1   IN THE SUPREME COURT OF THE UNITED STATES

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3   NATIONAL FEDERATION OF INDEPENDENT :

4   BUSINESS, ET AL.,   :

5   Petitioners   :   No. 11-393

6   v.   :

7   KATHLEEN SEBELIUS, SECRETARY OF   :

8   HEALTH AND HUMAN SERVICES, ET AL. :

9   - - - - - - - - - - - - - - - - - - -x

10   and

11   - - - - - - - - - - - - - - - - - - -x

12   FLORIDA, ET AL.,   :

13   Petitioners   :   No. 11-400

14   v.   :

15   DEPARTMENT OF HEALTH AND   :

16   HUMAN SERVICES, ET AL.   :

17   - - - - - - - - - - - - - - - - - - -x

18   Washington, D.C.

19   Wednesday, March 28, 2012

20

21   The above-entitled matter came on for oral

22   argument before the Supreme Court of the United States

23   at 10:19 a.m.

24   APPEARANCES:

25   PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

1   Petitioners.

2 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

3   Department of Justice, Washington, D.C.; on behalf of

4   Respondents.

5 H. BARTOW FARR, III, ESQ., Washington, D.C..; for

6   Court-appointed amicus curiae.

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1   C O N T E N T S

2   ORAL ARGUMENT OF   PAGE

3   PAUL D. CLEMENT, ESQ.

5   ORAL ARGUMENT OF

6   EDWIN S. KNEEDLER, ESQ.

8   ORAL ARGUMENT OF

9   H. BARTOW FARR, III, ESQ.

11   REBUTTAL ARGUMENT OF

12   PAUL D. CLEMENT, ESQ.

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

2   (10:19 a.m.)

3   CHIEF JUSTICE ROBERTS: We will continue

4 argument this morning in Case Number 11-393, National

5 Federation of Independent Business v. Sebelius and case

6 11-400, Florida v. The Department of HHS.

7   Mr. Clement.

8   ORAL ARGUMENT OF PAUL D. CLEMENT

9   ON BEHALF OF THE PETITIONERS

10   MR. CLEMENT: Mr. Chief Justice, and may it

11 please the Court:

12   If the individual mandate is

13 unconstitutional, then the rest of the Act cannot stand.

14 As Congress found and the Federal Government concedes,

15 the community rating and guaranteed-issue provisions of

16 the Act cannot stand without the individual mandate.

17 Congress found that the individual mandate was essential

18 to their operation. And not only can guaranteed-issue

19 and community-rating not stand, not operate in the

20 manner that Congress intended, they would actually

21 counteract Congress's basic goal of providing patient

22 protection but also affordable care.

23   If you do not have the individual mandate to

24 force people into the market then community rating and

25 guaranteed-issue will cause the cost of premiums to

4

1   skyrocket. We can debate the order of magnitude of that

2   but we can't debate that the direction will be upward.

3   We also can't debate --

4   JUSTICE SOTOMAYOR: Counsel, that may well

5   be true. The economists are going back and forth on

6   that issue, and the figures vary from up 10 percent to

7   up 30. We are not in the habit of doing the legislative

8   findings.

9   What we do know is that for those States

10   that found prices increasing, that they found various

11   solutions to that. In one instance, and we might or may

12   not say that it's unconstitutional, Massachusetts passed

13   the mandatory coverage provision. But others adjusted

14   some of the other provisions.

15   Why shouldn't we let Congress do that, if in

16   fact, the economists prove, some of the economists prove

17   right, that prices will spiral? What's wrong with

18   leaving it to -- in the hands of the people who should

19   be fixing this, not us?

20   MR. CLEMENT: Well, a couple of questions --

21   a couple of responses, Justice Sotomayor. First of all,

22   I think that it's very relevant here that Congress had

23   before it as examples some of the States that had tried

24   to impose guaranteed-issue and community rating and did

25   not impose an individual mandate. And Congress rejected

1   that model. So your question is quite right in the

2   saying that it's not impossible to have guaranteed-issue

3   and community-rating without an individual mandate. But

4   it's a model that Congress looked at and specifically

5   rejected.

6   And then, of course, there is Congress's own

7   finding, and their finding, of course, this is (i),

8   which is 43(a)of the government's brief in the appendix,

9   Congress specifically found that having the individual

10   mandate is essential to the operation of

11   guaranteed-issue and community-rating.

12   JUSTICE SOTOMAYOR: That's all it said it's

13   essential to. I mean, I'm looking at it. The

14   exchanges, the State exchanges are information-

15   gathering facilities that tell insurers what the various

16   policies actually mean. And that has proven to be a

17   cost saver in many of the States who have tried it. So

18   why should we be striking down a cost saver when if what

19   your argument is, was, that Congress was concerned about

20   costs rising? Why should we assume they wouldn't have

21   passed that information?

22   MR. CLEMENT: I think a couple of things.

23   One, you get -- I mean, I would think you are going to

24   have to take the bitter with the sweet. And if

25   Congress -- if we are going to look at Congress's goal

1   of providing patient protection but also affordable

2   care, we can't -- I don't think it works to just take

3   the things that save money and cut out the things that

4   are going to make premiums more expensive. But at a

5   minimum --

6   JUSTICE SOTOMAYOR: I want a bottom line is

7   why don't we let Congress fix it?

8   MR. CLEMENT: Well, let me answer the bottom

9   line question, which is, no matter what you do in this

10   case, at some point there's going to be -- if you strike

11   down the mandate, there is going to be something for

12   Congress to do. The question is really, what task do

13   you want to give Congress. Do you want to give Congress

14   the task of fixing the statute after something has been

15   taken out, especially a provision at the heart, or do

16   you want to give Congress the task of fixing health

17   care? And I think it would be better in this

18   situation --

19   JUSTICE SOTOMAYOR: We are not taking -- If

20   we strike down one provision, we are not taking that

21   power away from Congress. Congress could look at it

22   without the mandatory coverage provision and say, this

23   model doesn't work; let's start from the beginning. Or

24   it could choose to fix what it has. We are not

25   declaring -- one portion doesn't force Congress into any

7

1   path.

2   MR. CLEMENT: And of course that's right,

3   Justice Sotomayor, and no matter what you do here,

4   Congress will have the options available. So if you, if

5   you strike down only the individual mandate, Congress

6   could say the next day: Well, that's the last thing we

7   ever wanted to do so we will strike down the rest of the

8   statute immediately and then try to fix the problem. So

9   whatever you do, Congress is going to have options. The

10   question is --

11   JUSTICE SCALIA: Well, there is such a thing

12   as legislative inertia, isn't there?

13   MR. CLEMENT: That's exactly what I was

14   going to say, Justice Scalia, which is, I think the

15   question for this Court is, we all recognize there is

16   legislative inertia. And then the question is: What is

17   the best result in light of that reality?

18   JUSTICE SOTOMAYOR: Are you suggesting that

19   we should take on more power to the Court?

20   MR. CLEMENT: No --

21   JUSTICE SOTOMAYOR: Because Congress would

22   choose to take one path rather than another. That's

23   sort of taking onto the Court more power than one I

24   think would want.

25   MR. CLEMENT: And I agree. We are simply

1   asking this Court to take on straight on the idea of the

2   basic remedial inquiry into severability which looks to

3   be intent of the Congress --

4   JUSTICE SCALIA: Mr. Clement, I want to ask

5   you about that. Why -- why do we look to the -- are you

6   sure we look to the intent of the Congress? I thought

7   that, you know, sometimes Congress says that these

8   provisions will -- all the provisions of this Act will

9   be severable. And we ignore that when the Act really

10   won't work. When the remaining provisions just won't

11   work. Now how can you square that reality with the

12   proposition that what we're looking for here is what

13   would this Congress have wanted?

14   MR. CLEMENT: Well, two responses,

15   Justice Scalia. We can look at this Court's cases on

16   severability, and they all formulate the task a little

17   bit differently.

18   JUSTICE SCALIA: Yes, they sure do.

19   MR. CLEMENT: And every one of them talks

20   about congressional intent. But here's, here's the

21   other answer --

22   JUSTICE SCALIA: That's true, but is it

23   right?

24   MR. CLEMENT: It is right. And here is how

25   I would answer your question, which is, when Congress

1   includes a severability clause, it is addressing the

2   issue in the abstract. It doesn't say: No matter which

3   provisions you strike down, we absolutely, positively

4   want what's left.

5   JUSTICE SCALIA: All right. The consequence

6   of your proposition, would Congress have enacted it

7   without this provision, okay that's the consequence.

8   That would mean that if we struck down nothing in this

9   legislation but the -- what you call the corn husker

10 kickback, okay, we find that to violate the

11 constitutional proscription of venality, okay?

12   (Laughter.)

13   JUSTICE SCALIA: When we strike that down,

14 it's clear that Congress would not have passed it

15 without that. It was the means of getting the last

16 necessary vote in the Senate. And you are telling us

17 that the whole statute would fall because the corn

18 husker kickback is bad. That can't be right.

19   MR. CLEMENT: Well, Justice Scalia, I think

20 it can be, which is the basic proposition, that it's

21 congressional intent that governs. Now everybody on

22 this Court has a slightly different way of dividing

23 legislative intent. And I would suggest the one common

24 brand among every member of this Court as I understand

25 it is you start with the text. Everybody can agree with

 1   that.

 2   JUSTICE KAGAN: So Mr. Clement, let's start

 3   with the text. Then you suggest, and I think that there

 4   is -- this is right, that there is a textual basis for

 5   saying that the guaranteed-issue and the community

 6   ratings provisions are tied to the mandate. And you

 7   said -- you pointed to where that was in the findings.

 8   Is there a textual basis for anything else,

 9   because I've been unable to find one. It seems to me

10   that if you look at the text, the sharp dividing line is

11   between guaranteed-issue and community ratings on the

12   one hand, everything else on the other.

13   MR. CLEMENT: Well, Justice Kagan I would be

14   delighted to take you through my view of the text and

15   why there are other things that have to fall.

16   The first place I would ask you to look is

17   finding J which is on the same page 43 A. And as I read

18   that, that's a finding that the individual mandate is

19   essential to the operation of the exchanges. But there

20   are other links between guaranteed-issue and community

21   ratings and the exchanges. And there I think it's just

22   the way that the exchanges are supposed to work. And

23   the text makes this clear is they are supposed to

24   provide a market where people can compare community

25   rated insurance. That's what makes the exchanges

 1 function.

 2   JUSTICE KAGAN: Although the exchanges

 3 function perfectly well in Utah where there is no

 4 mandate. They function differently, but they function.

 5 And the question is always, does Congress want half a

 6 loaf. Is half a loaf better than no loaf? And on

 7 something like the exchanges it seems to me a perfect

 8 example where half a loaf is better than no loaf. The

 9 exchanges will do something. They won't do everything

10 that Congress envisioned.

11   MR. CLEMENT: Well, Justice Kagan, I think

12 there are situations where half a loaf is actually worse

13 and I want to address that. But before I do it --

14 broadly. But before I do that, if I could stick with

15 just the exchanges.

16   I do think the question that this Court is

17 supposed to ask is not just whether they can limp along

18 and they can operate independently, but whether they

19 operate in the manner that Congress intended. And

20 that's where I think the exchanges really fall down.

21   Because the vision of the exchanges was that

22 if you got out of this current situation where health

23 insurance is basically individualized price based on

24 individualized underwriting and you provide community

25 ratings, then it's going to be very easy for people to

1   say okay, well this is a silver policy and this is a

2   bronze policy and this is a gold policy and we can, you

3   know, I can just pick which insurer provides what I

4   think is going to be the best service based on those

5   comparable provisions.

6   JUSTICE KAGAN: Mr. Clement, you just said

7   something which you say a lot in your brief. You say

8   the question is the manner in which it would have

9   operated. And I think that that's not consistent with

10   our cases. And I guess the best example would be Booker

11   where we decided not to sever provisions,

12   notwithstanding that the sentencing guidelines clearly

13   operate in a different manner now than they did when

14   Congress passed them. They operate as advisory rather

15   than mandatory.

16   MR. CLEMENT: Well, but Justice Kagan, I

17   mean I actually think Booker supports our point as well,

18   because there are two aspects of the remedial holding of

19   Booker. And the first part of it, which I think

20   actually very much supports our point is where the

21   majority rejects the approach of the dissent, which

22   actually would have required nothing in the statute to

23   have been struck, not a single word.

24   But nonetheless this Court said, well, if

25   you do that then all of the sentencing is basically

13

 1   going to be done by a combination of the juries and the

 2   prosecutors and the judges are going to be cut out. And

 3   the Court said the one thing we know is that's not the

 4   manner in which Congress thought that this should

 5   operate.

 6   Now later they make a different judgment

 7   about the -- which particular provisions to cut out.

 8   But I do think Booker is consistent with this way of

 9   looking at it and certainly consistent with Brock, the

10   opinion we rely on because there the Court only reached

11   that part of the opinion after they already found that

12   the must-hire provision operated functionally

13   independent from the legislative detail, so --

14   JUSTICE GINSBURG: Mr. Clement, there are so

15   many things in this Act that are unquestionably okay. I

16   think you would concede that reauthorizing what is the

17   Indian Healthcare Improvement Act changes to long

18   benefits, why make Congress redo those? I mean it's a

19   question of whether we say everything you do is no good,

20   now start from scratch, or to say, yes, there are many

21   things in here that have nothing to do frankly with the

22   affordable healthcare and there are some that we think

23   it's better to let Congress to decide whether it wants

24   them in or out.

25   So why should we say it's a choice between a

1   wrecking operation, which is what you are requesting, or

2   a salvage job. And the more conservative approach would

3   be salvage rather than throwing out everything.

4   MR. CLEMENT: Well, Justice Ginsburg, two

5   kinds of responses to that. One, I do think there are

6   some provisions that I would identify as being at the

7   periphery of this statute. And I'll admit that the case

8   for severing those is perhaps the strongest.

9   But I do think it is fundamentally

10   different, because if we were here arguing that some

11   provision on the periphery of the statute, like the

12   Biosimilars Act or some of the provisions that you've

13   mentioned was unconstitutional, I think you'd strike it

14   down and you wouldn't even think hard about

15   severability.

16   What makes this different is that the

17   provisions that have constitutional difficulties or are

18   tied at the hip to those provisions that have the

19   constitutional difficulty are the very heart of this

20   Act. And then if you look at how they are textually

21   interconnected to the exchanges, which are then

22   connected to the tax credits, which are also connected

23   to the employer mandates, which is also connected to

24   some of the revenue offsets, which is also connected to

25   Medicaid, if you follow that through what you end up

1   with at the end of that process is just sort of a hollow

2   shell. And at that point I think there is a strong

3   argument for not -- I mean, you can't possibly think

4   that Congress would have passed that hollow shell

5   without the heart of the Act.

6   CHIEF JUSTICE ROBERTS: Well, but it would

7   have -- it would have passed parts of the hollow shell.

8   I mean, a lot of this is reauthorization of

9   appropriations that have been reauthorized for the

10   previous 5 or 10 years and it was just more convenient

11   for Congress to throw it in in the middle of the

12   2700 pages than to do it separately. I mean, can you

13   really suggest -- I mean, they've cited the Black Lung

14   Benefits Act and those have nothing to do with any of

15   the things we are talking about.

16   MR. CLEMENT: Well, Mr. Chief Justice, they

17   tried to make them germane. But I'm not here to tell

18   you that -- some of their -- surely there are provisions

19   that are just looking for the next legislative vehicle

20   that is going to make it across the finish line and

21   somebody's going to attach it to anything that is

22   moving. I mean, I'll admit that.

23   But the question is when everything else

24   from the center of the Act is interconnected and has to

25   go, if you follow me that far, then the question is

1   would you keep this hollowed-out shell?

2   JUSTICE SOTOMAYOR: Well, but it's not --

3   JUSTICE KENNEDY: But I'm still not sure,

4   what is the test -- and this was the colloquy you had

5   with Justice Scalia with the corn husker hypothetical.

6   So I need to know what standard you are asking me to

7   apply. Is it whether as a rational matter separate

8   parts could still function, or does it focus on the

9   intent of the Congress?

10   If you -- suppose you had party A wants

11   proposal number 1, party B wants proposal number 2.

12   Completely unrelated. One is airline rates, the other

13   is milk regulation. And we -- and they decide them

14   together. The procedural rules are these have to be

15   voted on as one. They are both passed. Then one is

16   declared unconstitutional. The other can operate

17   completely independently. Now, we know that Congress

18   would not have intended to pass one without the other.

19   Is that the end of it, or is there some different test?

20   Because we don't want to go into legislative history,

21   that's intrusive, so we ask whether or not an objective

22   -- as an objective rational matter one could function

23   without -- I still don't know what the test is that we

24   are supposed to apply. And this is the same question as

25   Justice Scalia asked. Could you give me some help on

1   that?

2   MR. CLEMENT: Sure. Justice Kennedy, the

3   reality is I think this Court's opinions have at various

4   times applied both strains of the analysis.

5   JUSTICE KENNEDY: And which one -- and what

6   test do you suggest that we follow if we want to clarify

7   our jurisprudence?

8   MR. CLEMENT: I'm -- I'm a big believer in

9   objective tests, Justice Kennedy. I would be perfectly

10   happy with you to apply a more textually based objective

11   approach. I think there are certain justices that are

12   more inclined to take more of a peek at legislative

13   history, and I think if you look at the legislative

14   history of this it would only fortify the conclusion

15   that you would reach from a very objective textual

16   inquiry. But I am happy to focus the Court on the

17   objective textual inquiry.

18   CHIEF JUSTICE ROBERTS: I don't

19   understand --

20   JUSTICE KENNEDY: And that objective test is

21   what?

22   MR. CLEMENT: Is whether the statute can

23   operate in the manner that Congress -- that Congress

24   intended.

25   JUSTICE SOTOMAYOR: No statute can do that,

1 because once we chop off a piece of it, by definition,

2 it's not the statute Congress passed. So it has to be

3 something more than that.

4   MR. CLEMENT: Justice Sotomayor, every one

5 of your cases, if you have a formulation for

6 severability, if you interpret it woodenly it becomes

7 tautological. And Justice Blackmun addressed this in

8 footnote 7 of the Brock opinion that we rely on, where

9 he says: Of course it's not just -- you know, it

10 doesn't operate exactly in the manner because it doesn't

11 have all the pieces, but you still make an inquiry as to

12 whether when Congress links two provisions together and

13 one really won't work without the other --

14   JUSTICE SOTOMAYOR: So what is wrong with

15 the presumption that our law says, which is we presume

16 that Congress would want to sever? Wouldn't that be the

17 simplest, most objective test? Going past what

18 Justice Scalia says we have done, okay, get rid of

19 legislative intent altogether, which some of our

20 colleagues in other contexts have promoted, and just

21 say: Unless Congress tells us directly, it's not

22 severable, we shouldn't sever. We should let them fix

23 their problems.

24   You still haven't asked -- answered me why

25 in a democracy structured like ours, where each branch

1   does different things, why we should involve the Court

2   in making the legislative judgment?

3   MR. CLEMENT: Justice Sotomayor let me try

4   to answer the specific question and then answer the big

5   picture question. The specific question is, I mean, you

6   could do that. You could adopt a new rule now that

7   basically says, look, we've severed --

8   JUSTICE SOTOMAYOR: It's not a new rule. We

9   presume. We've rebutted the presumption in some

10   cases -- -

11   MR. CLEMENT: Right.

12   JUSTICE SOTOMAYOR: But some would call that

13   judicial action.

14   MR. CLEMENT: I think in fairness, though,

15   Justice Sotomayor, to get to the point you are wanting

16   to get to, you would have to ratchet up that presumption

17   a couple of ticks on the scale, because the one thing --

18   JUSTICE SOTOMAYOR: And what's wrong with

19   that?

20   MR. CLEMENT: Well, one thing that's wrong

21   with that, which is still at a smaller level, is that's

22   inconsistent with virtually every statement in every one

23   of your severability opinions, which all talk about

24   congressional intent.

25   JUSTICE KAGAN: Well, it's not inconsistent

1   with our practice, right, Mr. Clement? I mean, you have

2   to go back decades and decades and decades, and I'm not

3   sure even then you could find a piece of legislation

4   that we refused to sever for this reason.

5   MR. CLEMENT: I don't think that's right,

6   Justice Kagan. I think there are more recent examples.

7   A great example I think which sort of proves, and maybe

8   is a segue to get to my broader point, is a case that

9   involves a State statute, not a Federal statute, but I

10   don't think anything turns on that, is Randall against

11   Sorrell, where this Court struck down various provisions

12   of the Vermont campaign finance law.

13   But there were other contribution provisions

14   that were not touched by the theory that the Court used

15   to strike down the contribution limits. But this Court

16   at the end of the opinion said: There is no way to

17   think that the Vermont legislator would have wanted

18   these handful of provisions there on the contribution

19   side, so we will strike down the whole thing.

20   And if I could make the broader point, I

21   mean, I think the reason it makes sense in the democracy

22   with separation of powers to in some cases sever the

23   whole thing is because sometimes a half a loaf is worse.

24   And a great example, if I dare say so, is Buckley. In

25   Buckley this Court looked at a statute that tried to, in

1   a coherent way, strike down limits on contributions and

2   closely related expenditures.

3   This Court struck down the ban on

4   expenditures, left the contribution ban in place, and

5   for 4 decades Congress has tried to fix what's left of

6   the statute, largely unsuccessfully, whereas it would

7   have I think worked much better from a democratic and

8   separation of powers standpoint if the Court would have

9   said: Look, expenditures are -- you can't limit

10   expenditures under the Constitution; the contribution

11   provision is joined at the hip. Give Congress a chance

12   to actually fix the problem.

13   JUSTICE KAGAN: Mr. Clement --

14   JUSTICE BREYER: Could I ask you one

15   question, which is a practical question. I take as a

16   given your answer to Justice Kennedy, you are saying

17   let's look at it objectively and say what Congress has

18   intended, okay? This is the mandate in the community,

19   this is Titles I and II, the mandate, the community,

20   pre-existing condition, okay? Here's the rest of it,

21   you know, and when I look through the rest of it, I have

22   all kinds of stuff in there. And I haven't read every

23   word of that, I promise. As you pointed out, there is

24   biosimilarity, there is breast feeding, there is

25   promoting nurses and doctors to serve underserved areas,

1   there is the CLASS Act, etcetera.

2   What do you suggest we do? I mean, should

3   we appoint a special master with an instruction? Should

4   we go back to the district court? You haven't argued

5   most of these. As I hear you now, you're pretty close

6   to the SG. I mean, you'd like it all struck down, but

7   we are supposed to apply the objective test. I don't

8   know if you differ very much.

9   So what do you propose that we do other than

10   spend a year reading all this and have you argument all

11   this?

12   MR. CLEMENT: Right. What I would propose

13   is the following, Justice Breyer, is you follow the

14   argument this far and then you ask yourself whether what

15   you have left is a hollowed-out shell or whether --

16   JUSTICE BREYER: I would say the Breast

17   Feeding Act, the getting doctors to serve underserved

18   areas, the biosimilar thing and drug regulation, the

19   CLASS Act, those have nothing to do with the stuff that

20   we've been talking about yesterday and the day before,

21   okay?

22   So if you ask me at that level, I would say,

23   sure, they have nothing to do with it, they could stand

24   on their own. The Indian thing about helping the

25   underserved Native Americans, all that stuff has nothing

1   to do. Black lung disease, nothing to do with it, okay?

2   So that's -- do you know what you have

3   there? A total off-the-cuff impression. So that's why

4   I am asking you, what should I do?

5   MR. CLEMENT: What you should do, is let me

6   say the following, which is follow me this far, which is

7   mandatory, individual mandate is tied, as the government

8   suggests, to guaranteed-issue and community rating, but

9   the individual mandate, guaranteed-issue, and community

10   rating together are the heart of this Act. They are

11   what make the exchanges work.

12   The exchanges in turn are critical to the

13   tax credits, because the amount of the tax credit is key

14   to the amount of the policy price on the exchange. The

15   exchanges are also key to the employer mandate, because

16   the employer mandate becomes imposed on an employer if

17   one of the employees gets insurance on the exchanges.

18   But it doesn't stop there. Look at the

19   Medicare provision for DISH hospitals, okay? These are

20   hospitals that serve a disproportionate share of the

21   needy. This isn't in Title I. It's in the other part

22   that you had in your other hand. But it doesn't work

23   without the mandate, community rating and

24   guaranteed-issue.

25   JUSTICE ALITO: Well, can I ask you this,

1   Mr. Clement?

2   MR. CLEMENT: Sure.

3   JUSTICE ALITO: What would your fallback

4   position be if -- if we don't accept the proposition

5   that if the mandate is declared unconstitutional, the

6   rest of the Act, every single provision, has to fall?

7   Other -- proposed other dispositions have been proposed.

8   There's the Solicitor General's disposition, the

9   recommended disposition to strike down the

10   guaranteed-issue and community rating provisions. One

11   of the -- one amicus says strike down all of Title I,

12   another one says strike down all of Title I and Title

13   II.

14   What -- what would you suggest?

15   MR. CLEMENT: Well, I -- I think what I

16   would suggest, Justice Alito -- I don't want to be

17   unresponsive -- is that you sort of follow the argument

18   through and figure out what in the core of the Act

19   falls. And then I guess my fallback would be if what's

20   left is a hollowed-out shell, you could just leave that

21   standing.

22   If you want a sort of practical answer, I

23   mean, I do think you could just -- you know, you could

24   use Justice Breyer's off-the-cuff as a starting point

25   and basically say, you know, Title I and a handful of

1   related provisions that are very closely related to that

2   are -- are really the heart of the Act --

3   CHIEF JUSTICE ROBERTS: Well, that's --

4   MR. CLEMENT: -- the bigger volume -- on the

5   other hand -- I mean, you could strike one and leave the

6   other, but at a certain point -- I'm sorry,

7   Mr. Chief Justice.

8   CHIEF JUSTICE ROBERTS: Finish your certain

9   point.

10   MR. CLEMENT: At -- at a certain point, I

11   just think that, you know, the better answer might be to

12   say, we've struck the heart of this Act, let's just give

13   Congress a clean slate. If it's so easy to have that

14   other big volume get reenacted, they can do it in a

15   couple of days; it won't be a big deal. If it's not,

16   because it's very --

17   (Laughter.)

18   MR. CLEMENT: -- well, but -- I mean, you

19   can laugh at me if you want, but the point is, I'd

20   rather suspect that it won't be easy. Because I rather

21   suspect that if you actually dug into that, there'd be

22   something that was quite controversial in there and it

23   couldn't be passed quickly --

24   CHIEF JUSTICE ROBERTS: But the -- the --

25   MR. CLEMENT: -- and that's our whole point.

1   CHIEF JUSTICE ROBERTS: -- the -- the

2   reality of the passage -- I mean, this was a piece of

3   legislation which, there was -- had to be a concerted

4   effort to gather enough votes so that it could be

5   passed. And I suspect with a lot of these miscellaneous

6   provisions that Justice Breyer was talking about, that

7   was the price of the vote.

8   Put in the Indian health care provision and

9   I will vote for the other 2700 pages. Put in the black

10   lung provision, and I'll go along with it. That's why

11   all -- many of these provisions I think were put in, not

12   because they were unobjectionable. So presumably what

13   Congress would have done is they wouldn't have been able

14   to put together, cobble together, the votes to get it

15   through.

16   MR. CLEMENT: Well, maybe that's right,

17   Mr. Chief Justice. And I don't want to, I mean, spend

18   all my time on -- fighting over the periphery, because I

19   do think there are some provisions that I think you

20   would make as -- as an exercise of your own judgment,

21   the judgment that once you've gotten rid of the core

22   provisions of this Act, that you would then decide to

23   let the periphery fall with it. But if you want to keep

24   the periphery, that's fine. What I think is important,

25   though, as to the core provisions of the Act, which

27

1   aren't just the mandate community rating and

2   guaranteed-issue, but include the exchanges, the tax

3   credit, Medicare and Medicaid -- as to all of that, I

4   think you do want to strike it all down to avoid a redux

5   of Buckley.

6   If I could reserve the remainder of my time.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   Mr. Clement.

9   Mr. Kneedler.

10   ORAL ARGUMENT OF EDWIN S. KNEEDLER

11   ON BEHALF OF THE RESPONDENTS

12   MR. KNEEDLER: Thank you, Mr. Chief Justice,

13   and may it please the Court:

14   There should be no occasion for the Court in

15   this case to consider issues of severability, because as

16   we argue, the -- the minimum coverage provision is fully

17   consistent with Article I of the Constitution. But if

18   the Court were to conclude otherwise, it should reject

19   Petitioners' sweeping proposition that the entire Act

20   must fall if this one provision is held

21   unconstitutional.

22   As an initial matter, we believe the Court

23   should not even consider that question. The vast

24   majority of the provisions of this Act do not even apply

25   to the Petitioners, but instead apply to millions of

1   citizens and businesses who are not before the Court --

2   CHIEF JUSTICE ROBERTS: How does your

3   proposal actually work? Your idea is that, well, they

4   can take care of it themselves later. I mean, do you

5   contemplate them bringing litigation and saying -- I

6   guess the insurers would be the most obvious ones --

7   without -- without the mandate, the whole thing falls

8   apart and we're going to bear a greater cost, and so the

9   rest of the law should be struck down.

10   And that's a whole other line of litigation?

11   MR. KNEEDLER: Well, I -- I think the

12   continuing validity of any particular provision would

13   arise in litigation that would otherwise arise under

14   that provision by parties who are actually --

15   CHIEF JUSTICE ROBERTS: But what cause of

16   action is it? I've never heard of a severability cause

17   of action.

18   MR. KNEEDLER: Well, in the first place, I

19   don't -- the point isn't that there has to be a -- an

20   affirmative cause of action to decide this. You

21   could -- for example, to use the Medicare reimbursement

22   issue is, one of the things that this Act does is change

23   Medicare reimbursement rates. Well, the place where

24   someone adjudicates the validity of Medicare

25   reimbursement rates is through the special statutory

1   review procedure for that.

2   And the same thing is true of the

3   Anti-Injunction Act --

4   JUSTICE SCALIA: Mr. Kneedler, there --

5   there are some provisions which nobody would have

6   standing to challenge. If the provision is simply an

7   expenditure of Federal money, it -- it doesn't hurt

8   anybody except the taxpayer, but the taxpayer doesn't

9   have standing. That -- that just continues.

10   Even though it -- it is -- it should -- it

11   is so closely aligned to what's been struck down that it

12   ought to go as well. But nonetheless, that has to

13   continue because there's nobody in the world that can

14   challenge it.

15   Can that possibly be the law?

16   MR. KNEEDLER: I think that proves our

17   point, Justice Scalia. This Court has repeatedly said

18   that just because there's -- no one may have standing to

19   challenge -- and particularly like tax credits or taxes

20   which are challenged only after going through the

21   Anti-Injunction Act -- just because no one has standing

22   doesn't mean that someone must.

23   But beyond that --

24   JUSTICE SCALIA: But -- but those are

25   provisions that have been legitimately enacted. The

1   whole issue here is whether these related provisions

2   have been legitimately enacted, or whether they are so

3   closely allied to one that has been held to be

4   unconstitutional that they also have not been

5   legitimately enacted.

6   You -- you can't compare that to -- to cases

7   dealing with a -- a statute that nobody denies is -- is

8   constitutional.

9   MR. KNEEDLER: This -- this case is directly

10   parallel to the Printz case, in our view. In that case,

11   the Court struck down several provisions of the Brady

12   Act, but went on to say it had no business addressing

13   the severability of other provisions that did not apply

14   to the people before whom --

15   JUSTICE SOTOMAYOR: But --

16   JUSTICE BREYER: What he's thinking of is

17   this: I think Justice Scalia is thinking, I suspect, of

18   -- imagine a tax which says, this tax, amount Y, goes to

19   purpose X, which will pay for half of purpose X. The

20   other half will come from the exchanges somehow. That

21   second half is unconstitutional. Purpose X can't

22   possibly be carried out now with only half the money.

23   Does the government just sit there

24   collecting half the money forever because nobody can

25   ever challenge it? You see, there -- if it were

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1   inextricably connected, is it enough to say, well, we

2   won't consider that because maybe somebody else could

3   bring that case and then there is no one else?

4   Is that --

5   MR. KNEEDLER: Yes, we think that is the

6   proper way to proceed.

7   Severability --

8   JUSTICE GINSBURG: It's not a choice between

9   someone else bringing the case and a law staying in

10   place. And what we're really talking about, as Justice

11   Sotomayor started this discussion, is who is the proper

12   party to take out what isn't infected by the Court's

13   holding -- with all these provisions where there may be

14   no standing, one institution clearly does have standing,

15   and that's Congress.

16   And if Congress doesn't want the provisions

17   that are not infected to stand, Congress can take care

18   of it.

19   It's a question of which -- which side --

20   should the Court say, we're going to wreck the whole

21   thing, or should the Court leave it to Congress?

22   MR. KNEEDLER: We think the Court should

23   leave it to Congress for two reasons. One is the point

24   I'm making now about justiciability, or whether the

25   Court can properly consider it at all. And the second

                              32

1   is, we think only a few provisions are inseverable from

2   the minimum coverage provision.

3   I just would like to --

4   CHIEF JUSTICE ROBERTS: Before you go,

5   Mr. Kneedler, I'd like your answer to Justice Breyer's

6   question.

7   I think you were interrupted before that --

8   MR. KNEEDLER: Yes. No. We -- we believe

9   that in that case, the -- the tax -- the tax provision

10   should not be struck down. In the first place, the

11   Anti-Injunction Act would bar a -- a direct suit to

12   challenge it. It would be very strange to allow a tax

13   to be struck down on the basis of a severability

14   analysis. Severability arises in a case only where it's

15   necessary to consider what relief a party before the

16   Court should get. The only party --

17   JUSTICE ALITO: Suppose that there was --

18   suppose there was a non-severability provision in -- in

19   this Act. If one provision were to be held

20   unconstitutional, then every single -- someone would

21   have to bring a -- a separate lawsuit challenging every

22   single other provision in the Act and say, well, one

23   fell and the Congress said it's all -- it's a package,

24   it can't be separated.

25   That's your position?

33

1   MR. KNEEDLER: The -- the fact that that's

2   such a clause might make it easy doesn't change the

3   point. Article III jurisdictional problems apply to

4   easy questions as well as -- as hard questions.

5   If I could just --

6   JUSTICE KENNEDY: But there's no Article III

7   jurisdictional problem in Justice Alito's hypothetical,

8   that this is a remedial exercise of the Court's power to

9   explain the consequences of its judgment in this case.

10   MR. KNEEDLER: But -- this Court had said

11   that one has -- has to have standing for every degree of

12   relief that -- that is sought. That was in Davis, that

13   was Los Angeles v. Lyons.

14   JUSTICE SCALIA: Mr. Kneedler --

15   MR. KNEEDLER: -- Daimler/Chrysler --

16   JUSTICE SCALIA: -- don't you think it's

17   unrealistic to say leave it to Congress, as though you

18   are sending it back to Congress for Congress to consider

19   it dispassionately on balance, should we have this

20   provision or should we not have provision? That's not

21   what it's going to be. It's going to be, these

22   provisions are in effect; even though you -- a lot of

23   you never wanted them to be in effect, and you only

24   voted for them because you wanted to get the heart of

25   the -- the Act, which has now been cut out; but

1   nonetheless these provisions are the law, and you have

2   to get the votes to overturn them. That's an enormously

3   different question from whether you get the votes

4   initially to put them into the law.

5   What -- there, there is no way that this

6   Court's decision is not going to distort the

7   congressional process. Whether we strike it all down or

8   leave some of it in place, the congressional process

9   will never be the same. One way or another, Congress is

10   going to have to reconsider this, and why isn't it

11   better to have them reconsider it -- what -- what should

12   I say -- in toto, rather than having some things already

13   in the law which you have to eliminate before you can

14   move on to consider everything on balance?

15   MR. KNEEDLER: We think as a matter of

16   judicial restraint, limits on equitable remedial power

17   limit this Court to addressing the provision that has

18   been challenged as unconstitutional and anything else

19   that the plaintiff seeks as relief. Here the only --

20   JUSTICE KENNEDY: But in restraint --

21   JUSTICE SOTOMAYOR: Mr. Kneedler would you

22   please --

23   CHIEF JUSTICE ROBERTS: Justice Kennedy?

24   JUSTICE KENNEDY: When you say judicial

25   restraint, you are echoing the earlier premise that it

1   increases the judicial power if the judiciary strikes

2   down other provisions of the Act. I suggest to you it

3   might be quite the opposite. We would be exercising the

4   judicial power if one Act was -- one provision was

5   stricken and the others remained to impose a risk on

6   insurance companies that Congress had never intended.

7   By reason of this Court, we would have a new regime that

8   Congress did not provide for, did not consider. That,

9   it seems to me can be argued at least to be a more

10   extreme exercise of judicial power than to strike --

11   than striking the whole.

12   MR. KNEEDLER: I -- I -- I think not --

13   JUSTICE KENNEDY: I just don't accept the

14   premise.

15   MR. KNEEDLER: I think not, Justice Kennedy

16   and then I -- I will move on.

17   But this is exactly the situation in Printz.

18   The Court identified the severability questions that

19   were -- that were briefed before the Court as important

20   ones, but said that they affect people who are -- rights

21   and obligations of people who are not before the Court.

22   JUSTICE SOTOMAYOR: Mr. Kneedler, move away

23   from the issue of whether it's a standing question or

24   not.

25   MR. KNEEDLER: Right.

 1   JUSTICE SOTOMAYOR: Make the assumption

 2   that's an -- that this is an issue of the Court's

 3   exercise of discretion. Because the last two questions

 4   had to do with what's wise for the Court to do, not

 5   whether it has power to do it or not.

 6   MR. KNEEDLER: Right. That --

 7   JUSTICE SOTOMAYOR: So let's move beyond the

 8   power issue, which your answers have centered on, and

 9   give me a sort of -- policy. And I know that's a,

10   that's a bugaboo word sometimes, but what should guide

11   the Court's discretion?

12   MR. KNEEDLER: Well, we think that matters

13   of justiciability do blend into --

14   JUSTICE SOTOMAYOR: Would you please -- I've

15   asked you three times to move around that.

16   MR. KNEEDLER: -- blend into, blend into

17   discretion, and in turn blend into the merits of the

18   severability question. And as to that, just to answer a

19   question that, that several Justices have asked, we

20   think that severability is a matter of statutory

21   interpretation. It should be resolved by looking at the

22   structure and the text of the Act, and the Court may

23   look at legislative history to figure out what the text

24   and structure mean with respect to severability. We

25   don't --

1   JUSTICE SCALIA: Mr. Kneedler, what happened

2   to the Eighth Amendment? You really want us to go

3   through these 2,700 pages?

4   (Laughter.)

5   JUSTICE SCALIA: And do you really expect

6   the Court to do that? Or do you expect us to -- to give

7   this function to our law clerks?

8   Is this not totally unrealistic? That we

9   are going to go through this enormous bill item by item

10   and decide each one?

11   MR. KNEEDLER: Well --

12   JUSTICE SOTOMAYOR: I thought the answer was

13   you don't have to because --

14   MR. KNEEDLER: Well, that is, that is the --

15   JUSTICE SOTOMAYOR: -- what we have to look

16   at is what Congress said was essential, correct?

17   MR. KNEEDLER: That is correct, and I'd also

18   like to -- going -- I just want to finish the thought I

19   had about this being a matter of statutory

20   interpretation. The Court's task, we submit, is not to

21   look at the legislative process to see whether the bill

22   would been -- would have passed or not based on the

23   political situation at the time, which would basically

24   convert the Court into a function such as a whip count.

25   That is not the Court's --

1   JUSTICE KAGAN: And Mr. Kneedler, that would

2   be a revolution --

3   MR. KNEEDLER: Yes.

4   JUSTICE KAGAN: -- in our severability law,

5   wouldn't it?

6   MR. KNEEDLER: It would.

7   JUSTICE KAGAN: I mean, we have never

8   suggested that we were going to say, look, this

9   legislation was a brokered compromise and we are going

10   to try to figure out exactly what would have happened in

11   the complex parliamentary shenanigans that go on across

12   the street and figure out whether they would have made a

13   difference.

14   Instead, we look at the text that's actually

15   given us. For some people, we look only at the text.

16   It should be easy for Justice Scalia's clerks.

17   (Laughter.)

18   MR. KNEEDLER: I -- I think -- I think

19   that --

20   JUSTICE SCALIA: I don't care whether it's

21   easy for my clerks. I care whether it's easy for me.

22   (Laughter.)

23   MR. KNEEDLER: I think that -- I think

24   that's exactly right. As I said, it is a question of

25   statutory interpretation.

39

1   CHIEF JUSTICE ROBERTS: Well, how is that --

2   what's exactly right? It's a question of statutory

3   interpretation; that means you have to go through every

4   line of the statute. I haven't heard your answer to

5   Justice Scalia's question yet.

6   MR. KNEEDLER: Well, I -- I think in this

7   case there is an easy answer, and that is, Justice Kagan

8   pointed out that, that the Act itself creates a sharp

9   dividing line between the minimum coverage provision --

10   the package of -- of reforms: The minimum coverage

11   provision along with the guaranteed-issue and community

12   rating. That is one package that Congress deemed

13   essential.

14   CHIEF JUSTICE ROBERTS: How do you know

15   that? Where is this line? I looked through the whole

16   Act, I didn't read -- well --

17   MR. KNEEDLER: It is in --

18   CHIEF JUSTICE ROBERTS: Where is the sharp

19   line?

20   MR. KNEEDLER: It is in Congress's findings

21   that the -- that the minimum coverage provision --

22   without it the Court -- the -- Congress said, in finding

23   I, without that provision people would wait to get

24   insurance, and therefore -- and cause all the adverse

25   selection problems that arise.

40

1   CHIEF JUSTICE ROBERTS: No, no. That --

2   that makes your case that the one provision should fall

3   if the other does. It doesn't tell us anything about

4   all the other provisions.

5   MR. KNEEDLER: Well, I -- I think -- I think

6   it does, because Congress said it was essential to those

7   provisions, but it conspicuously did not say that it was

8   essential to other provisions.

9   CHIEF JUSTICE ROBERTS: Well --

10   JUSTICE ALITO: May I ask you about the

11   argument that is made in the economists' amicus brief?

12   They say that the insurance reforms impose 10-year costs

13   of roughly $700 billion on the insurance industry, and

14   that these costs are supposed to be offset by about 350

15   billion in new revenue from the individual mandate and

16   350 billion from the Medicaid expansion. Now if the 350

17   billion -- maybe you will disagree with the numbers,

18   that they are fundamentally wrong; but assuming they are

19   in the ballpark, if the 350 million from the individual

20   mandate were to be lost, what would happen to the

21   insurance industry, which would now be in the -- in the

22   hole for $350 billion over 10 years?

23   MR. KNEEDLER: I don't -- I mean, first of

24   all, for the Court to go beyond text and legislative

25   history to try to figure out how the finances of the

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 1   bill operate, it -- it's like being a budget committee.

 2   But -- but we think the, the economists had added up the

 3   figures wrong. If there is Medicaid expansion, the

 4   insurance -- and the insurance companies are involved in

 5   that, they are going to be reimbursed.

 6   CHIEF JUSTICE ROBERTS: But what if there

 7   isn't Medicaid expansion? We've talked about the

 8   individual mandate, but does the government have a

 9   position on what should happen if the Medicaid expansion

10   is struck down?

11   MR. KNEEDLER: We don't -- we don't think

12   that that would have any effect. That could be

13   addressed in the next argument. But we don't think that

14   would have any effect on the -- on the rest of the -- on

15   the rest of the Act.

16   CHIEF JUSTICE ROBERTS: So if your -- the

17   government's position is that if Medicaid expansion is

18   struck down, the rest of the Act can operate --

19   MR. KNEEDLER: Yes. Yes. It's -- in the

20   past Congress has expanded Medicaid coverage without

21   there being -- it's done it many times without there

22   being a minimum coverage provision.

23   JUSTICE KENNEDY: But I still don't

24   understand where you are with the answer to

25   Justice Alito's question.

1   Assume that there is a, a substantial

2   probability that the 350 billion plus 350 billion equals

3   7 is going to be cut in half if the individual mandate

4   is -- is stricken. Assume there is a significant

5   possibility of that. Is it within the proper exercise

6   of this Court's function to impose that kind of risk?

7   Can we say that the Congress would have intended that

8   there be that kind of risk?

9   MR. KNEEDLER: Well, we don't think it's in

10   the Court's place to look at the, at the budgetary

11   implications, and we also --

12   JUSTICE KENNEDY: But isn't that -- isn't

13   that the point then, why we should just assume that it

14   is not severable?

15   MR. KNEEDLER: No.

16   JUSTICE KENNEDY: If we -- if we lack the

17   competence to even assess whether there is a risk, then

18   isn't this an awesome exercise of judicial power?

19   MR. KNEEDLER: No, I don't --

20   JUSTICE KENNEDY: To say we are doing

21   something and we are not telling you what the

22   consequences might be?

23   MR. KNEEDLER: No, I don't think so, because

24   when you -- when you are talking about monetary

25   consequences, you are looking through the Act, you are

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1   looking behind the Act, rather than -- the Court's

2   function is to look at the text and structure of the Act

3   and what the substantive provisions of the Act

4   themselves mean. And if I could go past --

5   JUSTICE SCALIA: Mr. Kneedler, can I -- can

6   you give us a prior case in -- that -- that resembles

7   this one in which we -- we are asked to strike down what

8   the other side says is the heart of the Act and yet

9   leave in -- as -- as you request, leave, in effect, the

10   rest of it? Have we ever -- most of our severability

11   cases, you know, involve one little aspect of the Act.

12   The question is whether the rest. When have we ever

13   really struck down what was the main purpose of the Act,

14   and left the rest in effect?

15   MR. KNEEDLER: I think Booker is the best

16   example of that. In -- in Booker the mandatory

17   sentencing provisions were central to the act, but the

18   Court said Congress would have preferred a statute

19   without the mandatory provision in the Act, and the

20   Court struck that but the rest of the sentencing

21   guidelines remained.

22   JUSTICE SCALIA: I think the reason -- the

23   reason the majority said that was they didn't think that

24   what was essential to the Act was what had been stricken

25   down, and that is the -- the ability of the judge to say

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1   on his own what -- what -- what the punishment would be.

2   I don't think that's a case where we struck -- where we

3   excised the heart of the statute.

4   You have another one?

5   MR. KNEEDLER: There is no example --

6   JUSTICE SCALIA: There is no example. This

7   is really --

8   MR. KNEEDLER: -- to our -- to our -- that

9   we have found that suggests the contrary.

10   JUSTICE SCALIA: This is really a case of

11   first impression. I don't know another case where we

12   have been confronted with this -- with this decision.

13   Can you take out the heart of the Act and

14   leave everything else in place?

15   MR. KNEEDLER: I would like to go to the

16   heart of the Act point in a moment. But what I'd like

17   to say is this is a huge Act with many provisions that

18   are completely unrelated to market reforms and operate

19   in different ways. And we think it would be

20   extraordinary in this extraordinary Act to strike all of

21   that down because there are many provisions and it would

22   be too hard to do it.

23   JUSTICE BREYER: I don't think it's not

24   uncommon that Congress passes an act, and then there are

25   many titles, and some of the titles have nothing to do

1 with the other titles. That's a common thing. And

2 you're saying you've never found an instance where they

3 are all struck out when they have nothing to do with

4 each other.

5   My question is, because I hear Mr. Clement

6 saying something not too different from what you say.

7 He talks about things at the periphery. We can't reject

8 or accept an argument on severability because it's a lot

9 of work for us. That's beside the point. But do you

10 think that it's possible for you and Mr. Clement, on

11 exploring this, to -- to get together and agree on --

12   (Laughter)

13   JUSTICE BREYER: -- I mean on -- on a list

14 of things that are in both your opinions peripheral,

15 then you would focus on those areas where one of you

16 thinks it's peripheral and one of you thinks it's not

17 peripheral. And at that point it might turn out to be

18 far fewer than we are currently imagining. At which

19 point we could hold an argument or figure out some way

20 or somebody hold an argument and try to -- try to get

21 those done.

22   Is -- is that a pipe dream or is that a --

23   MR. KNEEDLER: I -- I -- I just don't think

24 that is realistic. The Court would be doing it without

25 the parties, the millions of parties --

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1   JUSTICE SCALIA: You can have a conference

2   committee report afterwards, maybe.

3   (Laughter)

4   MR. KNEEDLER: No, it just -- it just is not

5   something that a court would ordinarily do. But I would

6   like --

7   JUSTICE SOTOMAYOR: Could you get back to

8   the argument of -- of the heart?

9   MR. KNEEDLER: Yes.

10   JUSTICE SOTOMAYOR: Striking down the heart,

11   do we want half a loaf or show. I think those are the

12   two analogies --

13   MR. KNEEDLER: Right. And -- and -- and I

14   would like to discuss it again in terms of the text and

15   structure of the Act. We have very important

16   indications from the structure of this Act that the

17   whole thing is not supposed to fall.

18   The -- the most basic one is, the notion

19   that Congress would have intended the whole Act to fall

20   if there couldn't be a minimum coverage provision is

21   refuted by the fact that there are many, many provisions

22   of this Act already in effect without a minimum coverage

23   provision. Two point -- 2 and-a-half million people

24   under 26 have gotten insurance by one of the insurance

25   requirements. Three point two billion dollars --

1   JUSTICE SCALIA: Anticipation of the minimum

2   coverage. That's going to bankrupt the insurance

3   companies if not the States, unless this minimum

4   coverage provision comes into effect.

5   MR. KNEEDLER: There is no reason to think

6   it's going to -- it's going to bankrupt anyone. The

7   costs will be set to cover those -- to cover those

8   amounts.

9   JUSTICE SOTOMAYOR: I thought that the

10 26-year-olds were saying that they were healthy and

11 didn't need insurance yesterday. So today they are

12 going to bankrupt the --

13   MR. KNEEDLER: Two and-a-half -- 2.5 million

14 people would be thrown off the insurance roles if the

15 Court were to say that. Congress made many changes to

16 Medicare rates that have gone into effect for the

17 Congress -- for the courts to have to unwind millions of

18 Medicare reimbursement rates. Medicare has -- has

19 covered 32 million insurance -- preventive care visits

20 by patients as a result of -- of this Act.

21   CHIEF JUSTICE ROBERTS: All of that was

22 based on the assumption that the mandate was -- was

23 constitutional. And if -- that certainly doesn't stop

24 us from reaching our own determination on that.

25   MR. KNEEDLER: No, what I'm saying is it's a

1   question of legislative intent, and we have a very

2   fundamental indication of legislative intent that

3   Congress did not mean the whole Act to fall if -- if --

4   without the minimum coverage provision, because we have

5   many provisions that are operating now without that.

6   But there's a further indication about why

7   the line should be drawn where I've suggested, which is

8   the package of these particular provisions. All the

9   other provisions of the Act would continue to advance

10   Congress's goal, the test that was articulated in Booker

11   but it's been said in Regan and other cases. You look

12   to whether the other provisions can continue to advance

13   the purposes of the Act.

14   Here they unquestionably can. The public

15   health -- the broad public health purposes of the Act

16   that are unrelated to the minimum coverage provision,

17   but also that the other provisions designed to enhance

18   access to affordable care. The employer responsibility

19   provision, the credit for small businesses, which is

20   already in effect, by the way, and affecting many small

21   businesses --

22   JUSTICE SCALIA: But many people might

23   not -- many of the people in Congress might not have

24   voted for those provisions if -- if the central part of

25   this statute was not adopted.

 1   MR. KNEEDLER: But that --

 2   JUSTICE SCALIA: I mean, you know, you're --

 3   to say that we're effectuating the intent of Congress is

 4   just unrealistic. Once you've cut the guts out of it,

 5   who knows, who knows which of them were really desired

 6   by Congress on their own and which ones weren't.

 7   MR. KNEEDLER: The question for the Court is

 8   Congress having passed the law by whatever majority

 9   there might be in one House or the other, Congress

10   having passed the law, what at that point is -- is -- is

11   the legislative intent embodied in the law Congress has

12   actually passed?

13   CHIEF JUSTICE ROBERTS: Well, that's right.

14   But the problem is, straight from the title we have two

15   complimentary purposes, patient protection and

16   affordable care. And you can't look at something and

17   say this promotes affordable care, therefore, it's

18   consistent with Congress's intent. Because Congress had

19   a balanced intent. You can't look at another provision

20   and say this promotes patient protection without asking

21   if it's affordable.

22   So, it seems to me what is going to promote

23   Congress's purpose, that's just an inquiry that you

24   can't carry out.

25   MR. KNEEDLER: No, with respect, I disagree,

1   because I think it's evident that Congress's purpose was

2   to expand access to affordable care. It did it in

3   discreet ways. It did it by the penalty on employers

4   that don't -- that don't offer suitable care. It did it

5   by offering tax credits to small employers. It did it

6   by offering tax credits to purchasers. All of those are

7   a variety of ways that continue to further Congress's

8   goal, and -- and most of all, Medicaid, which is --

9   which is unrelated to the -- to the private insurance

10   market altogether.

11   And in adopting those other provisions

12   governing employers and whatnot, Congress built on its

13   prior experience of using the tax code, which it is --

14   for a long period of time Congress has subsidized --

15   JUSTICE KENNEDY: I don't quite understand

16   about the employers. You're -- you are saying Congress

17   mandated employers to buy something that Congress itself

18   has not contemplated? I don't understand that.

19   MR. KNEEDLER: No. Employer coverage -- 150

20   million people in this country already get their

21   insurance through -- through their employers. What

22   Congress did in seeking to augment that was to add a

23   provision requiring employers to purchase insurance --

24   JUSTICE KENNEDY: Based on the assumption

25   that the cost of those policies would be lowered by --

1   by certain provisions which are by hypothesis -- we are

2   not sure -- by hypothesis are in doubt.

3   MR. KNEEDLER: No, I -- I -- I think any

4   cost assumptions -- there is no indication that Congress

5   made any cost assumptions, but -- but there is no reason

6   to think that the individual -- that the individual

7   market, which is where the minimum coverage provision is

8   directed, would affect that.

9   I would like to say -- I would point out why

10   the other things would advance Congress's goal. The

11   point here is that the package of three things would --

12   would be contrary -- would run contrary to Congress's

13   goal if you took out the minimum coverage provision.

14   And here's why -- and this is reflected in the findings:

15   If you take out minimum coverage but leave

16   in the guaranteed-issue and community-rating, you will

17   make matters worse. Rates will go up, and people will

18   be less -- fewer people covered in the individual

19   market.

20   JUSTICE ALITO: Well, if that is true, what

21   is the difference between guaranteed-issue and

22   community-rating provisions on the one hand and other

23   provisions that increase costs substantially for

24   insurance companies?

25   For example, the tax on high cost health

1   plans, which the economists in the amicus brief said

2   would cost $217 billion over 10 years?

3   MR. KNEEDLER: Those are -- what Congress --

4   Congress did not think of those things as balancing

5   insurance companies. Insurance companies are

6   participants in the market for Medicaid and -- and other

7   things.

8   JUSTICE KENNEDY: But you are saying we have

9   -- we have the expertise to make the inquiry you want us

10   to make, i.e., the guaranteed-issue, but not the

11   expertise that Justice Alito's question suggests we must

12   make.

13   MR. KNEEDLER: Well --

14   JUSTICE KENNEDY: I just don't understand

15   your position.

16   MR. KNEEDLER: -- that's because -- that's

17   because I think this Court's function is to look at the

18   text and structure and the legislative history of the

19   law that Congress enacted, not the financial -- not a

20   financial balance sheet, which doesn't appear anywhere

21   in the law. And just --

22   JUSTICE GINSBURG: You are relying on

23   Congress's quite explicitly tying these three things

24   together.

25   MR. KNEEDLER: We do. That's -- that's --

1   and it's not just the text of the act, but the

2   background of the act, the experience in the state, the

3   testimony of the National Association of Insurance

4   Commissioners.

5   That's the -- that's the problem Congress

6   was addressing. There was a -- there was -- a shifting

7   of present actuarial risks in that market that Congress

8   wanted to correct. And if you took the minimum coverage

9   provision out and left the other two provisions in,

10   there would be laid on top of the existing shifting of

11   present actuarial risks an additional one because the

12   uninsured would know that they would have guaranteed

13   access to insurance whenever they became sick. It would

14   make the -- it would make the adverse selection in that

15   market problem even worse.

16   And so what -- and Congress, trying to come

17   up with a market-based solution to control rates in that

18   market, has adopted something that would -- that would

19   work to control costs by guaranteed-issue and

20   community-rating; but, if you -- if -- if you take out

21   the minimum coverage, that won't work. That was

22   Congress's assumption, again, shown by the text and

23   legislative history of this provision. And that's why

24   we think those things rise or fall in a package because

25   they cut against what Congress was trying to do.

1   All of the other provisions would actually

2   increase access to affordable care and would have

3   advantageous effects on price. Again, Congress was

4   invoking its traditional use of the tax code, which has

5   long subsidized insurance through employers, has used

6   that to impose a tax penalty on employers, to give tax

7   credits. This is traditional stuff that Congress has

8   done.

9   And the other thing Congress has done, those

10   preexisting laws had their own protections for

11   guaranteed-issue and community-rating. Effectively,

12   within the large employer plans, they can't discriminate

13   among people, they can't charge different rates. What

14   Congress was doing, was doing that in the other market.

15   If it can't, that's all that should be struck from the

16   act.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   Mr. Kneedler.

19   Mr. Farr?

20   ORAL ARGUMENT OF H. BARTOW FARR

21   FOR COURT-APPOINTED AMICUS CURIAE

22   MR. FARR: Mr. Chief Justice and may it

23   please the Court:

24   At the outset, I would just like to say, I

25   think that the government's position in this case that

1   the community-rating and guaranteed-issue provisions

2   ought to be struck down is an example of the best

3   driving out the good; because, even without the minimum

4   coverage provision, those two provisions,

5   guaranteed-issue and community-rating, will still open

6   insurance markets to millions of people that were

7   excluded under the prior system, and for millions of

8   people will lower prices, which were raised high under

9   the old system because of their poor health.

10   So even though the system is not going to

11   work precisely as Congress wanted, it would certainly

12   serve central goals that Congress had of expanding

13   coverage for people who were unable to get coverage or

14   unable to get it at affordable prices.

15   So when the government --

16   JUSTICE GINSBURG: One of the points that

17   Mr. Kneedler made is that the price won't be affordable

18   because -- he spoke of the adverse selection problem,

19   that there would be so fewer people in there, the

20   insurance companies are going to have to raise the

21   premiums.

22   So it's nice that Congress made it possible

23   for more people to be covered, but the reality is they

24   won't because they won't be able to afford the premium.

25   MR. FARR: Well, Justice Ginsburg, let me

1   say two things about that.

2   First of all, when we talk about premiums

3   becoming less affordable, it's very important to keep in

4   mind different groups of people, because it is not

5   something that applies accurately to everybody.

6   For people who were not able to get

7   insurance before, obviously, their insurance beforehand

8   was -- the price was essentially infinite. They were

9   not able to get it at any price. They will now be able

10   to get it at a price that they can afford.

11   For people who are unhealthy and were able

12   to get insurance, but perhaps not for the things that

13   they were most concerned about, or only at very high

14   rates, their rates will be lower under the system, even

15   without the minimum coverage provision.

16   Also, you have a large number of people who,

17   under the Act --

18   JUSTICE SCALIA: Excuse me, why do you

19   say -- I didn't follow that. Why?

20   MR. FARR: Because --

21   JUSTICE SCALIA: Why would their rates be

22   lower?

23   MR. FARR: Their rates are going to be lower

24   than they were under the prior system because they are

25   going into a pool of people, rather than -- some of whom

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1   are healthy, rather than having their rates set

2   according to their individual health characteristics.

3   That's why their rates were so high.

4   JUSTICE KAGAN: But the problem, Mr. Farr,

5   isn't it, that they're going to a pool of people that

6   will gradually get older and unhealthier. That's the

7   way the thing works. Once you say that the insurance

8   companies have to cover all of the sick people and all

9   of the old people, the rates climb. More and more young

10   people and healthy people say, why should we

11   participate, we can just get it later when we get sick.

12   So they leave the market, the rates go up further, more

13   people leave the market, and the whole system crashes

14   and burns, becomes unsustainable.

15   MR. FARR: Well --

16   JUSTICE KAGAN: And this is not --

17   MR. FARR: Certainly.

18   JUSTICE KAGAN: -- like what I think. What

19   do I know? It's just what's reflected in Congress's

20   findings, that it's look -- it looks at some states and

21   says, this system crashed and burned. It looked at

22   another state with the minimum coverage provision and

23   said, this one seems to work. So we will package the

24   minimum coverage provision with the nondiscrimination

25   provisions.

1   MR. FARR: Well, in a moment, I'd like to

2   talk about the finding; but, if I could just postpone

3   that for a second and talk about adverse selection

4   itself.

5   I think one of the misconceptions here,

6   Justice Kagan, is that Congress, having seen the

7   experience of the states in the '90s with

8   community-rating and guaranteed-issue, simply imposed

9   the minimum coverage provision as a possible way of

10 dealing with that; and, if you don't have the minimum

11 coverage provision, then, essentially, adverse selection

12 runs rampant. But that's not what happened.

13   Congress included at least half a dozen

14 other provisions to deal with adverse selection caused

15 by bringing in people who are less healthy into the Act.

16   There are -- to begin with, the Act

17 authorizes annual enrollment periods, so people can't

18 just show up at the hospital. If they don't show up and

19 sign up at the right time, they at least have to wait

20 until the time next year. That's authorized by the Act.

21   There -- with respect to the subsidies,

22 there are three different things that make this

23 important. First of all, the subsidies are very

24 generous. For people below 200 percent of the federal

25 poverty line, the subsidy will cover 80 percent, on

1   average, of the premium which makes it attractive to

2   them to join.

3   The structure of the subsidies, because

4   their income -- they create a floor for -- based on the

5   income of the person getting the insurance, and then the

6   government covers everything over that. And this is

7   important in adverse selection because if you do have a

8   change in the mix of people, and average premiums start

9   to rise, the government picks up the increase in the

10 premium. The amount that the person who is getting

11 insured contributes remains constant at a percentage of

12 his or her income.

13   And the third thing --

14   JUSTICE SCALIA: And there is nothing about

15 federal support that is unsustainable, right? That is

16 infinite.

17   MR. FARR: Well, I mean, that's a fair

18 point, Justice Scalia; although, one of the things that

19 happens, if you take the mandate out, while it is true

20 that the subsidies that the government provides to any

21 individual will increase, and they will be less

22 efficient -- I'm not disputing that point -- actually

23 the overall amount of the subsidies that the government

24 will provide will decline, as the government notes

25 itself in its brief, because there will be fewer people

1   getting them. Some people will opt out of the system

2   even though they are getting subsidies.

3   But I would just like to go back for one

4   more second to the point about how the subsidies are

5   part of what Congress was using, because the other thing

6   is that for people below 250 percent of the Federal

7   poverty line Congress also picks up and subsidizes the

8   out-of-pocket costs, raising the actuarial value.

9   So you have all of that, and then you have

10   Congress also, unlike the States establishing -- or I

11   should be precisely accurate -- almost all the States,

12   establishing an age differential of up to three to one.

13   So an insurance company, for example, that is selling a

14   25-year-old a policy for $4,000 can charge a 60-year-old

15   $12,000 for exactly the same coverage.

16   The States typically in the 90s when they

17   were instituting these programs, they either had pure

18   community rating, where everybody is charged the same

19   premium, everybody regardless of their age is charged

20   the same premium. Some states had a variance of 1.5 to

21   1. Massachusetts, for example, which did have good

22   subsidies, but their age band was two to one.

23   So when Congress is enacting this Act, it's

24   not simply looking at the States and thinking: Well,

25   that didn't go very well; why don't we put in a minimum

1   coverage provision; that will solve the problem.

2   Congress did a lot of different things to try to combat

3   the adverse selection.

4   Now, if I could turn to the finding, because

5   I think this is the crux of the government's position

6   and then the plaintiffs pick up on that, and then move

7   --move from that to the rest of the Act. And it seems

8   to me, quite honestly, it's an important part because

9   that is textual. In this whole sort of quest for what

10   we are trying to figure out, the finding seems to stand

11   out as something that the Court could rely on and say

12   here's something Congress has actually told us.

13   But I think the real problem with the

14   finding is the context in which Congress made it. It's

15   quite clear. If the Court wants to look, the finding is

16   on page 42 -- 43A, excuse me, of the Solicitor General's

17   severability brief in the appendix.

18   But the finding is made specifically in the

19   context of interstate commerce. That is why the

20   findings are in the Act at all. Congress wanted to

21   indicate to the Court, knowing that the minimum coverage

22   provision was going to be challenged, wanted to indicate

23   to the Court the basis on which it believed it had the

24   power under the Commerce Clause to enact this law.

25   Why does that make a difference with respect

1   to finding I, which is the one that the government is

2   relying on, and in particular the last sentence, which

3   says "this requirement is essential to creating

4   effective health insurance markets in which

5   guaranteed-issue and preexisting illnesses can be

6   covered."

7   The reason is because the word "essential"

8   in the Commerce Clause context doesn't have the

9   colloquial meaning. In the Commerce Clause context

10   "essential" effectively means useful. So that when one

11   says in Lopez, when the Court says section 922(q) is not

12   an essential part of a larger regulatory scheme of

13   economic activity, it goes on to say, in which the

14   regulatory scheme would be undercut if we didn't have

15   this provision.

16   Well, if that's all Congress means, I agree

17   with that. The system will be undercut somewhat if you

18   don't have the minimum coverage provision. It's like

19   the word "necessary" in the Necessary and Proper Clause

20   clause. It doesn't mean, as the Court has said on

21   numerous occasions, absolutely necessary. It means

22   conducive to, useful, advancing the objectives,

23   advancing the aims. And it's easy to see, I think, that

24   that's what Congress --

25   JUSTICE SCALIA: Is there any dictionary

1   that gives that --

2   MR. FARR: I'm sorry, Justice Scalia?

3   JUSTICE SCALIA: -- that definition of

4   "essential"? It's very imaginative. Just give me one

5   dictionary.

6   MR. FARR: Well, but I think my point,

7   Justice Scalia, is that they are not using it in the

8   true dictionary sense.

9   JUSTICE SCALIA: How do we know that? When

10   people speak, I assume they are speaking English.

11   MR. FARR: Well, I think that there are

12   several reasons that I would suggest that we would know

13   that from. The first is, as I say, the findings

14   themselves. Congress says at the very beginning, the

15   head of it, is Congress makes the following findings,

16   and they are talking about the interstate -- you know, B

17   is headed "Effects on the national economy and

18   interstate commerce." So we know the context that

19   Congress is talking about.

20   It is more or less quoting from the Court's

21   Commerce Clause statements. But if one looks at the

22   very preceding finding, which is finding H, which is on

23   42 over onto 43, Congress at that point also uses the

24   word "essential." In the second sentence it says "this

25   requirement" -- and again we're talking about the

1   minimum coverage provision -- is an essential part of

2   this larger regulation of economic activity, which is,

3   by the way, an exact quote from Lopez, in which "the

4   absence of the requirement undercuts Federal

5   regulation," also an exact quote from Lopez.

6   But what it is referring to is an

7   essential -- an essential part of ERISA, the National

8   Health Service Act and the Affordable Care Act. It

9   can't possibly be, even the plaintiffs haven't argued,

10   that those Acts would all fall in their entirety if you

11   took out the minimum coverage provision.

12   And as a second example of the same usage by

13   Congress, the statute that was before the Court in

14   Raich, section 801 of Title 21, the Court said that the

15   regulation of intrastate drug activity, drug traffic,

16   was essential to the regulation of interstate drug

17   activity. Again, it is simply not conceivable that

18   Congress was saying one is so indispensable to the

19   other, the way the United States uses the term here, so

20   indispensable that if we can't regulate the intrastate

21   traffic we don't want to regulate the interstate

22   traffic, either. The whole law criminalizing drug

23   traffic would fall.

24   So I think once you look at the finding for

25   what I believe it says, which is we believe this is a

 1   useful part of our regulatory scheme, which the Congress

 2   would think in its own approach would be sufficient --

 3   JUSTICE SOTOMAYOR: Counsel, the problem I

 4   have is that you are ignoring the congressional findings

 5   and all of the evidence Congress had before it that

 6   community ratings and guaranteed-issuance would be a

 7   death spiral -- I think that was the word that was

 8   used -- without minimum coverage. Those are all of the

 9   materials that are part of the legislative record here.

10   So even if it might not be because of the

11   structure of the Act, that's post hoc evidence. Why

12   should we be looking at that as opposed to what Congress

13   had before it and use "essential" in its plain meaning:

14   You can't have minimum coverage without what the SG is

15   arguing, community ratings and guaranteed-issue. You

16   can't have those two without minimum coverage.

17   MR. FARR: Well, I think that's a fair

18   question. But the idea that -- that all the information

19   before Congress only led to the idea that you would have

20   death spirals seems to me to be contradicted a little

21   bit at least by the CBO report in November of 2009,

22   which is about 4 months before the Act passed, where the

23   CBO talks about adverse selection.

24   Now, I want to be clear. This is at a time

25   when the minimum coverage provision was in the statute,

 1   so I'm not suggesting that this is a discussion without

 2   that in it. But nonetheless, the CBO goes through and

 3   talks about adverse selection, and points out the

 4   different provisions in the Act, the ones I have

 5   mentioned plus one other, actually, where in the first 3

 6   years of the operation of the exchanges those insurance

 7   companies that get sort of a worse selection of

 8   consumers will be given essentially credits from

 9   insurance companies that get better selections.

10   JUSTICE KENNEDY: So do you want us to write

11   an opinion saying we have concluded that there is an

12   insignificant risk of a substantial adverse effect on

13   the insurance companies, that's our economic conclusion,

14   and therefore not severable? That's what you want me to

15   say?

16   MR. FARR: It doesn't sound right the way

17   you say it, Justice Kennedy.

18   (Laughter.)

19   MR. FARR: No, I --

20   JUSTICE SOTOMAYOR: But you don't want them

21   to say, either, that there is a death spiral. Do you

22   want -- you don't want us to make either of those two

23   findings, I'm assuming?

24   MR. FARR: That's correct. Now, I agree

25   that there is a risk and the significance of it people

1   can debate. But what I think is --is lost in that

2   question, and I didn't mean to be whimsical about it, I

3   think what is lost in it a little bit is what is on the

4   other side, which is the fact that if you follow the

5   government's suggestion, if the Court follows the

6   government's suggestion, what is going to be lost is

7   something we know is a central part of the Act. I mean,

8   indeed, if one sort of looks at the legislative history

9   more broadly, I think much of it is directed toward the

10   idea that guaranteed- issue and community rating were

11   the crown jewel of the Act.

12   The minimum coverage provision wasn't

13   something that everybody was bragging about, it was

14   something that was meant to be part of this package. I

15   agree with that.

16   But the -- the point of it was to have

17   guaranteed-issue and minimum coverage -- I mean, excuse

18   me -- guaranteed-issue and community rating. And that's

19   -- under the government's proposal, those would -- would

20   disappear. We would go back to the old system. And

21   under what I think is the proper severability analysis,

22   the -- the real question the Court is asking, should be

23   asking, is, would Congress rather go back to the old

24   system than to take perhaps the risk that you're talking

25   about, Justice Kennedy.

1   CHIEF JUSTICE ROBERTS: You're -- you're

2   referring to the government's second position. Their --

3   their first, of course, is that we shouldn't address

4   this issue at all.

5   MR. FARR: That's correct.

6   CHIEF JUSTICE ROBERTS: I asked Mr. Kneedler

7   about what procedure or process would be anticipated for

8   people who are affected by the change in -- in the law,

9   and change in the economic consequences. Do you have a

10   view on how that could be played out? It does seem to

11   me that if we accept your position, something -- there

12   have to -- there has to be a broad range of

13   consequences, whether it's additional legislation,

14   additional litigation.

15   Any thoughts on how that's going to play

16   out?

17   MR. FARR: Well, if the Court adopts the

18   position that I'm advocating, Mr. Chief Justice, I think

19   what would happen is that the Court would say that the

20   minimum coverage provision, by hypothesis of course, is

21   unconstitutional, and the fact of that being

22   unconstitutional does not mean the invalidation of any

23   other provision.

24   So under the position I'm advocating, there

25   would no longer be challenges to the remaining part of

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1   the Act. The --

2   CHIEF JUSTICE ROBERTS: But if the challenge

3   is what we're questioning today, whether -- if you're an

4   insurance company and you don't believe that you can

5   give the coverage in the way Congress mandated it

6   without the individual mandate, what -- what type of

7   action do you bring in a court?

8   MR. FARR: You -- if the Court follows the

9   course that I'm advocating, you do not bring an action

10   in court, you go to Congress and you seek a change from

11   Congress to say the minimum coverage provision has been

12   struck down by the Court, here is our -- here -- here's

13   the information that we have to show you what the risks

14   are going to be. Here are the adjustments you need to

15   make.

16   One of the questions earlier pointed out

17   that States have adjusted their systems as they've gone

18   along, as they've seen things work or not work.

19   You know, as I was talking earlier about the

20   -- the different ratio for -- for ages and insurance.

21   The States have tended to change that, because they've

22   found that having too narrow a band worked against the

23   effectiveness of -- of their programs. But they did --

24   except for in Massachusetts, they didn't enact mandates.

25   So to answer -- I think to answer your

1   question directly, Mr. Chief Justice, the position I'm

2   advocating would simply have those -- those pleas go to

3   Congress, not in court.

4   Now, if one -- just -- just to discuss the

5   issue more generally, if that's helpful, I -- I think

6   that -- that if there were situations where the Court

7   deferred -- let's say for discretionary reasons, they

8   just said -- the Court said we're -- we're not going to

9   take up the question of severability and therefore not

10 resolve it in these other situations, it certainly seems

11 to me that in enforcement actions, for example, if the

12 time comes in -- in 2014 and somebody applies to an

13 insurance company for a policy -- and the insurance

14 company says, well, we're not going to issue a policy,

15 we don't think your risks are ones that we're willing to

16 cover, that -- it seems to me that they could sue the

17 insurance company and the insurance company could raise

18 as a defense that this provision, the guaranteed-issue

19 provision of the statute, is not enforceable because it

20 was inseverable from the decision -- from the provision

21 that the Court held unconstitutional in 2012.

22   JUSTICE SCALIA: Mr. Farr, let's -- let's

23 consider how -- how your approach, severing as little as

24 possible there -- thereby increases the deference that

25 we're showing to -- to Congress. It seems to me it puts

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1 Congress in -- in this position: This Act is still in

2 full effect. There is going to be this deficit that

3 used to be made up by the mandatory coverage provision.

4 All that money has to come from somewhere.

5   You can't repeal the rest of the Act because

6 you're not going to get 60 votes in the Senate to repeal

7 the rest. It's not a matter of enacting a new act.

8 You've got to get 60 votes to repeal it. So the rest of

9 the Act is going to be the law.

10   So you're just put to the choice of I guess

11 bankrupting insurance companies and the whole system

12 comes tumbling down, or else enacting a Federal subsidy

13 program to the insurance companies, which is what the

14 insurance companies would like, I'm sure.

15   Do you really think that that is somehow

16 showing deference to Congress and -- and respecting the

17 democratic process?

18   It seems to me it's a gross distortion of

19 it.

20   MR. FARR: Well, Your Honor, the -- the

21 difficulty is that it seems to me the other possibility

22 is for the Court to make choices, particularly based on

23 what it expects the difficulties of Congress altering

24 the legislation after a Court ruling would be.

25   I'm not aware of any severability decision

1   that is --

2   JUSTICE SCALIA: No, I -- that wouldn't be

3   my approach. My approach would say if you take the

4   heart out of the statute, the statute's gone. That

5   enables Congress to -- to do what it wants in -- in the

6   usual fashion. And it doesn't inject us into the

7   process of saying, "this is good, this is bad, this is

8   good, this is bad."

9   It seems to me it reduces our options the

10   most and increases Congress's the most.

11   MR. FARR: I guess to some extent I have to

12   quarrel with the premise, Justice Scalia, because at

13   least the -- the position that I'm advocating today,

14   under which the Court would only take out the minimum

15   coverage provision, I don't think would fit the

16   description that you have given of taking out the heart

17   of the statute.

18   Now, I do think once you take out

19   guaranteed-issue and community rating, you are getting

20   closer to the heart of the statute. And one of the --

21   one of the difficulties I think with the government's

22   position is that I think it's harder to cabin that, to

23   draw that bright line around it. It's harder than the

24   government thinks it is.

25   I mean, to begin with, even the government

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1   seems to acknowledge, I think, that the exchanges are

2   going to be relatively pale relatives of -- of the

3   exchanges as they're intended to be, where you're going

4   to have standardized products, everybody can come and

5   make comparisons based on products that look more or

6   less the same.

7   But the other thing that's going to happen

8   is with the subsidy program. The -- the way that the

9   subsidy program is -- is set up, the subsidy is

10   calculated according to essentially a benchmark plan.

11   And this -- if the Court wants to look at the

12   provisions, they're -- they begin at page 64A of the

13   Private Plaintiffs' brief -- again, in the appendix.

14   The particular provision I'm talking about's at 68A, but

15   there's a -- there's a question -- you -- you're looking

16   essentially to calculate the premium by looking at a --

17   at a standardized silver plan.

18   First question, obviously, is, is there

19   going to be any such plan if you don't have

20   guaranteed-issue and community rating, if the plans can

21   basically be individualized? But the second problem is

22   that, in the provision on 68A, the -- the provision

23   that's used for calculating the subsidy, what -- what is

24   anticipated in the provision under the -- the Act as it

25   is now, is that you do have the floor of the income, you

1   would -- you would take this benchmark plan, and the

2   government would pay -- pay the difference.

3   And as we talked about earlier, the

4   benchmark plan can change for age, and -- and the

5   provision says it can be adjusted only for age. So if

6   in fact you even have such a thing as a benchmark plan

7   anymore -- if the rates of people in poor health go up

8   because of individual insurance underwriting, the

9   government subsidy is not going to pay for that.

10   JUSTICE KAGAN: Mr. Farr, I understood that

11   the answer that you gave to Justice Scalia was

12   essentially that the minimum coverage provision was not

13   the heart of the Act. Instead, the minimum coverage

14   provision was a tool to make the nondiscrimination

15   provisions, community rating guaranteed-issue, work.

16   So if you assume that, that all the minimum

17   coverage is is a tool to make those provisions work,

18   then I guess I would refocus Justice Scalia's question

19   and say, if we know that something is just a tool to

20   make other provisions work, shouldn't that be the case

21   in which those other provisions are severed along with

22   the tool?

23   MR. FARR: No. I don't think so, because

24   there are -- there are many other tools to make the same

25   things work. That's I think the point.

1   And if one -- the case that comes to mind is

2   New York v. the United States, where the Court struck

3   down the take title provision but left other -- two

4   other incentives essentially in place.

5   Even without the minimum coverage provision,

6   there will be a lot of other incentives still to bring

7   younger people into the market and to keep them in the

8   market. And if -- if my reading of the finding is

9   correct, and that's all that Congress is saying, that

10   this would be useful, it doesn't mean that it's

11   impossible.

12   JUSTICE BREYER: But would you -- I would

13   just like to hear before you leave your argument, if you

14   want to, against what Justice Scalia just said, let's

15   assume, contrary to what you want, that the government's

16   position is accepted by the majority of this Court. And

17   so we now are rid, quote, of the true "heart" of the

18   bill. Now still there are a lot of other provisions

19   here like the Indian Act, the Black Lung Disease, the

20   Wellness Program, that restaurants have to have a

21   calorie count of major menus, et cetera.

22   Now, some of them cost money. And some of

23   them don't. And there are loads of them. Now, what is

24   your argument that just because the heart of the bill is

25   gone, that has nothing to do with the validity of these

1   other provisions, both those that cost money, or at

2   least those that cost no money. Do you want to make an

3   argument in that respect, that destroying the heart of

4   the bill does not blow up the entire bill; it blows up

5   the heart of the bill. I just would like to hear what

6   you have to say about that.

7   MR. FARR: Well, Justice Breyer, I think

8   what I would say is if one goes back to the, what I

9   think is the proper severability standard and say, would

10   Congress rather have not -- no bill as opposed to the

11   bill with whatever is severed from it. It seems to me

12   when you are talking about provisions that don't have

13   anything to do with the minimum coverage provision,

14   there is no reason to answer that question as any other

15   way than yes, Congress would have wanted the --

16   JUSTICE KENNEDY: The -- the real Congress

17   or a hypothetical Congress?

18   (Laughter.)

19   MR. FARR: An objective Congress, Your

20   Honor, not the -- specific not with a vote count.

21   JUSTICE SCALIA: Why put -- why put Congress

22   to that false choice?

23   MR. FARR: Well --

24   JUSTICE SCALIA: You only have two choices,

25   Congress. You have the whole bill or you can have, you

1   can have parts of the bill or no bill at all. Why that

2   false choice?

3   MR. FARR: I think the reason is because

4   severability is by necessity a blunt tool. The Court

5   doesn't have, even if it had the inclination, doesn't

6   essentially have the authority to retool the statute --

7   JUSTICE BREYER: I would say stay out of

8   politics. That's for Congress; not us. But the, the

9   question here is, you've read all these cases, or

10   dozens, have you ever found a severability case where

11   the Court ever said: Well, the heart of the thing is

12   gone; and, therefore, we strike down these other

13   provisions that have nothing to do with it which could

14   stand on their feet independently and can be funded

15   separately or don't require money at all.

16   MR. FARR: I think the accurate answer would

17   be, I am not aware of a modern case that says that. I

18   think there probably are cases in the '20s and '30s that

19   would be more like that.

20   If I could just take one second to raise the

21   economist brief because Justice Alito raised it earlier.

22   I just want to make one simple point. Leaving aside the

23   whole balancing thing, if one looks at the economist

24   brief, it's very important to note that when they are

25   talking about one side of the balance -- if may I

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1   finish.

2   CHIEF JUSTICE ROBERTS: Certainly.

3   MR. FARR: When they are talking about the

4   balance, they are not just talking about the minimum

5   coverage provision. They very carefully word it to say

6   the minimum coverage provision and the subsidy programs.

7   And then so when you are doing the mathematical

8   balancing, the subsidy programs are extremely large.

9   They -- in the year 2020, they are expected to be over

10   $100 billion in that one year alone. So if you are

11   looking at the numbers, please consider that. Thank

12   you.

13   CHIEF JUSTICE ROBERTS: Thank you, Mr. Farr.

14   Mr. Clement, you have four minutes

15   remaining.

16   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

17   ON BEHALF OF THE PETITIONERS

18   JUSTICE SOTOMAYOR: -- Amicis' point, he

19   says that Congress didn't go into this Act to impose

20   minimum coverage. They went into the Act to have a

21   different purpose, i.e., to get people coverage jury

22   when they needed it, to increase coverage for people,

23   but this is only a tool. But other States -- going back

24   to my original point, that are other tools besides

25   minimum coverage that Congress can achieve these goals.

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 1   So if we strike just a tool, why should we strike the

 2   whole Act, when Congress has other tools available?

 3   MR. CLEMENT: Mr. Chief Justice, I will make

 4   four points in rebuttal, but I will start with Justice

 5   Sotomayor's question; which is to simply say this isn't

 6   just a tool; it's the principal tool, Congress

 7   identified it as an essential tool. It's not just a

 8   tool to make it work. It's a tool to pay for it, to

 9   make it affordable. And again, that's not my

10   characterization; that's Congress's characterization in

11   subfinding I on page 43a of the government's brief.

12   Now, that bring me to my first point in

13   rebuttal, which is Mr. Kneedler says quite correctly,

14   tells this Court, don't look at the budgetary

15   implications. The problem with that, though, is once

16   it's common ground, that the individual mandate is in

17   the statute at least in part to make community rating

18   and guaranteed-issue affordable, that really is all you

19   have to identify. That establishes the essential link

20   that it's there to pay for it. You don't have to figure

21   out exactly how much that is and which box -- I mean, it

22   clearly is a substantial part of it, because what they

23   were trying to do was take healthy individuals and put

24   them into the risk pool, and this is quoting their

25   finding, which is in order -- they put people into the

 1   market "which will lower premiums." So that's what

 2   their intent was.

 3   So you don't have to get to the -- the final

 4   number. You know that's what was going on here, and

 5   that's reason alone to sever it.

 6   Now the government -- Mr. Kneedler also says

 7   there is an easy dividing line between what they want to

 8   keep and what they want to dish out. The problem with

 9   that is that, you know, you read their brief and you

10   might think oh, there is a guaranteed-issue and a

11   community rating provision subtitle in the bill. There

12   is not.

13   To figure out what they are talking about

14   you have to go to page 6 of their brief, of their

15   opening severability brief, where they tell you what is

16   in and what's out. And the easy dividing line they

17   suggest is actually between 300g(a)(1) and 300g(a)(2),

18   because on community rating they don't -- they say that

19   (a)(1) goes, but then they say (a)(2) has to stay,

20   because that's the way that you'll have some sort of,

21   kind of Potemkin community rating for the exchanges.

22   But if you actually look at those provisions, (a)(2)

23   makes all these references to (a)(1). It just doesn't

24   work.

25   Now, in getting back to the -- an inquiry

 1   that I think this Court actually can approach, is to

 2   look at what Congress was trying to do, you need look no

 3   further than look than the title of this statute:

 4   Patient Protection and Affordable Care. I agree with

 5   Mr. Farr that community rating and guaranteed-issue were

 6   the crown jewels of this Act. They were what was trying

 7   to provide patient protection. And what made it

 8   affordable? The individual mandate. If you strike down

 9   guaranteed-issue, community rating and the individual

10   mandate, there is nothing left to the heart of the Act.

11   And that takes me to my last point, which is

12   simply this court in Buckley created a halfway house and

13   it took Congress 40 years to try to deal with the

14   situation, when contrary to any time of their intent,

15   they had to try to figure out what are we going to do

16   when we are stuck with this ban on contributions, but we

17   can't get at expenditures because the Court told us we

18   couldn't? And for 40 years they worked in that halfway

19   house. Why make them do that in health care? The

20   choice is to give Congress the task of fixing this

21   statute, the residuum of this statute after some of it

22   is struck down, or giving them the task of simply fixing

23   the problem on a clean slate. I don't think that is a

24   close choice. If the individual mandate is

25   unconstitutional, the rest of the Act should fall.

1   CHIEF JUSTICE ROBERTS: Thank you,

2   Mr. Clement.

3   Mr. Farr, you were invited by this Court to

4   brief and argue in these cases in support of the

5   decision below on severability. You have ably carried

6   out responsibility for which we are grateful.

7   Case Number 11-393 is submitted. We will

8   continue argument in Case Number 11-400 this afternoon.

9   (Whereupon, at 11:49 a.m., the case in the

10 above-entitled matter was submitted.)

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