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IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HEALTH AND :
HUMAN SERVICES, ET AL., :
Petitioners : No. 11-398
v. :
FLORIDA, ET AL. :
- - - - - x

Washington, D.C.

Tuesday, March 27, 2012

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

APPEARANCES:

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

PAUL D. CLEMENT, ESQ., Washington, D.C.; for
Respondents Florida, et al.

MICHAEL A. CARVIN, ESQ., Washington, D.C.; for
Respondents NFIB, et al.

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P R O C E E D I N G S

(10:00 a.m.)

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: Can you create Congress --

1 commerce order to regulate it?

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, the same, it

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

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

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

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

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

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

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

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

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

15 GENERAL VERRILLI: For burial services?

16 JUSTICE ALITO: Yes.

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

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

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

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

5 GENERAL VERRILLI: No --

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

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

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

1 cremated at some point.

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

4 JUSTICE ALITO: What's the difference?

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

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

11 GENERAL VERRILLI: But that's different.

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

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

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

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

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

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

25 GENERAL VERRILLI: (A) it is how insurance

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

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

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

1 I understand that we must presume laws are
2 constitutional, but, even so, when you are changing the
3 relation of the individual to the government in this,
4 what we can stipulate is, I think, a unique way, do you
5 not have a heavy burden of justification to show
6 authorization under the Constitution?

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

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

1 care from being provided --

2 JUSTICE SCALIA: Why do you -- why do you
3 define the market that broadly? Health care. It may
4 well be that everybody needs health care sooner or
5 later, but not everybody needs a heart transplant. Not
6 everybody needs a liver transplant. Why -- I mean --

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

10 JUSTICE SCALIA: Could you define the
11 market -- everybody has to buy food sooner or later.
12 So, you define the market as food; therefore,
13 everybody's in the market; therefore, you can make
14 people buy broccoli.

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

24 JUSTICE SCALIA: Well, is that a principled
25 basis for distinguishing this from other situations? I

1 mean, you know, you could also say, well, the person
2 subject to this has blue eyes. That would indeed
3 distinguish it from other situations.

4 GENERAL VERRILLI: It is a --

5 JUSTICE SCALIA: Is it a principled basis?
6 I mean, it's -- it's a basis that explains why the
7 government is doing this, but is it -- is it a basis
8 which shows that this is not going beyond what -- what
9 the system of enumerated powers allows the government to
10 do.

11 GENERAL VERRILLI: Yes, for two reasons.

12 First, this -- the test, as this Court has articulated
13 it, is: Is Congress regulating economic activity with a
14 substantial effect on interstate commerce?

15 The way in which this statute satisfies the
16 test is on the basis of the factors that I have
17 identified. It --

18 JUSTICE GINSBURG: Mr. Verrilli, I thought
19 that your main point is that, unlike food or any other
20 market, when you made the choice not to buy insurance,
21 even though you have every intent in the world to
22 self-insure, to save for it, when disaster strikes, you
23 may not have the money. And the tangible result of it
24 is -- we were told -- there was one brief that Maryland
25 hospital care bills 7 percent more because of these

1 uncompensated costs, that families pay a thousand
2 dollars more than they would if there were no
3 uncompensated costs.

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

8 GENERAL VERRILLI: That is -- and that is
9 definitely a difference that distinguished this market
10 and justifies this as a regulation --

11 JUSTICE BREYER: All right. So, if that is
12 your difference --

13 GENERAL VERRILLI: -- of common activity.

14 JUSTICE BREYER: If that is your difference,
15 I'm somewhat uncertain about your answers to -- for
16 example, Justice Kennedy asked, can you, under the
17 Commerce Clause, Congress, create commerce where
18 previously none existed?

19 GENERAL VERRILLI: Well --

20 JUSTICE BREYER: Yes, I thought the answer
21 to that was, since *McCulloch v. Maryland*, when the
22 Court said Congress could create the Bank of the United
23 States which did not previously exist, which job was to
24 create commerce that did not previously exist, since
25 that time the answer has been "yes." I would have

1 thought that your answer to, can the government, in
2 fact, require you to buy cell phones or buy burials,
3 that if we propose comparable situations, if we have,
4 for example, a uniform United States system of paying
5 for every burial such as Medicare Burial, Medicaid
6 Burial, CHIP Burial, ERISA Burial, and emergency burial
7 beside the side of the road, and Congress wanted to
8 rationalize that system, wouldn't the answer be, yes, of
9 course, they could?

10 GENERAL VERRILLI: So --

11 JUSTICE BREYER: And the same with the
12 computers or the same with the -- the cell phones, if
13 you're driving by the side of the highway and there is a
14 Federal emergency service. Just as you say you have to
15 buy certain mufflers for your car that don't hurt the
16 environment, you could -- I mean, you see, doesn't it
17 depend on the situation?

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

20 JUSTICE BREYER: Would be up here defending
21 it.

22 GENERAL VERRILLI: It would be my
23 responsibility to defend them --

24 JUSTICE BREYER: All right. So, then the
25 question -- fine.

1 GENERAL VERRILLI: -- and I would defend
2 them on a rationale like that, but I do think that we
3 are advancing a narrower rationale.

4 JUSTICE KENNEDY: Well, then the question
5 is whether or not there are any limits on the Commerce
6 Clause. Can you identify for us some limits on the
7 Commerce Clause?

8 GENERAL VERRILLI: Yes. The -- the
9 rationale purely under the Commerce Clause that we're
10 advocating here would not justify forced purchases of
11 commodities for the purpose of stimulating demand.
12 We -- the -- it would not justify purchases of insurance
13 for the purposes -- in situations in which insurance
14 doesn't serve as the method of payment for a service --

15 JUSTICE KENNEDY: But why not? If --

16 GENERAL VERRILLI: -- Congress can regulate.

17 JUSTICE KENNEDY: If Congress says that
18 interstate commerce is affected, isn't, according to
19 your view, that the end of the analysis?

20 GENERAL VERRILLI: No. The -- we think that
21 in a -- when -- the difference between those situations
22 and this situation is that in those situations, Your
23 Honor, Congress would be moving to create commerce.
24 Here Congress is regulating existing commerce, economic
25 activity that is already going on, people's

1 participation in the health care market, and is
2 regulating to deal with existing effects of existing
3 commerce.

4 CHIEF JUSTICE ROBERTS: That, it seems to
5 me, is -- and it's a passage in your reply brief that I
6 didn't quite grasp. It's the same point. You say,
7 "Health insurance is not purchased for its own sake like
8 a car or broccoli; it is a means of financing
9 health-care consumption and covering universal risks."

10 Well, a car or broccoli aren't purchased for
11 their own sake, either. They're purchased for the sake
12 of transportation or, in broccoli, covering the need for
13 food.

14 GENERAL VERRILLI: No --

15 CHIEF JUSTICE ROBERTS: I don't understand
16 that distinction.

17 GENERAL VERRILLI: The difference, Mr. Chief
18 Justice, is that health insurance is the means of
19 payment for health care, and broccoli is --

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

22 GENERAL VERRILLI: And broccoli is not the
23 means of payment for anything else. And an automobile
24 is not --

25 CHIEF JUSTICE ROBERTS: It's the means of

1 satisfying a basic human need --

2 GENERAL VERRILLI: But --

3 CHIEF JUSTICE ROBERTS: -- just as your

4 insurance is the means of satisfying --

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

13 JUSTICE GINSBURG: General Verrilli, can
14 we go --

15 GENERAL VERRILLI: This is a regulation of
16 existing commerce.

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

1 the result is that everybody else's premiums get raised.

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

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

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

15 GENERAL VERRILLI: That is not what we're
16 saying, Justice Scalia.

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

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

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

23 GENERAL VERRILLI: No. It's because you're
24 going -- in the health care market, you're going into
25 the market without the ability to pay for what you get,

1 getting the health care service anyway as a result of
2 the social norms that allow -- that -- to which we've
3 obligated ourselves so that people get health care.

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

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

10 JUSTICE SCALIA: No, you could do it. But
11 does that expand your ability to issue mandates to -
12 to the people?

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

18 JUSTICE SOTOMAYOR: General --

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

21 JUSTICE SOTOMAYOR: General, I see or have
22 seen three strands of arguments in your briefs, and one
23 of them is echoed today. The first strand that I've
24 seen is that Congress can pass any necessary laws to
25 effect those powers within its rights, i.e., because it

1 made a decision that to effect -- to effect mandatory
2 issuance of insurance, that it could also obligate the
3 mandatory purchase of it.

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

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

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

24 Is that -- which of these three is your
25 argument? Are all of them your argument? I'm just not

1 sure what the --

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

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

17 JUSTICE SOTOMAYOR: So, on that ground --

18 GENERAL VERRILLI: So --

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

22 GENERAL VERRILLI: So -- no. No.

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

25 GENERAL VERRILLI: No, because that's --

1 that's the first part of our argument.

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

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

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

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

1 authority to impose an insurance requirement or other --
2 or other penalty at the point of sale, and they have
3 agreed that Congress has the authority to do that to
4 achieve the same objectives that the minimum coverage
5 provision in the Affordable Care Act is designed to
6 achieve.

7 This is a situation in which we are talking
8 about means. Congress gets substantial deference in
9 the choice of means, and if one thinks about the
10 difference between the means they say Congress should
11 have chosen and the means Congress did choose, I think
12 you can see why it was eminently more sensible for
13 Congress to choose the means that it chose.

14 JUSTICE KENNEDY: I'm not sure which way it
15 cuts, if the Congress has alternate means. Let's assume
16 that it could use the tax power to raise revenue and to
17 just have a national health service, single payer. How
18 does that factor into our analysis? In one sense, it
19 can be argued if this is what the government is doing,
20 it ought to be honest about the power that it's using
21 and use the correct power.

22 On the other hand, it means that since the
23 Court can do it any way -- Congress can do it any way,
24 we give it a certain amount of latitude. I'm not sure
25 which way the argument goes.

1 GENERAL VERRILLI: Let me try to answer that
2 question, Justice Kennedy, and get back to the question
3 you asked me earlier. The -- the -- I do think one
4 striking feature of the argument here that this is a
5 novel exercise of power is that what Congress chose to
6 do was to rely on market mechanisms and efficiency and a
7 method that has more choice than would the traditional
8 Medicare or Medicaid type model. And so, it seems a
9 little ironic to suggest that that counts against it.

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

19 JUSTICE SCALIA: No, no, it's not. They all
20 involved commerce. There was no doubt that what was
21 being regulated was commerce. And here you're
22 regulating somebody who isn't commerce.

23 By the way, I don't agree with you that the
24 relevant market here is health care. You're not
25 regulating health care. You're regulating insurance.

1 It's the insurance market that you're addressing, and
2 you're saying that some people who are not in it must be
3 in it, and that's -- that's different from regulating in
4 any manner commerce that already exists out there.

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

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

21 JUSTICE SCALIA: Wait. That's -- it's both
22 "Necessary and Proper." What you just said addresses
23 what's necessary. Yes, has to be reasonably adapted.
24 Necessary does not mean essential, just reasonably
25 adapted. But in addition to being necessary, it has to

1 be proper. And we've held in two cases that something
2 that was reasonably adapted was not proper, because it
3 violated the sovereignty of the States, which was
4 implicit in the constitutional structure.

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

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

19 JUSTICE SCALIA: But that -- no, that wasn't
20 my point. That is not the only constitutional principle
21 that exists.

22 GENERAL VERRILLI: But it --

23 JUSTICE SCALIA: An equally evident
24 constitutional principle is the principle that the
25 Federal Government is a government of enumerated powers

1 and that the vast majority of powers remain in the
2 States and do not belong to the Federal Government. Do
3 you acknowledge that that's a principle?

4 GENERAL VERRILLI: Of course, we do, Your
5 Honor, but this is --

6 JUSTICE SCALIA: Okay. And that's what
7 we're talking about here.

8 GENERAL VERRILLI: And the way in which this
9 Court in its cases has policed the boundary that -- of
10 what's in the national sphere and what's in the local
11 sphere is to ask whether Congress is regulating economic
12 activity with a substantial effect on interstate
13 commerce.

14 And here I think it's really impossible, in
15 view of our history, to say that Congress is invading
16 the State sphere. This is a -- this is a market in
17 which 50 percent of the people in this country get their
18 health care through their employer. There is a massive
19 Federal tax subsidy of \$250 billion a year that makes
20 that much more affordable. ERISA and HIPAA regulate
21 that to ensure that the kinds of bans on pre-existing
22 condition discrimination and pricing practices that
23 occur in the individual market don't occur.

24 JUSTICE SCALIA: I don't understand your
25 point. Whatever the States --

1 GENERAL VERRILLI: This is in --

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

4 GENERAL VERRILLI: No, not at all.

5 JUSTICE SCALIA: I mean, the Tenth Amendment
6 says the powers not given to the Federal Government are
7 reserved, not just to the States, but to the States and
8 the people.

9 GENERAL VERRILLI: But what --

10 JUSTICE SCALIA: And the argument here is
11 that the people were left to decide whether they want to
12 buy insurance or not.

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

24 JUSTICE KENNEDY: But what Congress --

25 CHIEF JUSTICE ROBERTS: The key --

1 JUSTICE KENNEDY: Excuse me,
2 Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: The key in Lochner
4 is that we were talking about regulation of the States,
5 right, and the States are not limited to enumerated
6 powers. The Federal Government is. And it seems to me
7 it's an entirely different question when you ask
8 yourself whether or not there are going to be limits on
9 the Federal power, as opposed to limits on the States,
10 which was the issue in Lochner.

11 GENERAL VERRILLI: I agree, except,
12 Mr. Chief Justice, that what the Court has said, as I
13 read the Court's cases, is that the way in which you
14 ensure that the Federal Government stays in its sphere
15 and the sphere reserved for the States is protected is
16 by policing the boundary. Is the national government
17 regulating economic activity with a substantial effect
18 on interstate commerce?

19 JUSTICE KENNEDY: But the -- the reason this
20 is concerning is because it requires the individual to
21 do an affirmative act. In the law of torts, our
22 tradition, our law has been that you don't have the duty
23 to rescue someone if that person is in danger. The
24 blind man is walking in front of a car, and you do not
25 have a duty to stop him, absent some relation between

1 you. And there's some severe moral criticisms of that
2 rule, but that's generally the rule.

3 And here the government is saying that the
4 Federal Government has a duty to tell the individual
5 citizen that it must act. And that is different from
6 what we have in previous cases.

7 GENERAL VERRILLI: Well --

8 JUSTICE KENNEDY: And that changes the
9 relationship of the Federal Government to the individual
10 in a very fundamental way.

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

18 CHIEF JUSTICE ROBERTS: Well, but it's
19 critical how you define the market. If I understand the
20 law, the policies that you're requiring people to
21 purchase involve -- must contain provision for maternity
22 and newborn care, pediatric services, and substance use
23 treatment. It seems to me that you cannot say that
24 everybody is going to need substance use treatment --
25 substance use treatment or pediatric services; and yet,

1 that is part of what you require them to purchase.

2 GENERAL VERRILLI: Well, it's part of what
3 the statute requires the insurers to offer. And I think
4 the reason is because it's trying to define minimum
5 essential coverage because the problem --

6 CHIEF JUSTICE ROBERTS: Yes, but your theory
7 is that there is a market in which everyone participates
8 because everybody might need a certain range of health
9 care services. And yet, the -- you're requiring people
10 who are not -- never going to need pediatric or
11 maternity services to participate in that market.

12 GENERAL VERRILLI: The -- with respect to
13 what insurance has to cover, Your Honor, I think
14 Congress is entitled the latitude of making the
15 judgments of what the appropriate scope of coverage is.
16 And the problem here in this market is that for -- you
17 may think you're perfectly healthy and you may think
18 that you're not -- that you're being forced to subsidize
19 somebody else, but this is not a market in which you can
20 say that there is a immutable class of healthy people
21 who are being forced to subsidize the unhealthy. This
22 is a market in which you may be healthy one day, and you
23 may be a very unhealthy participant in that market the
24 next day. And that is a fundamental difference, and
25 you're not going to know in which --

1 CHIEF JUSTICE ROBERTS: I think you're
2 posing the question I was posing, which is that doesn't
3 apply to a lot of what you're requiring people to
4 purchase. Pediatric services, maternity services. You
5 cannot say that everybody is going to participate in the
6 substance use treatment market. And yet, you require
7 people to purchase insurance coverage for that.

8 GENERAL VERRILLI: Congress has got --
9 Congress is enacting economic regulation here. It has
10 latitude to define essential -- the attributes of
11 essential coverage. That doesn't -- that doesn't seem
12 to me to implicate the question of whether Congress is
13 engaging in economic regulation and solving an economic
14 problem here --

15 JUSTICE ALITO: Are you --

16 GENERAL VERRILLI: -- and that's what
17 Congress is doing.

18 JUSTICE ALITO: Are you denying this? If
19 you took the group of people who are subject to the
20 mandate and you calculated the amount of health care
21 services this whole group would consume and figured out
22 the cost of an insurance policy to cover the services
23 that group would consume, the cost of that policy would
24 be much, much less than the kind of policy that these
25 people are now going to be required to purchase under

1 the Affordable Care Act.

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

9 JUSTICE ALITO: That's not -- the point is --
10 no, you take into account that some people in that group
11 are going to be hit by a bus, some people in that group
12 are going to unexpectedly contract or be diagnosed with
13 a disease that -- that is very expensive to treat. But
14 if you take their costs and you calculate that, that's a
15 lot less than the amount that they're going to be
16 required to pay.

17 So that you can't just justify this on the
18 basis of their trying to shift their costs off to other
19 people, can you?

20 GENERAL VERRILLI: Well, no, the people in
21 that class get benefits, too, Justice Alito. They get
22 the guaranteed-issue benefit that they would not
23 otherwise have, which is an enormously valuable benefit.

24 And in terms of the -- the subsidy
25 rationale, I don't think -- I think it's -- it would be

1 unusual to say that it's an illegitimate exercise of the
2 commerce power for some people to subsidize others.
3 Telephone rates in this country for a century were set
4 via the exercise of the commerce power in a way in which
5 some people paid rates that were much higher than their
6 costs in order to subsidize --

7 JUSTICE SCALIA: Only if you make phone
8 calls.

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

21 JUSTICE KAGAN: And this is especially true,
22 isn't it --

23 GENERAL VERRILLI: -- because that's a
24 judgment Congress has made.

25 JUSTICE KAGAN: -- General Verrilli, because

1 in this context, the subsidizers eventually become the
2 subsidized?

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

10 JUSTICE SCALIA: These people not stupid.
11 They're going to buy insurance later. They're young and
12 need the money now.

13 GENERAL VERRILLI: But that's --

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

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

18 JUSTICE SCALIA: I don't know why you think
19 they're never going to buy it.

20 GENERAL VERRILLI: That's the problem,
21 Justice Scalia. That's -- and that's exactly the
22 experience that the States had that made the imposition
23 of guaranteed issue and community rating not only be
24 ineffectual but be highly counterproductive. Rates, for
25 example, in New Jersey doubled or tripled, went from

1 180,000 people covered in this market down to 80,000
2 people covered in this market. In Kentucky, virtually
3 every insurer left the market.

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

13 This is not a situation in which you're
14 conscripting -- you're forcing insurance companies to
15 cover very large numbers of unhealthy people --

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

22 But you don't want to do that.

23 GENERAL VERRILLI: But that seems to me to
24 say, Justice Scalia, that Congress -- that's the problem
25 here. And that seems to me --

1 JUSTICE SCALIA: It's a self-created
2 problem.

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

7 JUSTICE SCALIA: Whatever --

8 GENERAL VERRILLI: This is an economic
9 problem.

10 JUSTICE SCALIA: -- problems Congress's
11 economic regulation produces, whatever they are --

12 GENERAL VERRILLI: I think --

13 JUSTICE SCALIA: -- Congress can do
14 something to counteract them. Here, requiring somebody
15 to enter -- to enter the insurance market.

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

1 problem.

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

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

6 GENERAL VERRILLI: Yes. It's limited to
7 insurance.

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

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

1 can't say there are limitations on what Congress can do
2 under its commerce power. Just like in any other
3 area -- given significant deference that we accord to
4 Congress in this area, all bets are off, and you could
5 regulate that market in any rational way.

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

9 CHIEF JUSTICE ROBERTS: Exactly. You're
10 worried --

11 GENERAL VERRILLI: And that --

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

24 GENERAL VERRILLI: Mr. Chief Justice, let me
25 answer that, and then if I may, I'd like to move to the

1 tax power argument.

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

4 (Laughter.)

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

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

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

24 GENERAL VERRILLI: But I think it's common
25 ground between us and the Respondents that this is an

1 interstate market in which everybody participates.

2 CHIEF JUSTICE ROBERTS: Right.

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

12 CHIEF JUSTICE ROBERTS: Right. No, I think
13 you're just --

14 GENERAL VERRILLI: -- show up to get health
15 care. And that --

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

20 GENERAL VERRILLI: And it is --

21 CHIEF JUSTICE ROBERTS: It may be a good
22 one. But what I'm concerned about is, once we accept
23 the principle that everybody is in this market, I don't
24 see why Congress's power is limited to regulating the
25 method of payment and doesn't include as it does in any

1 other area.

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

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

16 JUSTICE ALITO: Could you just say--

17 GENERAL VERRILLI: Yes.

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

24 GENERAL VERRILLI: We've got --

25 JUSTICE ALITO: Is that it?

1 GENERAL VERRILLI: We've got --

2 JUSTICE ALITO: Is there anything more?

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

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

1 to pay for it or not and shift costs to other market
2 participants.

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

8 JUSTICE SOTOMAYOR: General, could you turn
9 to the tax clause?

10 GENERAL VERRILLI: Yes. Thank you, so --

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

16 Do you know of any case where we've done
17 that?

18 GENERAL VERRILLI: Well, I think I would
19 point the Court to the license tax case, where it was --
20 was denominated a fee, a nontax, and the Court upheld it
21 as an exercise of the taxing power, in a situation in
22 which the structure of the law was very much like the
23 structure of this law, in that there was a separate
24 stand-alone provision that set the predicate and then a
25 separate provision imposing the fee.

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

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

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

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

20 GENERAL VERRILLI: They may still be
21 exercise of the tax -- exercises of the taxing power,
22 Justice Ginsburg, as this is, and I think there isn't a
23 case in which the Court has, to my mind, suggested
24 anything that bears this many indicia of a tax can't be
25 considered as an exercise of the taxing power.

1 In fact, it seems to me the license tax
2 cases point you in the opposite direction. And beyond
3 that, your -- the -- it seems to me the right way to
4 think about this question is whether it is capable of
5 being understood as an exercise of the tax power.

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

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

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

18 GENERAL VERRILLI: What the President
19 said --

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

22 GENERAL VERRILLI: The President said it
23 wasn't a tax increase because it ought to be understood
24 as an incentive to get people to have insurance. I
25 don't think it's fair to infer from that anything about

1 whether that is an exercise of the tax power or not.

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

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

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

21 The mortgage deduction works that
22 way. When the mortgage deduction is -- it's clearly an
23 exercise of the taxing power. When it's successful, it
24 raises less revenue for the Federal Government. It's
25 still an exercise of the taxing power. So, I don't --

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

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

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

23 It would be one thing if Congress explicitly
24 disavowed an exercise of the tax power. But given that
25 it hasn't done so, it seems to me that it's -- not only

1 is it fair to read this as an exercise of the tax power,
2 but this Court has got an obligation to construe it as
3 an exercise of the tax power, if it can be upheld on
4 that basis.

5 CHIEF JUSTICE ROBERTS: Well, why didn't
6 Congress call it a tax, then?

7 GENERAL VERRILLI: Well --

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

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

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

20 GENERAL VERRILLI: Well, I -- you know, I
21 don't -- there's nothing that I know of that illuminates
22 that. Certainly --

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

1 GENERAL VERRILLI: No. There are certain
2 limiting principles under the taxing power, and --

3 JUSTICE SOTOMAYOR: So, there has to be a
4 limiting principle as to when --

5 GENERAL VERRILLI: -- and they -- and I
6 think, of course, the Constitution imposes some: Got to
7 be uniform; can't be a tax on exports; if it's a direct
8 tax, it's got to be apportioned. Beyond that, the
9 limiting principle, as the Court has identified from
10 Drexel Furniture to Kurth Ranch, is that it can't be
11 punishment, punitive in the guise of a tax.

12 And there are three factors the Court has
13 identified to look at that. The first is the sanction
14 and how disproportionate it is to the conduct; the
15 second is whether there is scienter; and the third is
16 whether there is an administrative apparatus out there
17 to enforce the tax.

18 Now, in Bailey v. Drexel Furniture, for
19 example, the tax was 10 percent of the company's
20 profits, even if they had only one child laborer for one
21 day. There was a scienter requirement. And it was
22 enforced by the Department of Labor. It wasn't just
23 collected by the Internal Revenue Service.

24 Here you don't have any of those things.
25 This -- the penalty is calculated to be no more than, at

1 most, the equivalent of what one would have paid for
2 insurance that you've forgone. There is no scienter
3 requirement. There's no enforcement apparatus out
4 there. So, it's certainly --

5 JUSTICE ALITO: Can the --

6 GENERAL VERRILLI: -- consistent with those
7 limits.

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

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

22 JUSTICE SCALIA: So you're saying that all
23 the discussion we had earlier about how this is one big
24 uniform scheme and the Commerce Clause, blah, blah,
25 blah, it really doesn't matter. This is a tax, and the

1 Federal Government could simply have said, without all
2 of the rest of this legislation, could simply have said
3 everybody who doesn't buy health insurance at a certain
4 age will be taxed so much money, right?

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

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

9 GENERAL VERRILLI -- providing affordable
10 coverage for --

11 JUSTICE SCALIA: You didn't need that. If
12 it's a tax, it's only to --

13 GENERAL VERRILLI: It used its --

14 JUSTICE SCALIA: Raising money is enough.

15 GENERAL VERRILLI: It used its -- it is
16 justifiable under its tax power.

17 JUSTICE SCALIA: Okay. Extraordinary.

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

20 CHIEF JUSTICE ROBERTS: Thank you, General.

21 We'll take a pause for a minute or so,
22 Mr. Clement.

23 (Pause.)

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

1 Mr. Clement.

2 ORAL ARGUMENT OF PAUL D. CLEMENT

3 ON BEHALF OF THE RESPONDENTS FLORIDA, ET AL.

4 MR. CLEMENT: Mr. Chief Justice, and may it
5 please the Court:

6 The mandate represents an unprecedented
7 effort by Congress to compel individuals to enter
8 commerce in order to better regulate commerce. The
9 Commerce Clause gives Congress the power to regulate
10 existing commerce. It does not give Congress the far
11 greater power to compel people to enter commerce, to
12 create commerce essentially in the first place.

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

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

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

1 point of sale, you regulate commerce, that's within
2 Congress's commerce power.

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

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

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

1 point, and that would be regulating at the point of
2 sale.

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

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

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

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

1 services, insofar as the way health insurance companies
2 figure risk. That person who is sitting at home in his
3 or her living room doing nothing is an actuarial reality
4 that can and must be measured for health service
5 purposes; is that their argument?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 wasn't a valid regulation of the market in carriages.

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

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

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

17 I look back into history, and I see it seems
18 pretty clear that if there are substantial effects on
19 interstate commerce, Congress can act. And I look at
20 the person who's growing marijuana in her house, or I
21 look at the farmer who is growing wheat for home
22 consumption. This seems to have more substantial
23 effects.

24 Is this commerce? Well, it seems to me more
25 commerce than marijuana. I mean, is it, in fact, a

1 regulation? Well, why not? If creating the bank is, why
2 isn't this?

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

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

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

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

22 So, here, we have a group of 40 million, and
23 57 percent of those people visit emergency care or other
24 care, which we're paying for. And 22 percent of those
25 pay more than \$100,000 for that. And Congress says

1 they're in the midst of this big thing. We just want to
2 rationalize the system they're already in.

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

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

7 (Laughter.)

8 JUSTICE BREYER: Well, no, it's one
9 question. It's looking back at that -- looking back at
10 that history. The thing I concede, that you say to some
11 people go buy -- why does that make a difference in
12 terms of the Commerce Clause?

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

16 JUSTICE BREYER: It was both?

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

22 And what, of course, the Court didn't say,
23 and I think the Court would have had a very different
24 reaction to, is, you know, we're not just going to have
25 the bank, because that would be necessary and proper;

1 we're going to force the citizenry to put all of their
2 money in the bank, because, if we do that, then we know
3 the Bank of the United States will be secure.

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, Mr. Clement,
25 the key to the Government's argument to the contrary is

1 that everybody is in this market. It's all right to
2 regulate Wickard -- in Wickard v. Filburn, because
3 that's a particular market in which the farmer had been
4 participating.

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

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

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

24 MR. CLEMENT: Well, Justice Kagan, I'm not
25 sure that's right. I think what health insurance does

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

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

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

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

24 JUSTICE SOTOMAYOR: Well, that goes back to
25 the substantive due process question. Is this a

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

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

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

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

23 So, even the car market is different from
24 this market, where there's no way to get outside of the
25 regulatory web. And that's, I think, one of the real

1 problems with this because, I mean, we take as a
2 given --

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

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

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

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

20 MR. CLEMENT: Of course not --

21 JUSTICE BREYER: We don't know which?

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

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

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

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

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

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

25 JUSTICE KAGAN: Well, we're talking about

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

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

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

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

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

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

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

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

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

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

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

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

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

16 And in the same way, I think if the Framers
17 had understood the commerce power to include the power
18 to compel people to engage in commerce --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. CLEMENT: Well, Justice Breyer, let me
2 take them in --

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

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

10 Second of all --

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

17 But there is no conscription in the -- set
18 forth in the Constitution --

19 MR. CLEMENT: I agree --

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

22 MR. CLEMENT: I agree 100 percent, and I
23 think that was the Chief Justice's point, which was once
24 you open the door to compelling people into commerce
25 based on the narrow rationales that exist in this

1 industry, you are not going to be able to stop that
2 process.

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

4 JUSTICE SCALIA: I would like hear you
5 address Justice Breyer's other two principles.

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

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

24 CHIEF JUSTICE ROBERTS: And now maybe return
25 to Justice Sotomayor's question.

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

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

23 The second thing is I would urge you to read
24 the license tax case, which the Solicitor General says
25 is his best case for why you ignore the fact that a tax

1 is denominated into something other. Because that's a
2 case where the argument was that because the Federal
3 Government had passed a license, not a tax, that somehow
4 that allowed people to take actions that would have been
5 unlawful under State law, that this was some special
6 Federal license to do something that was forbidden by
7 State law. This Court looked beyond the label in order
8 to preserve federalism there.

9 What the Solicitor General and the
10 government ask you to do here is exactly the opposite,
11 which is to look past labels in order to up-end our
12 basic federalist system. And this --

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

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

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

21 MR. CLEMENT: Well, Justice Sotomayor, I
22 have to resist your premise, because I didn't answer,
23 yes, the States can do it because it would be a valid
24 regulation of intrastate commerce. I said, yes, the
25 States can do it because they have a police power, and

1 that is the fundamental difference between the States on
2 the one hand and the limited, enumerated Federal
3 Government on the other.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Clement.

6 Mr. Carvin.

7 ORAL ARGUMENT OF MICHAEL A. CARVIN

8 ON BEHALF OF THE RESPONDENTS NFIB, ET AL.

9 MR. CARVIN: Thank you, Mr. Chief Justice.
10 May it please the Court:

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

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

1 it has beneficial policy effects in the health care
2 market.

3 In other words, Congress does not have the
4 power to promote commerce. Commerce has -- Congress has
5 the power to regulate commerce. And if the power
6 exceeds their permissible regulatory authority, then the
7 law is invalid.

8 JUSTICE GINSBURG: I thought you --

9 CHIEF JUSTICE ROBERTS: Well, surely --

10 MR. CARVIN: I'm sorry.

11 CHIEF JUSTICE ROBERTS: Well, surely,
12 regulation includes the power to promote. Since the New
13 Deal, we've said there's regulation in -- there's a
14 market in agricultural products, and Congress has the
15 power to subsidize, to limit production, all sorts of
16 things.

17 MR. CARVIN: Absolutely, Chief Justice, and
18 that's the distinction I'm trying to draw. When they're
19 acting within their enumerated power, then obviously
20 they're promoting commerce.

21 But the Solicitor General wants to turn it
22 into a different power. He wants to say we have the
23 power to promote commerce, to regulate anything to
24 promote commerce. And if they have the power to promote
25 commerce, then they have the power to regulate

1 everything, right? Because --

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

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

22 CHIEF JUSTICE ROBERTS: Yet, we don't know
23 who they are.

24 MR. CARVIN: We don't, no, and we don't know
25 in advance, and -- but that doesn't change the basic

1 principle, that you are nonetheless forcing people for
2 paternalistic reasons to go into the insurance market to
3 insure against risks that they have made the voluntary
4 decision that they are not -- have decided not to.

5 JUSTICE GINSBURG: But the problem is --

6 MR. CARVIN: But even if --

7 JUSTICE GINSBURG: The problem is that they
8 are making the rest of us pay for it, because as much as
9 they say, well, we're not in the market, we don't know
10 when they -- the timing when they will be.

11 MR. CARVIN: With --

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

20 MR. CARVIN: Yes, but my point is this:

21 That, with respect, Justice Ginsburg, conflates the
22 people who do result in uncompensated care, the free
23 riders. Those are people who default on their health
24 care payments. That is an entirely different group of
25 people, an entirely different activity than being

1 uninsured.

2 So, the question is whether or not you can
3 regulate activity because it has a statistical
4 connection to an activity that harms commerce. And my
5 basic point to you is this: The Constitution only gives
6 Congress the power to regulate things that negatively
7 affect commerce or commerce regulation. It doesn't give
8 them the power to regulate things that are statistically
9 connected to things that negatively affect the
10 commerce --

11 JUSTICE KAGAN: Well, Mr. Carvin --

12 MR. CARVIN: -- because -- I'm sorry.

13 JUSTICE KAGAN: Please.

14 MR. CARVIN: I was just going to say,
15 because if they have that power, then they obviously
16 have the power to regulate everything, because
17 everything in the aggregate is statistically connected
18 to something that negatively affects commerce, and every
19 compelled purchase promotes commerce.

20 JUSTICE BREYER: So, in your view, right
21 there -- in your view -- in your view right there --

22 MR. CARVIN: Justice Breyer --

23 JUSTICE BREYER: Can I just --

24 MR. CARVIN: I'm sorry.

25 JUSTICE BREYER: I'm just picking on

1 something. I'd like to just -- if it turned out there
2 was some terrible epidemic sweeping the United States,
3 and we couldn't say that more than 40 or 50 percent -- I
4 can make the number as high as I want -- but the -- the
5 -- you'd say the Federal Government doesn't have the
6 power to get people inoculated, to require them to be
7 inoculated, because that's just statistical.

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

11 JUSTICE BREYER: Is your answer to that yes
12 or no?

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

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

16 MR. CARVIN: Yes.

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

21 MR. CARVIN: May --

22 JUSTICE BREYER: Please turn to Justice
23 Kagan.

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

25 JUSTICE BREYER: Yes.

1 MR. CARVIN: Violence against women as
2 obviously creates the same negative impression on fellow
3 citizens as this communicable disease, but the -- and it
4 has huge effects on the health care of our country.
5 Congress found that it increased health care costs by --

6 JUSTICE BREYER: I agree with you --

7 MR. CARVIN: Well, but --

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

10 MR. CARVIN: Now --

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

12 (Laughter.)

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

25 JUSTICE ALITO: Mr. Carvin, isn't there this

1 difference between Justice Breyer's hypothetical and the
2 law that we have before us here? In his hypothetical,
3 the harm to other people from the communicable disease
4 is the result of the disease. It is not the result of
5 something that the government has done, whereas here the
6 reason why there's cost-shifting is because the
7 government has mandated that. It has required hospitals
8 to provide emergency treatment; and, instead of paying
9 for that through a tax which would be borne by
10 everybody, it has required -- it has set up a system in
11 which the cost is surreptitiously shifted to people who
12 have health insurance and who pay their bills when they
13 go to the hospital.

14 MR. CLEMENT: Justice Alito, that is exactly
15 the Government's argument. It's an extraordinarily
16 illogical argument.

17 JUSTICE BREYER: Fine. Then if that's so,
18 is it -- let me just change my example under pressure --
19 (Laughter.)

20 JUSTICE BREYER: -- and say that in fact it
21 turns out that 90 percent of all automobiles driving
22 interstate without certain equipment put out pollution,
23 which travels interstate -- not 100 percent, maybe only
24 60 percent. Does the EPA have the power then to say
25 you've got to have an antipollution device? It's

1 statistical.

2 MR. CARVIN: What they can't do -- yes, if
3 you have a car, they can require you to have an
4 anti-pollution --

5 JUSTICE BREYER: Then you're -- then you're
6 not going on statistics; you're going on something else,
7 which is what I'd like to know what it is.

8 MR. CARVIN: It's this: They can't require
9 you to buy a car with an anti-pollution device. Once
10 you've entered the market and made a decision, they can
11 regulate the terms and conditions of the car that you
12 do, and they can do it for all sorts of reasons. What
13 they can't do it compel you to enter the market.

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

22 MR. CARVIN: If being born is entering the
23 market, then I can't think of a more plenary power
24 Congress can have, because that literally means they can
25 regulate every human activity from cradle to grave. I

1 thought that's what distinguished the plenary police
2 power from the very limited commerce power.

3 I don't disagree that giving the Congress
4 plenary power to mandate property transfers from A to B
5 would be a very efficient way of helping B and of
6 accomplishing Congress's objectives. But the Framers --

7 JUSTICE BREYER: I see the point. You can
8 go back to -- go back to Justice Kagan. Don't forget
9 her question.

10 JUSTICE KAGAN: I've forgotten my question.

11 (Laughter.)

12 MR. CARVIN: I was facing the same dilemma,
13 Justice Kagan. I --

14 JUSTICE GINSBURG: Well, let me -- let me
15 ask a question that I asked Mr. Clement. It just seems --

16 JUSTICE KAGAN: See what it means to be the
17 junior Justice?

18 (Laughter.)

19 JUSTICE GINSBURG: It just seems very
20 strange to me that there's no question we can have a
21 Social Security system -- besides all the people who say
22 I am being forced to pay for something I don't want --
23 and this, which seems to me, to try to get care for the
24 ones who need it by having everyone in the pool, but is
25 also trying to preserve a role for the private sector,

1 for the private insurers. There's something very odd
2 about that, that the government can take over the whole
3 thing and we all say, oh, yes, that's fine. But if the
4 government wants to get -- to preserve private insurers,
5 it can't do that.

6 MR. CARVIN: Well, I don't think the test of
7 a law's constitutionality is whether it more adheres to
8 the libertarian principles of the Cato Institute or the
9 statist principles of someone else. I think the test of
10 the law is -- constitutionally is not those policy
11 questions; it's whether or not the law is regulating
12 things that negatively affect commerce or don't.

13 And since obviously the failure to purchase
14 an item doesn't create the kind of effects on supply and
15 demand that the market participants in Wickard and Raich
16 did and doesn't in any way interfere with regulation of
17 the insurance companies, I don't think it can pass the
18 basic --

19 JUSTICE GINSBURG: I thought -- I thought
20 that Wickard was you must buy; we're not going to let
21 you use the home-grown wheat. You've got to go out in
22 the market and buy that wheat that you don't want.

23 MR. CARVIN: Oh, but let's be careful about
24 what they were regulating in Wickard, Justice Ginsburg.
25 What they were regulating was the supply of wheat. It

1 didn't in any way imply that they could require every
2 American to go out and buy wheat. And the -- yes, one
3 of the consequences of regulating local market
4 participants is it'll affect the supply and the demand
5 for the product. That's why you can regulate them,
6 because those local market participants have the same
7 effect on the interstate market that a black market has
8 on a legal market.

9 But none of that is true -- in other words,
10 you can regulate local bootleggers, but that doesn't
11 suggest you can regulate teetotalers, people who stay
12 out of the liquor market, because they don't have any
13 negative effect on the existing market participants or
14 on regulation of those market participants.

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

24 So, the question is, can Congress respond to
25 those facts, that we have no crystal ball, that we can't

1 tell who is and isn't going to be in the health
2 insurance market, and say most of these people will be
3 and most of these people will thereby impose costs on
4 the rest of us and that's a problem that we can deal
5 with on a class-wide basis?

6 MR. CARVIN: No again. The people who
7 impose the costs on the rest of us are people who engage
8 in a different activity at a different time, which is
9 defaulting on their health care payments. It's not the
10 uninsured. Under your theory, you could regulate
11 anybody if they've got a statistical connection to a
12 problem. You could say, since we could regulate people
13 who enter into the mortgage market and impose mortgage
14 insurance on them, we can simply impose the requirement
15 to buy private mortgage insurance on everybody before
16 they have entered the market, because we're doing it in
17 this prophylactic way before it develops. And that --

18 CHIEF JUSTICE ROBERTS: No, no, that's not
19 -- I don't think that's fair, because not everybody is
20 going to enter the mortgage market. The Government's
21 position is that almost everybody is going to enter the
22 health care market.

23 MR. CARVIN: Two points, one of which
24 Mr. Clement's already made, which is the health
25 insurance market is different than the health care

1 market. But let me take it on full-stride. I think
2 everybody is in the milk market. I think everybody is
3 in the wheat product market. But that doesn't suggest
4 that the government compel you to buy five gallons of
5 meat or five bushels of wheat, because they are not
6 regulating commerce.

7 Whether you're a market participant or not,
8 they are still requiring you to make a purchase that you
9 don't want to do.

10 And to get back to your facial example --

11 JUSTICE SOTOMAYOR: But then that's true of
12 almost every product.

13 MR. CARVIN: I'm sorry?

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

22 MR. CARVIN: You are not forced to buy a
23 product you don't want. And I agree with you that since
24 the government regulates all markets, there is no
25 limiting principle on their compelled purchase. When

1 they put these environmental controls on the car --

2 JUSTICE SOTOMAYOR: They force me to buy --

3 MR. CARVIN: I'm sorry.

4 JUSTICE SOTOMAYOR: They force me to buy if
5 I need --

6 MR. CARVIN: No. I'm sorry.

7 JUSTICE SOTOMAYOR: --unpasteurized goods,
8 goods that don't have certain pesticides but have
9 others. There is government compulsion in almost every
10 economic decision because the government regulates so
11 much. It's a condition of life that some may rail
12 against, but --

13 MR. CARVIN: Let's think about it this way:
14 Yes, when you've entered the marketplace, they can
15 impose all sorts of restrictions on you, and they can
16 impose, for example, all kinds of restrictions on States
17 after they've enacted laws. They can wipe out the laws.
18 They can condition them.

19 But what can't they do? They can't compel
20 States to enact laws. They can't compel States to carry
21 out Federal law. And I am arguing for precisely the
22 same distinction, because everyone intuitively
23 understands that regulating participants after A and B
24 have entered into a contract is fundamentally less
25 intrusive --

1 JUSTICE SOTOMAYOR: But wait a minute. We
2 let --

3 MR. CARVIN: -- than requiring A to
4 contract --

5 JUSTICE SOTOMAYOR: We let the government
6 regulate the manufacturing process whether or not the
7 goods will enter into interstate commerce, merely
8 because they might statistically. We let -- there's all
9 sorts of government regulation of manufacturing plants,
10 of agricultural farms, of all sorts of -- of activity
11 that will be purely intrastate because it might affect
12 interstate activity.

13 MR. CARVIN: I fully agree with you, Justice
14 Sotomayor. And I think --

15 JUSTICE SOTOMAYOR: So, how is that
16 different from saying you are self-insuring today,
17 you're forgoing insurance? Why isn't that a predecessor
18 to the need that you're eventually going to have?

19 MR. CARVIN: The cases you referred to I
20 think effectively eliminated the distinction between
21 participants in the intrastate market vis-à-vis
22 participants in the interstate market. None of those
23 cases suggest that you can regulate people who are
24 outside of the market on both an intrastate and
25 interstate level by compelling them to enter into the

1 market. And that --

2 JUSTICE BREYER: But what about -- you know,
3 the simplest counter-example for me to suggest is you've
4 undoubtedly read Judge Sutton's concurring opinion. He
5 has about two pages, it seemed to me, of examples where
6 everyone accepts the fact that under these kinds of
7 regulations the government can compel people to buy
8 things they don't otherwise want to buy.

9 For example, he gives -- even in that farm
10 case, the farmer was being forced to go out and buy
11 grain to feed to his animals because he couldn't raise
12 it at home. You know, and he goes through one example
13 after another. So, what is your response to that, which
14 you've read?

15 MR. CARVIN: Judge Sutton is wrong in each
16 and every example. There was no -- there was no
17 compulsion in Raich for him to buy wheat. He could have
18 gotten wheat substitutes, or he could have not sold
19 wheat, which is actually what he was doing. There is a
20 huge difference between conditioning regulation, i.e.,
21 conditioning access to the health care market and saying
22 you must buy a product, and forcing you to buy a
23 product.

24 JUSTICE GINSBURG: I thought that it --

25 MR. CARVIN: And that -- that -- I'm sorry.

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

11 MR. CARVIN: The guaranteed issue.

12 JUSTICE GINSBURG: Yes. That that is
13 legitimate Commerce Clause legislation?

14 MR. CARVIN: Oh, sure. And that's why --
15 but we didn't -- don't in any way impede that sort of
16 regulation. These nondiscrimination regulations will
17 apply to every insurance company just as Congress
18 intended whether or not we buy insurance. We're not --

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

25 MR. CARVIN: It depends what you mean by

1 "work." It'll work just fine in ensuring that no sick
2 people are discriminated against. What -- but when you
3 do that, Congress --

4 JUSTICE GINSBURG: But how about the sick
5 people? Why would they insure early if they were going to
6 be protected if they get insurance late?

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

17 JUSTICE SOTOMAYOR: Do you think that there
18 is -- what percentage of the American people who took
19 their son or daughter to an emergency room and that
20 child was turned away because the parent didn't have
21 insurance -- do you think there's a large percentage of
22 the American population who would stand for the death of
23 that child --

24 MR. CARVIN: One of the most --

25 JUSTICE SOTOMAYOR: -- if they had an

1 allergic reaction and a simple shot would have saved the
2 child?

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

15 JUSTICE SOTOMAYOR: I'm sorry. Did you say
16 the penalty's okay but not the mandate? I'm sorry.
17 Maybe I've misheard you.

18 MR. CARVIN: No. No, no. I was -- they
19 create this straw man that says, look, the only
20 alternative to doing it the way we've done it, if we
21 condition access to health care on buying health
22 insurance, the only way you can enforce that is making
23 sick people not get care. I'm saying no, no. There's a
24 perfectly legitimate way they could enforce their
25 alternative, i.e., requiring you to buy health insurance

1 when you access health care, which is the same penalty
2 structure that's in the Act.

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

13 They're making young, healthy people
14 subsidize insurance premiums --

15 JUSTICE GINSBURG: Well, we all --

16 MR. CARVIN: -- for the cost that the
17 nondiscrimination provisions have put on insurance
18 premiums --

19 JUSTICE SOTOMAYOR: So, the --

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

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

Official

1 MR. CARVIN: Yes.

2 JUSTICE SOTOMAYOR: That would be okay?

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

4 JUSTICE SOTOMAYOR: Okay. Congress can --

5 MR. CARVIN: A way to correct that --

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

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

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

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

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

9 MR. CARVIN: No. Not --

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

14 MR. CARVIN: Right. And everywhere that
15 it's --

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

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

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

1 government set up these emergency room laws. The
2 government set up Medicaid. The government set up
3 Medicare. The government set up CHIP, and there are 40
4 million people who don't have the private insurance.

5 In that world, the government has set up
6 commerce. It's all over the United States. And in that
7 world, of course, the decision by the 40 million not to
8 buy the insurance affects that commerce and
9 substantially so.

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

16 MR. CARVIN: That's the --

17 JUSTICE BREYER: So, that's the part of your
18 argument I'm not hearing.

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

1 to regulate the 100 percent of the uninsured at the
2 risk --

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

5 MR. CARVIN: Okay.

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

16 That's my concern in the case.

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

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

1 prohibiting us from buying the only economically
2 sensible product that we would want, catastrophic
3 insurance.

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

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

14 So, Justice Kennedy, even if we were going
15 to create exceptions for people that are outside of
16 commerce and inside of commerce, surely we'd make
17 Congress do a closer nexus and say, look, we're really
18 addressing this problem; we want these 30-year-olds to
19 get catastrophic health insurance. And not only did
20 they -- they deprived them of that option.

21 And I think that illustrates the dangers of
22 giving Congress these plenary powers, because they can
23 always leverage them. They can always come up with some
24 public policy rationale that converts the power to
25 regulate commerce into the power to promote commerce,

1 which, as I was saying before, is the one that I think
2 is plenary.

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

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

17 MR. CARVIN: The problem you identify is
18 exactly the problem you would create if you bought the
19 government's bogus limiting principles. You'd have to
20 draw distinctions between the insurance industry and the
21 car industry and all of that, returning to the Commerce
22 Clause jurisprudence that bedeviled the Court before the
23 1930s, where they were drawing all these kinds of
24 distinctions among industries; whereas our test is
25 really very simple. Are you buying the product, or is

1 Congress compelling you to buy the product? I can't
2 think of a brighter line.

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

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

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

19 The Framers consciously gave Congress the
20 ability to regulate commerce, because that's not a
21 particularly threatening activity that deprives you of
22 individual freedom.

23 If you were required -- if you were
24 authorized to require A to transfer property to B, you
25 have, as the early cases put it, a monster in

1 legislation which is against all reason and justice,
2 because everyone intuitively understands that regulating
3 people who voluntarily enter into contracts in setting
4 terms and conditions does not create the possibility of
5 Congress compelling wealth transfers among the
6 citizenry. And that is precisely why the Framers denied
7 them the power to compel commerce and precisely why they
8 didn't give them plenary power.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Carvin.

11 General Verrilli, you have 4 minutes
12 remaining.

13 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,
14 ON BEHALF OF THE PETITIONERS

15 GENERAL VERRILLI: Thank you,
16 Mr. Chief Justice.

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

24 That won't work. The reason it won't work
25 is because people will still show up at the hospital or

1 at their physician's office seeking care without
2 insurance, causing the cost-shifting problem. And
3 Mr. Clement's suggestion that they can be signed up for
4 a high risk pool at that point is utterly unrealistic.

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

13 That is the kind of choice of means that
14 McCulloch says that the Constitution leaves to the
15 democratically accountable branches of government.

16 There is no temporal limitation in the
17 Commerce Clause. Everyone subject to this regulation is
18 in or will be in the health care market. They are just
19 being regulated in advance. That's exactly the kind of
20 thing that ought to be left to the judgment of Congress
21 and the democratically accountable branches of
22 government.

23 And I think this is actually a paradigm
24 example of the kind of situation that Chief Justice
25 Marshall envisioned in McCulloch itself, that the

1 provisions of the Constitution needed to be interpreted
2 in a manner that would allow them to be effective in
3 addressing the great crises of human affairs that the
4 Framers could not even envision.

5 But if there's any doubt about that under
6 the Commerce Clause, then I urge this Court to uphold
7 the -- the minimum coverage provision as an exercise of
8 the taxing power.

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, General.
24 Counsel, we'll see you tomorrow.

25 (Whereupon, at 12:02 p.m., the case in the

1 above-entitled matter was submitted.)

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