 McCulloch says that the Constitution leaves to the  
13 democratically accountable branches of government.  
14 There is no temporal limitation in the Commerce Clause.  
15 Everyone subject to this regulation is in or will be in  
16 the health care market. They are just being regulated  
17 in advance. That's exactly the kind of thing that ought  
18 to be left to the judgment of Congress and the  
19 democratically accountable branches of government.

20 And I think this is actually a paradigm  
21 example of the kind of situation that Chief Justice  
22 Marshall envisioned in McCulloch itself, that the  
23 provisions of the Constitution needed to be interpreted  
24 in a manner that would allow them to be effective in  
25 addressing the great crises of human affairs that the

1 Framers could not even envision.

2 But if there is any doubt about that under  
3 the Commerce Clause, then I urge this Court to uphold  
4 the minimum coverage provision as an exercise of the  
5 taxing power.

6 Under *New York v. United States*, this is  
7 precisely a parallel situation. If the Court thinks  
8 there is any doubt about the ability of Congress to  
9 impose the requirement in 5000A(a), it can be treated as  
10 simply the predicate to which the tax incentive of  
11 5000A(b) seeks accomplishment. And the Court -- as the  
12 Court said in *New York*, has a solemn obligation to  
13 respect the judgments of the democratically accountable  
14 branches of government, and because this statute can be  
15 construed in a manner that allows it to be upheld in  
16 that way, I respectfully submit that it is this Court's  
17 duty to do so.

18 CHIEF JUSTICE ROBERTS: Thank you, General.  
19 Counsel, we'll see you tomorrow.

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

22

23

24

25

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