

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL FEDERATION OF INDEPENDENT :

4 BUSINESS, ET AL., :

5 Petitioners : No. 11-393

6 v. :

7 KATHLEEN SEBELIUS, SECRETARY OF :

8 HEALTH AND HUMAN SERVICES, ET AL. :

9 - - - - -x

10 and

11 - - - - -x

12 FLORIDA, ET AL., :

13 Petitioners : No. 11-400

14 v. :

15 DEPARTMENT OF HEALTH AND :

16 HUMAN SERVICES, ET AL. :

17 - - - - -x

18 Washington, D.C.

19 Wednesday, March 28, 2012

20

21 The above-entitled matter came on for oral
22 argument before the Supreme Court of the United States
23 at 10:19 a.m.

24 APPEARANCES:

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

1 Petitioners.

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

4 Respondents.

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

6 Court-appointed amicus curiae.

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	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	EDWIN S. KNEEDLER, ESQ.	
7	On behalf of the Respondents	28
8	ORAL ARGUMENT OF	
9	H. BARTOW FARR, III, ESQ.	
10	For Court-appointed amicus curiae	55
11	REBUTTAL ARGUMENT OF	
12	PAUL D. CLEMENT, ESQ.	
13	On behalf of the Petitioners	79
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
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15
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17
18
19
20
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24
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P R O C E E D I N G S

(10:19 a.m.)

CHIEF JUSTICE ROBERTS: We will continue argument this morning in Case Number 11-393, National Federation of Independent Business v. Sebelius and case 11-400, Florida v. The Department of HHS.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

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

If the individual mandate is unconstitutional, then the rest of the Act cannot stand. As Congress found and the Federal Government concedes, the community rating and guaranteed-issue provisions of the Act cannot stand without the individual mandate. Congress found that the individual mandate was essential to their operation. And not only can guaranteed-issue and community-rating not stand, not operate in the manner that Congress intended, they would actually counteract Congress's basic goal of providing patient protection but also affordable care.

If you do not have the individual mandate to force people into the market then community rating and guaranteed-issue will cause the cost of premiums to

1 skyrocket. We can debate the order of magnitude of that
2 but we can't debate that the direction will be upward.
3 We also can't debate --

4 JUSTICE SOTOMAYOR: Counsel, that may well
5 be true. The economists are going back and forth on
6 that issue, and the figures vary from up 10 percent to
7 up 30. We are not in the habit of doing the legislative
8 findings.

9 What we do know is that for those States
10 that found prices increasing, that they found various
11 solutions to that. In one instance, and we might or may
12 not say that it's unconstitutional, Massachusetts passed
13 the mandatory coverage provision. But others adjusted
14 some of the other provisions.

15 Why shouldn't we let Congress do that, if in
16 fact, the economists prove, some of the economists prove
17 right, that prices will spiral? What's wrong with
18 leaving it to -- in the hands of the people who should
19 be fixing this, not us?

20 MR. CLEMENT: Well, a couple of questions --
21 a couple of responses, Justice Sotomayor. First of all,
22 I think that it's very relevant here that Congress had
23 before it as examples some of the States that had tried
24 to impose guaranteed-issue and community rating and did
25 not impose an individual mandate. And Congress rejected

1 that model. So your question is quite right in the
2 saying that it's not impossible to have guaranteed-issue
3 and community-rating without an individual mandate. But
4 it's a model that Congress looked at and specifically
5 rejected.

6 And then, of course, there is Congress's own
7 finding, and their finding, of course, this is (i),
8 which is 43(a) of the government's brief in the appendix,
9 Congress specifically found that having the individual
10 mandate is essential to the operation of
11 guaranteed-issue and community-rating.

12 JUSTICE SOTOMAYOR: That's all it said it's
13 essential to. I mean, I'm looking at it. The
14 exchanges, the State exchanges are information-
15 gathering facilities that tell insurers what the various
16 policies actually mean. And that has proven to be a
17 cost saver in many of the States who have tried it. So
18 why should we be striking down a cost saver when if what
19 your argument is, was, that Congress was concerned about
20 costs rising? Why should we assume they wouldn't have
21 passed that information?

22 MR. CLEMENT: I think a couple of things.
23 One, you get -- I mean, I would think you are going to
24 have to take the bitter with the sweet. And if
25 Congress -- if we are going to look at Congress's goal

1 of providing patient protection but also affordable
2 care, we can't -- I don't think it works to just take
3 the things that save money and cut out the things that
4 are going to make premiums more expensive. But at a
5 minimum --

6 JUSTICE SOTOMAYOR: I want a bottom line is
7 why don't we let Congress fix it?

8 MR. CLEMENT: Well, let me answer the bottom
9 line question, which is, no matter what you do in this
10 case, at some point there's going to be -- if you strike
11 down the mandate, there is going to be something for
12 Congress to do. The question is really, what task do
13 you want to give Congress. Do you want to give Congress
14 the task of fixing the statute after something has been
15 taken out, especially a provision at the heart, or do
16 you want to give Congress the task of fixing health
17 care? And I think it would be better in this
18 situation --

19 JUSTICE SOTOMAYOR: We are not taking -- If
20 we strike down one provision, we are not taking that
21 power away from Congress. Congress could look at it
22 without the mandatory coverage provision and say, this
23 model doesn't work; let's start from the beginning. Or
24 it could choose to fix what it has. We are not
25 declaring -- one portion doesn't force Congress into any

1 path.

2 MR. CLEMENT: And of course that's right,
3 Justice Sotomayor, and no matter what you do here,
4 Congress will have the options available. So if you, if
5 you strike down only the individual mandate, Congress
6 could say the next day: Well, that's the last thing we
7 ever wanted to do so we will strike down the rest of the
8 statute immediately and then try to fix the problem. So
9 whatever you do, Congress is going to have options. The
10 question is --

11 JUSTICE SCALIA: Well, there is such a thing
12 as legislative inertia, isn't there?

13 MR. CLEMENT: That's exactly what I was
14 going to say, Justice Scalia, which is, I think the
15 question for this Court is, we all recognize there is
16 legislative inertia. And then the question is: What is
17 the best result in light of that reality?

18 JUSTICE SOTOMAYOR: Are you suggesting that
19 we should take on more power to the Court?

20 MR. CLEMENT: No --

21 JUSTICE SOTOMAYOR: Because Congress would
22 choose to take one path rather than another. That's
23 sort of taking onto the Court more power than one I
24 think would want.

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

1 asking this Court to take on straight on the idea of the
2 basic remedial inquiry into severability which looks to
3 be intent of the Congress --

4 JUSTICE SCALIA: Mr. Clement, I want to ask
5 you about that. Why -- why do we look to the -- are you
6 sure we look to the intent of the Congress? I thought
7 that, you know, sometimes Congress says that these
8 provisions will -- all the provisions of this Act will
9 be severable. And we ignore that when the Act really
10 won't work. When the remaining provisions just won't
11 work. Now how can you square that reality with the
12 proposition that what we're looking for here is what
13 would this Congress have wanted?

14 MR. CLEMENT: Well, two responses,
15 Justice Scalia. We can look at this Court's cases on
16 severability, and they all formulate the task a little
17 bit differently.

18 JUSTICE SCALIA: Yes, they sure do.

19 MR. CLEMENT: And every one of them talks
20 about congressional intent. But here's, here's the
21 other answer --

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

24 MR. CLEMENT: It is right. And here is how
25 I would answer your question, which is, when Congress

1 includes a severability clause, it is addressing the
2 issue in the abstract. It doesn't say: No matter which
3 provisions you strike down, we absolutely, positively
4 want what's left.

5 JUSTICE SCALIA: All right. The consequence
6 of your proposition, would Congress have enacted it
7 without this provision, okay that's the consequence.
8 That would mean that if we struck down nothing in this
9 legislation but the -- what you call the corn husker
10 kickback, okay, we find that to violate the
11 constitutional proscription of venality, okay?

12 (Laughter.)

13 JUSTICE SCALIA: When we strike that down,
14 it's clear that Congress would not have passed it
15 without that. It was the means of getting the last
16 necessary vote in the Senate. And you are telling us
17 that the whole statute would fall because the corn
18 husker kickback is bad. That can't be right.

19 MR. CLEMENT: Well, Justice Scalia, I think
20 it can be, which is the basic proposition, that it's
21 congressional intent that governs. Now everybody on
22 this Court has a slightly different way of dividing
23 legislative intent. And I would suggest the one common
24 brand among every member of this Court as I understand
25 it is you start with the text. Everybody can agree with

1 that.

2 JUSTICE KAGAN: So Mr. Clement, let's start
3 with the text. Then you suggest, and I think that there
4 is -- this is right, that there is a textual basis for
5 saying that the guaranteed-issue and the community
6 ratings provisions are tied to the mandate. And you
7 said -- you pointed to where that was in the findings.

8 Is there a textual basis for anything else,
9 because I've been unable to find one. It seems to me
10 that if you look at the text, the sharp dividing line is
11 between guaranteed-issue and community ratings on the
12 one hand, everything else on the other.

13 MR. CLEMENT: Well, Justice Kagan I would be
14 delighted to take you through my view of the text and
15 why there are other things that have to fall.

16 The first place I would ask you to look is
17 finding J which is on the same page 43 A. And as I read
18 that, that's a finding that the individual mandate is
19 essential to the operation of the exchanges. But there
20 are other links between guaranteed-issue and community
21 ratings and the exchanges. And there I think it's just
22 the way that the exchanges are supposed to work. And
23 the text makes this clear is they are supposed to
24 provide a market where people can compare community
25 rated insurance. That's what makes the exchanges

1 function.

2 JUSTICE KAGAN: Although the exchanges
3 function perfectly well in Utah where there is no
4 mandate. They function differently, but they function.
5 And the question is always, does Congress want half a
6 loaf. Is half a loaf better than no loaf? And on
7 something like the exchanges it seems to me a perfect
8 example where half a loaf is better than no loaf. The
9 exchanges will do something. They won't do everything
10 that Congress envisioned.

11 MR. CLEMENT: Well, Justice Kagan, I think
12 there are situations where half a loaf is actually worse
13 and I want to address that. But before I do it --
14 broadly. But before I do that, if I could stick with
15 just the exchanges.

16 I do think the question that this Court is
17 supposed to ask is not just whether they can limp along
18 and they can operate independently, but whether they
19 operate in the manner that Congress intended. And
20 that's where I think the exchanges really fall down.

21 Because the vision of the exchanges was that
22 if you got out of this current situation where health
23 insurance is basically individualized price based on
24 individualized underwriting and you provide community
25 ratings, then it's going to be very easy for people to

1 say okay, well this is a silver policy and this is a
2 bronze policy and this is a gold policy and we can, you
3 know, I can just pick which insurer provides what I
4 think is going to be the best service based on those
5 comparable provisions.

6 JUSTICE KAGAN: Mr. Clement, you just said
7 something which you say a lot in your brief. You say
8 the question is the manner in which it would have
9 operated. And I think that that's not consistent with
10 our cases. And I guess the best example would be Booker
11 where we decided not to sever provisions,
12 notwithstanding that the sentencing guidelines clearly
13 operate in a different manner now than they did when
14 Congress passed them. They operate as advisory rather
15 than mandatory.

16 MR. CLEMENT: Well, but Justice Kagan, I
17 mean I actually think Booker supports our point as well,
18 because there are two aspects of the remedial holding of
19 Booker. And the first part of it, which I think
20 actually very much supports our point is where the
21 majority rejects the approach of the dissent, which
22 actually would have required nothing in the statute to
23 have been struck, not a single word.

24 But nonetheless this Court said, well, if
25 you do that then all of the sentencing is basically

1 going to be done by a combination of the juries and the
2 prosecutors and the judges are going to be cut out. And
3 the Court said the one thing we know is that's not the
4 manner in which Congress thought that this should
5 operate.

6 Now later they make a different judgment
7 about the -- which particular provisions to cut out.
8 But I do think Booker is consistent with this way of
9 looking at it and certainly consistent with Brock, the
10 opinion we rely on because there the Court only reached
11 that part of the opinion after they already found that
12 the must-hire provision operated functionally
13 independent from the legislative detail, so --

14 JUSTICE GINSBURG: Mr. Clement, there are so
15 many things in this Act that are unquestionably okay. I
16 think you would concede that reauthorizing what is the
17 Indian Healthcare Improvement Act changes to long
18 benefits, why make Congress redo those? I mean it's a
19 question of whether we say everything you do is no good,
20 now start from scratch, or to say, yes, there are many
21 things in here that have nothing to do frankly with the
22 affordable healthcare and there are some that we think
23 it's better to let Congress to decide whether it wants
24 them in or out.

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

1 wrecking operation, which is what you are requesting, or
2 a salvage job. And the more conservative approach would
3 be salvage rather than throwing out everything.

4 MR. CLEMENT: Well, Justice Ginsburg, two
5 kinds of responses to that. One, I do think there are
6 some provisions that I would identify as being at the
7 periphery of this statute. And I'll admit that the case
8 for severing those is perhaps the strongest.

9 But I do think it is fundamentally
10 different, because if we were here arguing that some
11 provision on the periphery of the statute, like the
12 Biosimilars Act or some of the provisions that you've
13 mentioned was unconstitutional, I think you'd strike it
14 down and you wouldn't even think hard about
15 severability.

16 What makes this different is that the
17 provisions that have constitutional difficulties or are
18 tied at the hip to those provisions that have the
19 constitutional difficulty are the very heart of this
20 Act. And then if you look at how they are textually
21 interconnected to the exchanges, which are then
22 connected to the tax credits, which are also connected
23 to the employer mandates, which is also connected to
24 some of the revenue offsets, which is also connected to
25 Medicaid, if you follow that through what you end up

1 with at the end of that process is just sort of a hollow
2 shell. And at that point I think there is a strong
3 argument for not -- I mean, you can't possibly think
4 that Congress would have passed that hollow shell
5 without the heart of the Act.

6 CHIEF JUSTICE ROBERTS: Well, but it would
7 have -- it would have passed parts of the hollow shell.
8 I mean, a lot of this is reauthorization of
9 appropriations that have been reauthorized for the
10 previous 5 or 10 years and it was just more convenient
11 for Congress to throw it in in the middle of the
12 2700 pages than to do it separately. I mean, can you
13 really suggest -- I mean, they've cited the Black Lung
14 Benefits Act and those have nothing to do with any of
15 the things we are talking about.

16 MR. CLEMENT: Well, Mr. Chief Justice, they
17 tried to make them germane. But I'm not here to tell
18 you that -- some of their -- surely there are provisions
19 that are just looking for the next legislative vehicle
20 that is going to make it across the finish line and
21 somebody's going to attach it to anything that is
22 moving. I mean, I'll admit that.

23 But the question is when everything else
24 from the center of the Act is interconnected and has to
25 go, if you follow me that far, then the question is

1 would you keep this hollowed-out shell?

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

3 JUSTICE KENNEDY: But I'm still not sure,
4 what is the test -- and this was the colloquy you had
5 with Justice Scalia with the corn husker hypothetical.
6 So I need to know what standard you are asking me to
7 apply. Is it whether as a rational matter separate
8 parts could still function, or does it focus on the
9 intent of the Congress?

10 If you -- suppose you had party A wants
11 proposal number 1, party B wants proposal number 2.
12 Completely unrelated. One is airline rates, the other
13 is milk regulation. And we -- and they decide them
14 together. The procedural rules are these have to be
15 voted on as one. They are both passed. Then one is
16 declared unconstitutional. The other can operate
17 completely independently. Now, we know that Congress
18 would not have intended to pass one without the other.
19 Is that the end of it, or is there some different test?
20 Because we don't want to go into legislative history,
21 that's intrusive, so we ask whether or not an objective
22 -- as an objective rational matter one could function
23 without -- I still don't know what the test is that we
24 are supposed to apply. And this is the same question as
25 Justice Scalia asked. Could you give me some help on

1 that?

2 MR. CLEMENT: Sure. Justice Kennedy, the
3 reality is I think this Court's opinions have at various
4 times applied both strains of the analysis.

5 JUSTICE KENNEDY: And which one -- and what
6 test do you suggest that we follow if we want to clarify
7 our jurisprudence?

8 MR. CLEMENT: I'm -- I'm a big believer in
9 objective tests, Justice Kennedy. I would be perfectly
10 happy with you to apply a more textually based objective
11 approach. I think there are certain justices that are
12 more inclined to take more of a peek at legislative
13 history, and I think if you look at the legislative
14 history of this it would only fortify the conclusion
15 that you would reach from a very objective textual
16 inquiry. But I am happy to focus the Court on the
17 objective textual inquiry.

18 CHIEF JUSTICE ROBERTS: I don't
19 understand --

20 JUSTICE KENNEDY: And that objective test is
21 what?

22 MR. CLEMENT: Is whether the statute can
23 operate in the manner that Congress -- that Congress
24 intended.

25 JUSTICE SOTOMAYOR: No statute can do that,

1 because once we chop off a piece of it, by definition,
2 it's not the statute Congress passed. So it has to be
3 something more than that.

4 MR. CLEMENT: Justice Sotomayor, every one
5 of your cases, if you have a formulation for
6 severability, if you interpret it woodenly it becomes
7 tautological. And Justice Blackmun addressed this in
8 footnote 7 of the Brock opinion that we rely on, where
9 he says: Of course it's not just -- you know, it
10 doesn't operate exactly in the manner because it doesn't
11 have all the pieces, but you still make an inquiry as to
12 whether when Congress links two provisions together and
13 one really won't work without the other --

14 JUSTICE SOTOMAYOR: So what is wrong with
15 the presumption that our law says, which is we presume
16 that Congress would want to sever? Wouldn't that be the
17 simplest, most objective test? Going past what
18 Justice Scalia says we have done, okay, get rid of
19 legislative intent altogether, which some of our
20 colleagues in other contexts have promoted, and just
21 say: Unless Congress tells us directly, it's not
22 severable, we shouldn't sever. We should let them fix
23 their problems.

24 You still haven't asked -- answered me why
25 in a democracy structured like ours, where each branch

1 does different things, why we should involve the Court
2 in making the legislative judgment?

3 MR. CLEMENT: Justice Sotomayor let me try
4 to answer the specific question and then answer the big
5 picture question. The specific question is, I mean, you
6 could do that. You could adopt a new rule now that
7 basically says, look, we've severed --

8 JUSTICE SOTOMAYOR: It's not a new rule. We
9 presume. We've rebutted the presumption in some
10 cases -- -

11 MR. CLEMENT: Right.

12 JUSTICE SOTOMAYOR: But some would call that
13 judicial action.

14 MR. CLEMENT: I think in fairness, though,
15 Justice Sotomayor, to get to the point you are wanting
16 to get to, you would have to ratchet up that presumption
17 a couple of ticks on the scale, because the one thing --

18 JUSTICE SOTOMAYOR: And what's wrong with
19 that?

20 MR. CLEMENT: Well, one thing that's wrong
21 with that, which is still at a smaller level, is that's
22 inconsistent with virtually every statement in every one
23 of your severability opinions, which all talk about
24 congressional intent.

25 JUSTICE KAGAN: Well, it's not inconsistent

1 with our practice, right, Mr. Clement? I mean, you have
2 to go back decades and decades and decades, and I'm not
3 sure even then you could find a piece of legislation
4 that we refused to sever for this reason.

5 MR. CLEMENT: I don't think that's right,
6 Justice Kagan. I think there are more recent examples.
7 A great example I think which sort of proves, and maybe
8 is a segue to get to my broader point, is a case that
9 involves a State statute, not a Federal statute, but I
10 don't think anything turns on that, is Randall against
11 Sorrell, where this Court struck down various provisions
12 of the Vermont campaign finance law.

13 But there were other contribution provisions
14 that were not touched by the theory that the Court used
15 to strike down the contribution limits. But this Court
16 at the end of the opinion said: There is no way to
17 think that the Vermont legislator would have wanted
18 these handful of provisions there on the contribution
19 side, so we will strike down the whole thing.

20 And if I could make the broader point, I
21 mean, I think the reason it makes sense in the democracy
22 with separation of powers to in some cases sever the
23 whole thing is because sometimes a half a loaf is worse.
24 And a great example, if I dare say so, is Buckley. In
25 Buckley this Court looked at a statute that tried to, in

1 a coherent way, strike down limits on contributions and
2 closely related expenditures.

3 This Court struck down the ban on
4 expenditures, left the contribution ban in place, and
5 for 4 decades Congress has tried to fix what's left of
6 the statute, largely unsuccessfully, whereas it would
7 have I think worked much better from a democratic and
8 separation of powers standpoint if the Court would have
9 said: Look, expenditures are -- you can't limit
10 expenditures under the Constitution; the contribution
11 provision is joined at the hip. Give Congress a chance
12 to actually fix the problem.

13 JUSTICE KAGAN: Mr. Clement --

14 JUSTICE BREYER: Could I ask you one
15 question, which is a practical question. I take as a
16 given your answer to Justice Kennedy, you are saying
17 let's look at it objectively and say what Congress has
18 intended, okay? This is the mandate in the community,
19 this is Titles I and II, the mandate, the community,
20 pre-existing condition, okay? Here's the rest of it,
21 you know, and when I look through the rest of it, I have
22 all kinds of stuff in there. And I haven't read every
23 word of that, I promise. As you pointed out, there is
24 biosimilarity, there is breast feeding, there is
25 promoting nurses and doctors to serve underserved areas,

1 there is the CLASS Act, etcetera.

2 What do you suggest we do? I mean, should
3 we appoint a special master with an instruction? Should
4 we go back to the district court? You haven't argued
5 most of these. As I hear you now, you're pretty close
6 to the SG. I mean, you'd like it all struck down, but
7 we are supposed to apply the objective test. I don't
8 know if you differ very much.

9 So what do you propose that we do other than
10 spend a year reading all this and have you argument all
11 this?

12 MR. CLEMENT: Right. What I would propose
13 is the following, Justice Breyer, is you follow the
14 argument this far and then you ask yourself whether what
15 you have left is a hollowed-out shell or whether --

16 JUSTICE BREYER: I would say the Breast
17 Feeding Act, the getting doctors to serve underserved
18 areas, the biosimilar thing and drug regulation, the
19 CLASS Act, those have nothing to do with the stuff that
20 we've been talking about yesterday and the day before,
21 okay?

22 So if you ask me at that level, I would say,
23 sure, they have nothing to do with it, they could stand
24 on their own. The Indian thing about helping the
25 underserved Native Americans, all that stuff has nothing

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

2 So that's -- do you know what you have
3 there? A total off-the-cuff impression. So that's why
4 I am asking you, what should I do?

5 MR. CLEMENT: What you should do, is let me
6 say the following, which is follow me this far, which is
7 mandatory, individual mandate is tied, as the government
8 suggests, to guaranteed-issue and community rating, but
9 the individual mandate, guaranteed-issue, and community
10 rating together are the heart of this Act. They are
11 what make the exchanges work.

12 The exchanges in turn are critical to the
13 tax credits, because the amount of the tax credit is key
14 to the amount of the policy price on the exchange. The
15 exchanges are also key to the employer mandate, because
16 the employer mandate becomes imposed on an employer if
17 one of the employees gets insurance on the exchanges.

18 But it doesn't stop there. Look at the
19 Medicare provision for DISH hospitals, okay? These are
20 hospitals that serve a disproportionate share of the
21 needy. This isn't in Title I. It's in the other part
22 that you had in your other hand. But it doesn't work
23 without the mandate, community rating and
24 guaranteed-issue.

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

1 Mr. Clement?

2 MR. CLEMENT: Sure.

3 JUSTICE ALITO: What would your fallback
4 position be if -- if we don't accept the proposition
5 that if the mandate is declared unconstitutional, the
6 rest of the Act, every single provision, has to fall?
7 Other -- proposed other dispositions have been proposed.
8 There's the Solicitor General's disposition, the
9 recommended disposition to strike down the
10 guaranteed-issue and community rating provisions. One
11 of the -- one amicus says strike down all of Title I,
12 another one says strike down all of Title I and Title
13 II.

14 What -- what would you suggest?

15 MR. CLEMENT: Well, I -- I think what I
16 would suggest, Justice Alito -- I don't want to be
17 unresponsive -- is that you sort of follow the argument
18 through and figure out what in the core of the Act
19 falls. And then I guess my fallback would be if what's
20 left is a hollowed-out shell, you could just leave that
21 standing.

22 If you want a sort of practical answer, I
23 mean, I do think you could just -- you know, you could
24 use Justice Breyer's off-the-cuff as a starting point
25 and basically say, you know, Title I and a handful of

1 related provisions that are very closely related to that
2 are -- are really the heart of the Act --

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

4 MR. CLEMENT: -- the bigger volume -- on the
5 other hand -- I mean, you could strike one and leave the
6 other, but at a certain point -- I'm sorry,
7 Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Finish your certain
9 point.

10 MR. CLEMENT: At -- at a certain point, I
11 just think that, you know, the better answer might be to
12 say, we've struck the heart of this Act, let's just give
13 Congress a clean slate. If it's so easy to have that
14 other big volume get reenacted, they can do it in a
15 couple of days; it won't be a big deal. If it's not,
16 because it's very --

17 (Laughter.)

18 MR. CLEMENT: -- well, but -- I mean, you
19 can laugh at me if you want, but the point is, I'd
20 rather suspect that it won't be easy. Because I rather
21 suspect that if you actually dug into that, there'd be
22 something that was quite controversial in there and it
23 couldn't be passed quickly --

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

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

1 CHIEF JUSTICE ROBERTS: -- the -- the
2 reality of the passage -- I mean, this was a piece of
3 legislation which, there was -- had to be a concerted
4 effort to gather enough votes so that it could be
5 passed. And I suspect with a lot of these miscellaneous
6 provisions that Justice Breyer was talking about, that
7 was the price of the vote.

8 Put in the Indian health care provision and
9 I will vote for the other 2700 pages. Put in the black
10 lung provision, and I'll go along with it. That's why
11 all -- many of these provisions I think were put in, not
12 because they were unobjectionable. So presumably what
13 Congress would have done is they wouldn't have been able
14 to put together, cobble together, the votes to get it
15 through.

16 MR. CLEMENT: Well, maybe that's right,
17 Mr. Chief Justice. And I don't want to, I mean, spend
18 all my time on -- fighting over the periphery, because I
19 do think there are some provisions that I think you
20 would make as -- as an exercise of your own judgment,
21 the judgment that once you've gotten rid of the core
22 provisions of this Act, that you would then decide to
23 let the periphery fall with it. But if you want to keep
24 the periphery, that's fine. What I think is important,
25 though, as to the core provisions of the Act, which

1 aren't just the mandate community rating and
2 guaranteed-issue, but include the exchanges, the tax
3 credit, Medicare and Medicaid -- as to all of that, I
4 think you do want to strike it all down to avoid a redux
5 of Buckley.

6 If I could reserve the remainder of my time.

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

9 Mr. Kneedler.

10 ORAL ARGUMENT OF EDWIN S. KNEEDLER

11 ON BEHALF OF THE RESPONDENTS

12 MR. KNEEDLER: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 There should be no occasion for the Court in
15 this case to consider issues of severability, because as
16 we argue, the -- the minimum coverage provision is fully
17 consistent with Article I of the Constitution. But if
18 the Court were to conclude otherwise, it should reject
19 Petitioners' sweeping proposition that the entire Act
20 must fall if this one provision is held
21 unconstitutional.

22 As an initial matter, we believe the Court
23 should not even consider that question. The vast
24 majority of the provisions of this Act do not even apply
25 to the Petitioners, but instead apply to millions of

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

2 CHIEF JUSTICE ROBERTS: How does your
3 proposal actually work? Your idea is that, well, they
4 can take care of it themselves later. I mean, do you
5 contemplate them bringing litigation and saying -- I
6 guess the insurers would be the most obvious ones --
7 without -- without the mandate, the whole thing falls
8 apart and we're going to bear a greater cost, and so the
9 rest of the law should be struck down.

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

11 MR. KNEEDLER: Well, I -- I think the
12 continuing validity of any particular provision would
13 arise in litigation that would otherwise arise under
14 that provision by parties who are actually --

15 CHIEF JUSTICE ROBERTS: But what cause of
16 action is it? I've never heard of a severability cause
17 of action.

18 MR. KNEEDLER: Well, in the first place, I
19 don't -- the point isn't that there has to be a -- an
20 affirmative cause of action to decide this. You
21 could -- for example, to use the Medicare reimbursement
22 issue is, one of the things that this Act does is change
23 Medicare reimbursement rates. Well, the place where
24 someone adjudicates the validity of Medicare
25 reimbursement rates is through the special statutory

1 review procedure for that.

2 And the same thing is true of the
3 Anti-Injunction Act --

4 JUSTICE SCALIA: Mr. Kneedler, there --
5 there are some provisions which nobody would have
6 standing to challenge. If the provision is simply an
7 expenditure of Federal money, it -- it doesn't hurt
8 anybody except the taxpayer, but the taxpayer doesn't
9 have standing. That -- that just continues.

10 Even though it -- it is -- it should -- it
11 is so closely aligned to what's been struck down that it
12 ought to go as well. But nonetheless, that has to
13 continue because there's nobody in the world that can
14 challenge it.

15 Can that possibly be the law?

16 MR. KNEEDLER: I think that proves our
17 point, Justice Scalia. This Court has repeatedly said
18 that just because there's -- no one may have standing to
19 challenge -- and particularly like tax credits or taxes
20 which are challenged only after going through the
21 Anti-Injunction Act -- just because no one has standing
22 doesn't mean that someone must.

23 But beyond that --

24 JUSTICE SCALIA: But -- but those are
25 provisions that have been legitimately enacted. The

1 whole issue here is whether these related provisions
2 have been legitimately enacted, or whether they are so
3 closely allied to one that has been held to be
4 unconstitutional that they also have not been
5 legitimately enacted.

6 You -- you can't compare that to -- to cases
7 dealing with a -- a statute that nobody denies is -- is
8 constitutional.

9 MR. KNEEDLER: This -- this case is directly
10 parallel to the Printz case, in our view. In that case,
11 the Court struck down several provisions of the Brady
12 Act, but went on to say it had no business addressing
13 the severability of other provisions that did not apply
14 to the people before whom --

15 JUSTICE SOTOMAYOR: But --

16 JUSTICE BREYER: What he's thinking of is
17 this: I think Justice Scalia is thinking, I suspect, of
18 -- imagine a tax which says, this tax, amount Y, goes to
19 purpose X, which will pay for half of purpose X. The
20 other half will come from the exchanges somehow. That
21 second half is unconstitutional. Purpose X can't
22 possibly be carried out now with only half the money.

23 Does the government just sit there
24 collecting half the money forever because nobody can
25 ever challenge it? You see, there -- if it were

1 inextricably connected, is it enough to say, well, we
2 won't consider that because maybe somebody else could
3 bring that case and then there is no one else?

4 Is that --

5 MR. KNEEDLER: Yes, we think that is the
6 proper way to proceed.

7 Severability --

8 JUSTICE GINSBURG: It's not a choice between
9 someone else bringing the case and a law staying in
10 place. And what we're really talking about, as Justice
11 Sotomayor started this discussion, is who is the proper
12 party to take out what isn't infected by the Court's
13 holding -- with all these provisions where there may be
14 no standing, one institution clearly does have standing,
15 and that's Congress.

16 And if Congress doesn't want the provisions
17 that are not infected to stand, Congress can take care
18 of it.

19 It's a question of which -- which side --
20 should the Court say, we're going to wreck the whole
21 thing, or should the Court leave it to Congress?

22 MR. KNEEDLER: We think the Court should
23 leave it to Congress for two reasons. One is the point
24 I'm making now about justiciability, or whether the
25 Court can properly consider it at all. And the second

1 is, we think only a few provisions are inseverable from
2 the minimum coverage provision.

3 I just would like to --

4 CHIEF JUSTICE ROBERTS: Before you go,
5 Mr. Kneedler, I'd like your answer to Justice Breyer's
6 question.

7 I think you were interrupted before that --

8 MR. KNEEDLER: Yes. No. We -- we believe
9 that in that case, the -- the tax -- the tax provision
10 should not be struck down. In the first place, the
11 Anti-Injunction Act would bar a -- a direct suit to
12 challenge it. It would be very strange to allow a tax
13 to be struck down on the basis of a severability
14 analysis. Severability arises in a case only where it's
15 necessary to consider what relief a party before the
16 Court should get. The only party --

17 JUSTICE ALITO: Suppose that there was --
18 suppose there was a non-severability provision in -- in
19 this Act. If one provision were to be held
20 unconstitutional, then every single -- someone would
21 have to bring a -- a separate lawsuit challenging every
22 single other provision in the Act and say, well, one
23 fell and the Congress said it's all -- it's a package,
24 it can't be separated.

25 That's your position?

1 MR. KNEEDLER: The -- the fact that that's
2 such a clause might make it easy doesn't change the
3 point. Article III jurisdictional problems apply to
4 easy questions as well as -- as hard questions.

5 If I could just --

6 JUSTICE KENNEDY: But there's no Article III
7 jurisdictional problem in Justice Alito's hypothetical,
8 that this is a remedial exercise of the Court's power to
9 explain the consequences of its judgment in this case.

10 MR. KNEEDLER: But -- this Court had said
11 that one has -- has to have standing for every degree of
12 relief that -- that is sought. That was in Davis, that
13 was Los Angeles v. Lyons.

14 JUSTICE SCALIA: Mr. Kneedler --

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

16 JUSTICE SCALIA: -- don't you think it's
17 unrealistic to say leave it to Congress, as though you
18 are sending it back to Congress for Congress to consider
19 it dispassionately on balance, should we have this
20 provision or should we not have provision? That's not
21 what it's going to be. It's going to be, these
22 provisions are in effect; even though you -- a lot of
23 you never wanted them to be in effect, and you only
24 voted for them because you wanted to get the heart of
25 the -- the Act, which has now been cut out; but

1 nonetheless these provisions are the law, and you have
2 to get the votes to overturn them. That's an enormously
3 different question from whether you get the votes
4 initially to put them into the law.

5 What -- there, there is no way that this
6 Court's decision is not going to distort the
7 congressional process. Whether we strike it all down or
8 leave some of it in place, the congressional process
9 will never be the same. One way or another, Congress is
10 going to have to reconsider this, and why isn't it
11 better to have them reconsider it -- what -- what should
12 I say -- in toto, rather than having some things already
13 in the law which you have to eliminate before you can
14 move on to consider everything on balance?

15 MR. KNEEDLER: We think as a matter of
16 judicial restraint, limits on equitable remedial power
17 limit this Court to addressing the provision that has
18 been challenged as unconstitutional and anything else
19 that the plaintiff seeks as relief. Here the only --

20 JUSTICE KENNEDY: But in restraint --

21 JUSTICE SOTOMAYOR: Mr. Kneedler would you
22 please --

23 CHIEF JUSTICE ROBERTS: Justice Kennedy?

24 JUSTICE KENNEDY: When you say judicial
25 restraint, you are echoing the earlier premise that it

1 increases the judicial power if the judiciary strikes
2 down other provisions of the Act. I suggest to you it
3 might be quite the opposite. We would be exercising the
4 judicial power if one Act was -- one provision was
5 stricken and the others remained to impose a risk on
6 insurance companies that Congress had never intended.
7 By reason of this Court, we would have a new regime that
8 Congress did not provide for, did not consider. That,
9 it seems to me can be argued at least to be a more
10 extreme exercise of judicial power than to strike --
11 than striking the whole.

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

13 JUSTICE KENNEDY: I just don't accept the
14 premise.

15 MR. KNEEDLER: I think not, Justice Kennedy
16 and then I -- I will move on.

17 But this is exactly the situation in *Printz*.
18 The Court identified the severability questions that
19 were -- that were briefed before the Court as important
20 ones, but said that they affect people who are -- rights
21 and obligations of people who are not before the Court.

22 JUSTICE SOTOMAYOR: Mr. Kneedler, move away
23 from the issue of whether it's a standing question or
24 not.

25 MR. KNEEDLER: Right.

1 JUSTICE SOTOMAYOR: Make the assumption
2 that's an -- that this is an issue of the Court's
3 exercise of discretion. Because the last two questions
4 had to do with what's wise for the Court to do, not
5 whether it has power to do it or not.

6 MR. KNEEDLER: Right. That --

7 JUSTICE SOTOMAYOR: So let's move beyond the
8 power issue, which your answers have centered on, and
9 give me a sort of -- policy. And I know that's a,
10 that's a bugaboo word sometimes, but what should guide
11 the Court's discretion?

12 MR. KNEEDLER: Well, we think that matters
13 of justiciability do blend into --

14 JUSTICE SOTOMAYOR: Would you please -- I've
15 asked you three times to move around that.

16 MR. KNEEDLER: -- blend into, blend into
17 discretion, and in turn blend into the merits of the
18 severability question. And as to that, just to answer a
19 question that, that several Justices have asked, we
20 think that severability is a matter of statutory
21 interpretation. It should be resolved by looking at the
22 structure and the text of the Act, and the Court may
23 look at legislative history to figure out what the text
24 and structure mean with respect to severability. We
25 don't --

1 JUSTICE SCALIA: Mr. Kneedler, what happened
2 to the Eighth Amendment? You really want us to go
3 through these 2,700 pages?

4 (Laughter.)

5 JUSTICE SCALIA: And do you really expect
6 the Court to do that? Or do you expect us to -- to give
7 this function to our law clerks?

8 Is this not totally unrealistic? That we
9 are going to go through this enormous bill item by item
10 and decide each one?

11 MR. KNEEDLER: Well --

12 JUSTICE SOTOMAYOR: I thought the answer was
13 you don't have to because --

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

15 JUSTICE SOTOMAYOR: -- what we have to look
16 at is what Congress said was essential, correct?

17 MR. KNEEDLER: That is correct, and I'd also
18 like to -- going -- I just want to finish the thought I
19 had about this being a matter of statutory
20 interpretation. The Court's task, we submit, is not to
21 look at the legislative process to see whether the bill
22 would have been -- would have passed or not based on the
23 political situation at the time, which would basically
24 convert the Court into a function such as a whip count.
25 That is not the Court's --

1 JUSTICE KAGAN: And Mr. Kneedler, that would
2 be a revolution --

3 MR. KNEEDLER: Yes.

4 JUSTICE KAGAN: -- in our severability law,
5 wouldn't it?

6 MR. KNEEDLER: It would.

7 JUSTICE KAGAN: I mean, we have never
8 suggested that we were going to say, look, this
9 legislation was a brokered compromise and we are going
10 to try to figure out exactly what would have happened in
11 the complex parliamentary shenanigans that go on across
12 the street and figure out whether they would have made a
13 difference.

14 Instead, we look at the text that's actually
15 given us. For some people, we look only at the text.
16 It should be easy for Justice Scalia's clerks.

17 (Laughter.)

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

20 JUSTICE SCALIA: I don't care whether it's
21 easy for my clerks. I care whether it's easy for me.

22 (Laughter.)

23 MR. KNEEDLER: I think that -- I think
24 that's exactly right. As I said, it is a question of
25 statutory interpretation.

1 CHIEF JUSTICE ROBERTS: Well, how is that --
2 what's exactly right? It's a question of statutory
3 interpretation; that means you have to go through every
4 line of the statute. I haven't heard your answer to
5 Justice Scalia's question yet.

6 MR. KNEEDLER: Well, I -- I think in this
7 case there is an easy answer, and that is, Justice Kagan
8 pointed out that, that the Act itself creates a sharp
9 dividing line between the minimum coverage provision --
10 the package of -- of reforms: The minimum coverage
11 provision along with the guaranteed-issue and community
12 rating. That is one package that Congress deemed
13 essential.

14 CHIEF JUSTICE ROBERTS: How do you know
15 that? Where is this line? I looked through the whole
16 Act, I didn't read -- well --

17 MR. KNEEDLER: It is in --

18 CHIEF JUSTICE ROBERTS: Where is the sharp
19 line?

20 MR. KNEEDLER: It is in Congress's findings
21 that the -- that the minimum coverage provision --
22 without it the Court -- the -- Congress said, in finding
23 I, without that provision people would wait to get
24 insurance, and therefore -- and cause all the adverse
25 selection problems that arise.

1 CHIEF JUSTICE ROBERTS: No, no. That --
2 that makes your case that the one provision should fall
3 if the other does. It doesn't tell us anything about
4 all the other provisions.

5 MR. KNEEDLER: Well, I -- I think -- I think
6 it does, because Congress said it was essential to those
7 provisions, but it conspicuously did not say that it was
8 essential to other provisions.

9 CHIEF JUSTICE ROBERTS: Well --

10 JUSTICE ALITO: May I ask you about the
11 argument that is made in the economists' amicus brief?
12 They say that the insurance reforms impose 10-year costs
13 of roughly \$700 billion on the insurance industry, and
14 that these costs are supposed to be offset by about 350
15 billion in new revenue from the individual mandate and
16 350 billion from the Medicaid expansion. Now if the 350
17 billion -- maybe you will disagree with the numbers,
18 that they are fundamentally wrong; but assuming they are
19 in the ballpark, if the 350 million from the individual
20 mandate were to be lost, what would happen to the
21 insurance industry, which would now be in the -- in the
22 hole for \$350 billion over 10 years?

23 MR. KNEEDLER: I don't -- I mean, first of
24 all, for the Court to go beyond text and legislative
25 history to try to figure out how the finances of the

1 bill operate, it -- it's like being a budget committee.
2 But -- but we think the, the economists had added up the
3 figures wrong. If there is Medicaid expansion, the
4 insurance -- and the insurance companies are involved in
5 that, they are going to be reimbursed.

6 CHIEF JUSTICE ROBERTS: But what if there
7 isn't Medicaid expansion? We've talked about the
8 individual mandate, but does the government have a
9 position on what should happen if the Medicaid expansion
10 is struck down?

11 MR. KNEEDLER: We don't -- we don't think
12 that that would have any effect. That could be
13 addressed in the next argument. But we don't think that
14 would have any effect on the -- on the rest of the -- on
15 the rest of the Act.

16 CHIEF JUSTICE ROBERTS: So if your -- the
17 government's position is that if Medicaid expansion is
18 struck down, the rest of the Act can operate --

19 MR. KNEEDLER: Yes. Yes. It's -- in the
20 past Congress has expanded Medicaid coverage without
21 there being -- it's done it many times without there
22 being a minimum coverage provision.

23 JUSTICE KENNEDY: But I still don't
24 understand where you are with the answer to
25 Justice Alito's question.

1 Assume that there is a, a substantial
2 probability that the 350 billion plus 350 billion equals
3 7 is going to be cut in half if the individual mandate
4 is -- is stricken. Assume there is a significant
5 possibility of that. Is it within the proper exercise
6 of this Court's function to impose that kind of risk?
7 Can we say that the Congress would have intended that
8 there be that kind of risk?

9 MR. KNEEDLER: Well, we don't think it's in
10 the Court's place to look at the, at the budgetary
11 implications, and we also --

12 JUSTICE KENNEDY: But isn't that -- isn't
13 that the point then, why we should just assume that it
14 is not severable?

15 MR. KNEEDLER: No.

16 JUSTICE KENNEDY: If we -- if we lack the
17 competence to even assess whether there is a risk, then
18 isn't this an awesome exercise of judicial power?

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

20 JUSTICE KENNEDY: To say we are doing
21 something and we are not telling you what the
22 consequences might be?

23 MR. KNEEDLER: No, I don't think so, because
24 when you -- when you are talking about monetary
25 consequences, you are looking through the Act, you are

1 looking behind the Act, rather than -- the Court's
2 function is to look at the text and structure of the Act
3 and what the substantive provisions of the Act
4 themselves mean. And if I could go past --

5 JUSTICE SCALIA: Mr. Kneedler, can I -- can
6 you give us a prior case in -- that -- that resembles
7 this one in which we -- we are asked to strike down what
8 the other side says is the heart of the Act and yet
9 leave in -- as -- as you request, leave, in effect, the
10 rest of it? Have we ever -- most of our severability
11 cases, you know, involve one little aspect of the Act.
12 The question is whether the rest. When have we ever
13 really struck down what was the main purpose of the Act,
14 and left the rest in effect?

15 MR. KNEEDLER: I think Booker is the best
16 example of that. In -- in Booker the mandatory
17 sentencing provisions were central to the act, but the
18 Court said Congress would have preferred a statute
19 without the mandatory provision in the Act, and the
20 Court struck that but the rest of the sentencing
21 guidelines remained.

22 JUSTICE SCALIA: I think the reason -- the
23 reason the majority said that was they didn't think that
24 what was essential to the Act was what had been stricken
25 down, and that is the -- the ability of the judge to say

1 on his own what -- what -- what the punishment would be.
2 I don't think that's a case where we struck -- where we
3 excised the heart of the statute.

4 You have another one?

5 MR. KNEEDLER: There is no example --

6 JUSTICE SCALIA: There is no example. This
7 is really --

8 MR. KNEEDLER: -- to our -- to our -- that
9 we have found that suggests the contrary.

10 JUSTICE SCALIA: This is really a case of
11 first impression. I don't know another case where we
12 have been confronted with this -- with this decision.

13 Can you take out the heart of the Act and
14 leave everything else in place?

15 MR. KNEEDLER: I would like to go to the
16 heart of the Act point in a moment. But what I'd like
17 to say is this is a huge Act with many provisions that
18 are completely unrelated to market reforms and operate
19 in different ways. And we think it would be
20 extraordinary in this extraordinary Act to strike all of
21 that down because there are many provisions and it would
22 be too hard to do it.

23 JUSTICE BREYER: I don't think it's not
24 uncommon that Congress passes an act, and then there are
25 many titles, and some of the titles have nothing to do

1 with the other titles. That's a common thing. And
2 you're saying you've never found an instance where they
3 are all struck out when they have nothing to do with
4 each other.

5 My question is, because I hear Mr. Clement
6 saying something not too different from what you say.
7 He talks about things at the periphery. We can't reject
8 or accept an argument on severability because it's a lot
9 of work for us. That's beside the point. But do you
10 think that it's possible for you and Mr. Clement, on
11 exploring this, to -- to get together and agree on --

12 (Laughter)

13 JUSTICE BREYER: -- I mean on -- on a list
14 of things that are in both your opinions peripheral,
15 then you would focus on those areas where one of you
16 thinks it's peripheral and one of you thinks it's not
17 peripheral. And at that point it might turn out to be
18 far fewer than we are currently imagining. At which
19 point we could hold an argument or figure out some way
20 or somebody hold an argument and try to -- try to get
21 those done.

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

23 MR. KNEEDLER: I -- I -- I just don't think
24 that is realistic. The Court would be doing it without
25 the parties, the millions of parties --

1 JUSTICE SCALIA: You can have a conference
2 committee report afterwards, maybe.

3 (Laughter)

4 MR. KNEEDLER: No, it just -- it just is not
5 something that a court would ordinarily do. But I would
6 like --

7 JUSTICE SOTOMAYOR: Could you get back to
8 the argument of -- of the heart?

9 MR. KNEEDLER: Yes.

10 JUSTICE SOTOMAYOR: Striking down the heart,
11 do we want half a loaf or show. I think those are the
12 two analogies --

13 MR. KNEEDLER: Right. And -- and -- and I
14 would like to discuss it again in terms of the text and
15 structure of the Act. We have very important
16 indications from the structure of this Act that the
17 whole thing is not supposed to fall.

18 The -- the most basic one is, the notion
19 that Congress would have intended the whole Act to fall
20 if there couldn't be a minimum coverage provision is
21 refuted by the fact that there are many, many provisions
22 of this Act already in effect without a minimum coverage
23 provision. Two point -- 2 and-a-half million people
24 under 26 have gotten insurance by one of the insurance
25 requirements. Three point two billion dollars --

1 JUSTICE SCALIA: Anticipation of the minimum
2 coverage. That's going to bankrupt the insurance
3 companies if not the States, unless this minimum
4 coverage provision comes into effect.

5 MR. KNEEDLER: There is no reason to think
6 it's going to -- it's going to bankrupt anyone. The
7 costs will be set to cover those -- to cover those
8 amounts.

9 JUSTICE SOTOMAYOR: I thought that the
10 26-year-olds were saying that they were healthy and
11 didn't need insurance yesterday. So today they are
12 going to bankrupt the --

13 MR. KNEEDLER: Two and-a-half -- 2.5 million
14 people would be thrown off the insurance roles if the
15 Court were to say that. Congress made many changes to
16 Medicare rates that have gone into effect for the
17 Congress -- for the courts to have to unwind millions of
18 Medicare reimbursement rates. Medicare has -- has
19 covered 32 million insurance -- preventive care visits
20 by patients as a result of -- of this Act.

21 CHIEF JUSTICE ROBERTS: All of that was
22 based on the assumption that the mandate was -- was
23 constitutional. And if -- that certainly doesn't stop
24 us from reaching our own determination on that.

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

1 question of legislative intent, and we have a very
2 fundamental indication of legislative intent that
3 Congress did not mean the whole Act to fall if -- if --
4 without the minimum coverage provision, because we have
5 many provisions that are operating now without that.

6 But there's a further indication about why
7 the line should be drawn where I've suggested, which is
8 the package of these particular provisions. All the
9 other provisions of the Act would continue to advance
10 Congress's goal, the test that was articulated in Booker
11 but it's been said in Regan and other cases. You look
12 to whether the other provisions can continue to advance
13 the purposes of the Act.

14 Here they unquestionably can. The public
15 health -- the broad public health purposes of the Act
16 that are unrelated to the minimum coverage provision,
17 but also that the other provisions designed to enhance
18 access to affordable care. The employer responsibility
19 provision, the credit for small businesses, which is
20 already in effect, by the way, and affecting many small
21 businesses --

22 JUSTICE SCALIA: But many people might
23 not -- many of the people in Congress might not have
24 voted for those provisions if -- if the central part of
25 this statute was not adopted.

1 MR. KNEEDLER: But that --

2 JUSTICE SCALIA: I mean, you know, you're --
3 to say that we're effectuating the intent of Congress is
4 just unrealistic. Once you've cut the guts out of it,
5 who knows, who knows which of them were really desired
6 by Congress on their own and which ones weren't.

7 MR. KNEEDLER: The question for the Court is
8 Congress having passed the law by whatever majority
9 there might be in one House or the other, Congress
10 having passed the law, what at that point is -- is -- is
11 the legislative intent embodied in the law Congress has
12 actually passed?

13 CHIEF JUSTICE ROBERTS: Well, that's right.
14 But the problem is, straight from the title we have two
15 complimentary purposes, patient protection and
16 affordable care. And you can't look at something and
17 say this promotes affordable care, therefore, it's
18 consistent with Congress's intent. Because Congress had
19 a balanced intent. You can't look at another provision
20 and say this promotes patient protection without asking
21 if it's affordable.

22 So, it seems to me what is going to promote
23 Congress's purpose, that's just an inquiry that you
24 can't carry out.

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

1 because I think it's evident that Congress's purpose was
2 to expand access to affordable care. It did it in
3 discreet ways. It did it by the penalty on employers
4 that don't -- that don't offer suitable care. It did it
5 by offering tax credits to small employers. It did it
6 by offering tax credits to purchasers. All of those are
7 a variety of ways that continue to further Congress's
8 goal, and -- and most of all, Medicaid, which is --
9 which is unrelated to the -- to the private insurance
10 market altogether.

11 And in adopting those other provisions
12 governing employers and whatnot, Congress built on its
13 prior experience of using the tax code, which it is --
14 for a long period of time Congress has subsidized --

15 JUSTICE KENNEDY: I don't quite understand
16 about the employers. You're -- you are saying Congress
17 mandated employers to buy something that Congress itself
18 has not contemplated? I don't understand that.

19 MR. KNEEDLER: No. Employer coverage -- 150
20 million people in this country already get their
21 insurance through -- through their employers. What
22 Congress did in seeking to augment that was to add a
23 provision requiring employers to purchase insurance --

24 JUSTICE KENNEDY: Based on the assumption
25 that the cost of those policies would be lowered by --

1 by certain provisions which are by hypothesis -- we are
2 not sure -- by hypothesis are in doubt.

3 MR. KNEEDLER: No, I -- I -- I think any
4 cost assumptions -- there is no indication that Congress
5 made any cost assumptions, but -- but there is no reason
6 to think that the individual -- that the individual
7 market, which is where the minimum coverage provision is
8 directed, would affect that.

9 I would like to say -- I would point out why
10 the other things would advance Congress's goal. The
11 point here is that the package of three things would --
12 would be contrary -- would run contrary to Congress's
13 goal if you took out the minimum coverage provision.
14 And here's why -- and this is reflected in the findings:

15 If you take out minimum coverage but leave
16 in the guaranteed-issue and community-rating, you will
17 make matters worse. Rates will go up, and people will
18 be less -- fewer people covered in the individual
19 market.

20 JUSTICE ALITO: Well, if that is true, what
21 is the difference between guaranteed-issue and
22 community-rating provisions on the one hand and other
23 provisions that increase costs substantially for
24 insurance companies?

25 For example, the tax on high cost health

1 plans, which the economists in the amicus brief said
2 would cost \$217 billion over 10 years?

3 MR. KNEEDLER: Those are -- what Congress --
4 Congress did not think of those things as balancing
5 insurance companies. Insurance companies are
6 participants in the market for Medicaid and -- and other
7 things.

8 JUSTICE KENNEDY: But you are saying we have
9 -- we have the expertise to make the inquiry you want us
10 to make, i.e., the guaranteed-issue, but not the
11 expertise that Justice Alito's question suggests we must
12 make.

13 MR. KNEEDLER: Well --

14 JUSTICE KENNEDY: I just don't understand
15 your position.

16 MR. KNEEDLER: -- that's because -- that's
17 because I think this Court's function is to look at the
18 text and structure and the legislative history of the
19 law that Congress enacted, not the financial -- not a
20 financial balance sheet, which doesn't appear anywhere
21 in the law. And just --

22 JUSTICE GINSBURG: You are relying on
23 Congress's quite explicitly tying these three things
24 together.

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

1 and it's not just the text of the act, but the
2 background of the act, the experience in the state, the
3 testimony of the National Association of Insurance
4 Commissioners.

5 That's the -- that's the problem Congress
6 was addressing. There was a -- there was -- a shifting
7 of present actuarial risks in that market that Congress
8 wanted to correct. And if you took the minimum coverage
9 provision out and left the other two provisions in,
10 there would be laid on top of the existing shifting of
11 present actuarial risks an additional one because the
12 uninsured would know that they would have guaranteed
13 access to insurance whenever they became sick. It would
14 make the -- it would make the adverse selection in that
15 market problem even worse.

16 And so what -- and Congress, trying to come
17 up with a market-based solution to control rates in that
18 market, has adopted something that would -- that would
19 work to control costs by guaranteed-issue and
20 community-rating; but, if you -- if -- if you take out
21 the minimum coverage, that won't work. That was
22 Congress's assumption, again, shown by the text and
23 legislative history of this provision. And that's why
24 we think those things rise or fall in a package because
25 they cut against what Congress was trying to do.

1 All of the other provisions would actually
2 increase access to affordable care and would have
3 advantageous effects on price. Again, Congress was
4 invoking its traditional use of the tax code, which has
5 long subsidized insurance through employers, has used
6 that to impose a tax penalty on employers, to give tax
7 credits. This is traditional stuff that Congress has
8 done.

9 And the other thing Congress has done, those
10 preexisting laws had their own protections for
11 guaranteed-issue and community-rating. Effectively,
12 within the large employer plans, they can't discriminate
13 among people, they can't charge different rates. What
14 Congress was doing, was doing that in the other market.
15 If it can't, that's all that should be struck from the
16 act.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Kneedler.

19 Mr. Farr?

20 ORAL ARGUMENT OF H. BARTOW FARR
21 FOR COURT-APPOINTED AMICUS CURIAE

22 MR. FARR: Mr. Chief Justice and may it
23 please the Court:

24 At the outset, I would just like to say, I
25 think that the government's position in this case that

1 the community-rating and guaranteed-issue provisions
2 ought to be struck down is an example of the best
3 driving out the good; because, even without the minimum
4 coverage provision, those two provisions,
5 guaranteed-issue and community-rating, will still open
6 insurance markets to millions of people that were
7 excluded under the prior system, and for millions of
8 people will lower prices, which were raised high under
9 the old system because of their poor health.

10 So even though the system is not going to
11 work precisely as Congress wanted, it would certainly
12 serve central goals that Congress had of expanding
13 coverage for people who were unable to get coverage or
14 unable to get it at affordable prices.

15 So when the government --

16 JUSTICE GINSBURG: One of the points that
17 Mr. Kneedler made is that the price won't be affordable
18 because -- he spoke of the adverse selection problem,
19 that there would be so fewer people in there, the
20 insurance companies are going to have to raise the
21 premiums.

22 So it's nice that Congress made it possible
23 for more people to be covered, but the reality is they
24 won't because they won't be able to afford the premium.

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

1 say two things about that.

2 First of all, when we talk about premiums
3 becoming less affordable, it's very important to keep in
4 mind different groups of people, because it is not
5 something that applies accurately to everybody.

6 For people who were not able to get
7 insurance before, obviously, their insurance beforehand
8 was -- the price was essentially infinite. They were
9 not able to get it at any price. They will now be able
10 to get it at a price that they can afford.

11 For people who are unhealthy and were able
12 to get insurance, but perhaps not for the things that
13 they were most concerned about, or only at very high
14 rates, their rates will be lower under the system, even
15 without the minimum coverage provision.

16 Also, you have a large number of people who,
17 under the Act --

18 JUSTICE SCALIA: Excuse me, why do you
19 say -- I didn't follow that. Why?

20 MR. FARR: Because --

21 JUSTICE SCALIA: Why would their rates be
22 lower?

23 MR. FARR: Their rates are going to be lower
24 than they were under the prior system because they are
25 going into a pool of people, rather than -- some of whom

1 are healthy, rather than having their rates set
2 according to their individual health characteristics.
3 That's why their rates were so high.

4 JUSTICE KAGAN: But the problem, Mr. Farr,
5 isn't it, that they're going to a pool of people that
6 will gradually get older and unhealthier. That's the
7 way the thing works. Once you say that the insurance
8 companies have to cover all of the sick people and all
9 of the old people, the rates climb. More and more young
10 people and healthy people say, why should we
11 participate, we can just get it later when we get sick.
12 So they leave the market, the rates go up further, more
13 people leave the market, and the whole system crashes
14 and burns, becomes unsustainable.

15 MR. FARR: Well --

16 JUSTICE KAGAN: And this is not --

17 MR. FARR: Certainly.

18 JUSTICE KAGAN: -- like what I think. What
19 do I know? It's just what's reflected in Congress's
20 findings, that it's look -- it looks at some states and
21 says, this system crashed and burned. It looked at
22 another state with the minimum coverage provision and
23 said, this one seems to work. So we will package the
24 minimum coverage provision with the nondiscrimination
25 provisions.

1 MR. FARR: Well, in a moment, I'd like to
2 talk about the finding; but, if I could just postpone
3 that for a second and talk about adverse selection
4 itself.

5 I think one of the misconceptions here,
6 Justice Kagan, is that Congress, having seen the
7 experience of the states in the '90s with
8 community-rating and guaranteed-issue, simply imposed
9 the minimum coverage provision as a possible way of
10 dealing with that; and, if you don't have the minimum
11 coverage provision, then, essentially, adverse selection
12 runs rampant. But that's not what happened.

13 Congress included at least half a dozen
14 other provisions to deal with adverse selection caused
15 by bringing in people who are less healthy into the Act.

16 There are -- to begin with, the Act
17 authorizes annual enrollment periods, so people can't
18 just show up at the hospital. If they don't show up and
19 sign up at the right time, they at least have to wait
20 until the time next year. That's authorized by the Act.

21 There -- with respect to the subsidies,
22 there are three different things that make this
23 important. First of all, the subsidies are very
24 generous. For people below 200 percent of the federal
25 poverty line, the subsidy will cover 80 percent, on

1 average, of the premium which makes it attractive to
2 them to join.

3 The structure of the subsidies, because
4 their income -- they create a floor for -- based on the
5 income of the person getting the insurance, and then the
6 government covers everything over that. And this is
7 important in adverse selection because if you do have a
8 change in the mix of people, and average premiums start
9 to rise, the government picks up the increase in the
10 premium. The amount that the person who is getting
11 insured contributes remains constant at a percentage of
12 his or her income.

13 And the third thing --

14 JUSTICE SCALIA: And there is nothing about
15 federal support that is unsustainable, right? That is
16 infinite.

17 MR. FARR: Well, I mean, that's a fair
18 point, Justice Scalia; although, one of the things that
19 happens, if you take the mandate out, while it is true
20 that the subsidies that the government provides to any
21 individual will increase, and they will be less
22 efficient -- I'm not disputing that point -- actually
23 the overall amount of the subsidies that the government
24 will provide will decline, as the government notes
25 itself in its brief, because there will be fewer people

1 getting them. Some people will opt out of the system
2 even though they are getting subsidies.

3 But I would just like to go back for one
4 more second to the point about how the subsidies are
5 part of what Congress was using, because the other thing
6 is that for people below 250 percent of the Federal
7 poverty line Congress also picks up and subsidizes the
8 out-of-pocket costs, raising the actuarial value.

9 So you have all of that, and then you have
10 Congress also, unlike the States establishing -- or I
11 should be precisely accurate -- almost all the States,
12 establishing an age differential of up to three to one.
13 So an insurance company, for example, that is selling a
14 25-year-old a policy for \$4,000 can charge a 60-year-old
15 \$12,000 for exactly the same coverage.

16 The States typically in the 90s when they
17 were instituting these programs, they either had pure
18 community rating, where everybody is charged the same
19 premium, everybody regardless of their age is charged
20 the same premium. Some states had a variance of 1.5 to
21 1. Massachusetts, for example, which did have good
22 subsidies, but their age band was two to one.

23 So when Congress is enacting this Act, it's
24 not simply looking at the States and thinking: Well,
25 that didn't go very well; why don't we put in a minimum

1 coverage provision; that will solve the problem.
2 Congress did a lot of different things to try to combat
3 the adverse selection.

4 Now, if I could turn to the finding, because
5 I think this is the crux of the government's position
6 and then the plaintiffs pick up on that, and then move
7 --move from that to the rest of the Act. And it seems
8 to me, quite honestly, it's an important part because
9 that is textual. In this whole sort of quest for what
10 we are trying to figure out, the finding seems to stand
11 out as something that the Court could rely on and say
12 here's something Congress has actually told us.

13 But I think the real problem with the
14 finding is the context in which Congress made it. It's
15 quite clear. If the Court wants to look, the finding is
16 on page 42 -- 43A, excuse me, of the Solicitor General's
17 severability brief in the appendix.

18 But the finding is made specifically in the
19 context of interstate commerce. That is why the
20 findings are in the Act at all. Congress wanted to
21 indicate to the Court, knowing that the minimum coverage
22 provision was going to be challenged, wanted to indicate
23 to the Court the basis on which it believed it had the
24 power under the Commerce Clause to enact this law.

25 Why does that make a difference with respect

1 to finding I, which is the one that the government is
2 relying on, and in particular the last sentence, which
3 says "this requirement is essential to creating
4 effective health insurance markets in which
5 guaranteed-issue and preexisting illnesses can be
6 covered."

7 The reason is because the word "essential"
8 in the Commerce Clause context doesn't have the
9 colloquial meaning. In the Commerce Clause context
10 "essential" effectively means useful. So that when one
11 says in *Lopez*, when the Court says section 922(q) is not
12 an essential part of a larger regulatory scheme of
13 economic activity, it goes on to say, in which the
14 regulatory scheme would be undercut if we didn't have
15 this provision.

16 Well, if that's all Congress means, I agree
17 with that. The system will be undercut somewhat if you
18 don't have the minimum coverage provision. It's like
19 the word "necessary" in the Necessary and Proper Clause
20 clause. It doesn't mean, as the Court has said on
21 numerous occasions, absolutely necessary. It means
22 conducive to, useful, advancing the objectives,
23 advancing the aims. And it's easy to see, I think, that
24 that's what Congress --

25 JUSTICE SCALIA: Is there any dictionary

1 that gives that --

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

3 JUSTICE SCALIA: -- that definition of
4 "essential"? It's very imaginative. Just give me one
5 dictionary.

6 MR. FARR: Well, but I think my point,
7 Justice Scalia, is that they are not using it in the
8 true dictionary sense.

9 JUSTICE SCALIA: How do we know that? When
10 people speak, I assume they are speaking English.

11 MR. FARR: Well, I think that there are
12 several reasons that I would suggest that we would know
13 that from. The first is, as I say, the findings
14 themselves. Congress says at the very beginning, the
15 head of it, is Congress makes the following findings,
16 and they are talking about the interstate -- you know, B
17 is headed "Effects on the national economy and
18 interstate commerce." So we know the context that
19 Congress is talking about.

20 It is more or less quoting from the Court's
21 Commerce Clause statements. But if one looks at the
22 very preceding finding, which is finding H, which is on
23 42 over onto 43, Congress at that point also uses the
24 word "essential." In the second sentence it says "this
25 requirement" -- and again we're talking about the

1 minimum coverage provision -- is an essential part of
2 this larger regulation of economic activity, which is,
3 by the way, an exact quote from Lopez, in which "the
4 absence of the requirement undercuts Federal
5 regulation," also an exact quote from Lopez.

6 But what it is referring to is an
7 essential -- an essential part of ERISA, the National
8 Health Service Act and the Affordable Care Act. It
9 can't possibly be, even the plaintiffs haven't argued,
10 that those Acts would all fall in their entirety if you
11 took out the minimum coverage provision.

12 And as a second example of the same usage by
13 Congress, the statute that was before the Court in
14 Raich, section 801 of Title 21, the Court said that the
15 regulation of intrastate drug activity, drug traffic,
16 was essential to the regulation of interstate drug
17 activity. Again, it is simply not conceivable that
18 Congress was saying one is so indispensable to the
19 other, the way the United States uses the term here, so
20 indispensable that if we can't regulate the intrastate
21 traffic we don't want to regulate the interstate
22 traffic, either. The whole law criminalizing drug
23 traffic would fall.

24 So I think once you look at the finding for
25 what I believe it says, which is we believe this is a

1 useful part of our regulatory scheme, which the Congress
2 would think in its own approach would be sufficient --

3 JUSTICE SOTOMAYOR: Counsel, the problem I
4 have is that you are ignoring the congressional findings
5 and all of the evidence Congress had before it that
6 community ratings and guaranteed-issuance would be a
7 death spiral -- I think that was the word that was
8 used -- without minimum coverage. Those are all of the
9 materials that are part of the legislative record here.

10 So even if it might not be because of the
11 structure of the Act, that's post hoc evidence. Why
12 should we be looking at that as opposed to what Congress
13 had before it and use "essential" in its plain meaning:
14 You can't have minimum coverage without what the SG is
15 arguing, community ratings and guaranteed-issue. You
16 can't have those two without minimum coverage.

17 MR. FARR: Well, I think that's a fair
18 question. But the idea that -- that all the information
19 before Congress only led to the idea that you would have
20 death spirals seems to me to be contradicted a little
21 bit at least by the CBO report in November of 2009,
22 which is about 4 months before the Act passed, where the
23 CBO talks about adverse selection.

24 Now, I want to be clear. This is at a time
25 when the minimum coverage provision was in the statute,

1 so I'm not suggesting that this is a discussion without
2 that in it. But nonetheless, the CBO goes through and
3 talks about adverse selection, and points out the
4 different provisions in the Act, the ones I have
5 mentioned plus one other, actually, where in the first 3
6 years of the operation of the exchanges those insurance
7 companies that get sort of a worse selection of
8 consumers will be given essentially credits from
9 insurance companies that get better selections.

10 JUSTICE KENNEDY: So do you want us to write
11 an opinion saying we have concluded that there is an
12 insignificant risk of a substantial adverse effect on
13 the insurance companies, that's our economic conclusion,
14 and therefore not severable? That's what you want me to
15 say?

16 MR. FARR: It doesn't sound right the way
17 you say it, Justice Kennedy.

18 (Laughter.)

19 MR. FARR: No, I --

20 JUSTICE SOTOMAYOR: But you don't want them
21 to say, either, that there is a death spiral. Do you
22 want -- you don't want us to make either of those two
23 findings, I'm assuming?

24 MR. FARR: That's correct. Now, I agree
25 that there is a risk and the significance of it people

1 can debate. But what I think is --is lost in that
2 question, and I didn't mean to be whimsical about it, I
3 think what is lost in it a little bit is what is on the
4 other side, which is the fact that if you follow the
5 government's suggestion, if the Court follows the
6 government's suggestion, what is going to be lost is
7 something we know is a central part of the Act. I mean,
8 indeed, if one sort of looks at the legislative history
9 more broadly, I think much of it is directed toward the
10 idea that guaranteed- issue and community rating were
11 the crown jewel of the Act.

12 The minimum coverage provision wasn't
13 something that everybody was bragging about, it was
14 something that was meant to be part of this package. I
15 agree with that.

16 But the -- the point of it was to have
17 guaranteed-issue and minimum coverage -- I mean, excuse
18 me -- guaranteed-issue and community rating. And that's
19 -- under the government's proposal, those would -- would
20 disappear. We would go back to the old system. And
21 under what I think is the proper severability analysis,
22 the -- the real question the Court is asking, should be
23 asking, is, would Congress rather go back to the old
24 system than to take perhaps the risk that you're talking
25 about, Justice Kennedy.

1 CHIEF JUSTICE ROBERTS: You're -- you're
2 referring to the government's second position. Their --
3 their first, of course, is that we shouldn't address
4 this issue at all.

5 MR. FARR: That's correct.

6 CHIEF JUSTICE ROBERTS: I asked Mr. Kneedler
7 about what procedure or process would be anticipated for
8 people who are affected by the change in -- in the law,
9 and change in the economic consequences. Do you have a
10 view on how that could be played out? It does seem to
11 me that if we accept your position, something -- there
12 have to -- there has to be a broad range of
13 consequences, whether it's additional legislation,
14 additional litigation.

15 Any thoughts on how that's going to play
16 out?

17 MR. FARR: Well, if the Court adopts the
18 position that I'm advocating, Mr. Chief Justice, I think
19 what would happen is that the Court would say that the
20 minimum coverage provision, by hypothesis of course, is
21 unconstitutional, and the fact of that being
22 unconstitutional does not mean the invalidation of any
23 other provision.

24 So under the position I'm advocating, there
25 would no longer be challenges to the remaining part of

1 the Act. The --

2 CHIEF JUSTICE ROBERTS: But if the challenge
3 is what we're questioning today, whether -- if you're an
4 insurance company and you don't believe that you can
5 give the coverage in the way Congress mandated it
6 without the individual mandate, what -- what type of
7 action do you bring in a court?

8 MR. FARR: You -- if the Court follows the
9 course that I'm advocating, you do not bring an action
10 in court, you go to Congress and you seek a change from
11 Congress to say the minimum coverage provision has been
12 struck down by the Court, here is our -- here -- here's
13 the information that we have to show you what the risks
14 are going to be. Here are the adjustments you need to
15 make.

16 One of the questions earlier pointed out
17 that States have adjusted their systems as they've gone
18 along, as they've seen things work or not work.

19 You know, as I was talking earlier about the
20 -- the different ratio for -- for ages and insurance.
21 The States have tended to change that, because they've
22 found that having too narrow a band worked against the
23 effectiveness of -- of their programs. But they did --
24 except for in Massachusetts, they didn't enact mandates.

25 So to answer -- I think to answer your

1 question directly, Mr. Chief Justice, the position I'm
2 advocating would simply have those -- those pleas go to
3 Congress, not in court.

4 Now, if one -- just -- just to discuss the
5 issue more generally, if that's helpful, I -- I think
6 that -- that if there were situations where the Court
7 deferred -- let's say for discretionary reasons, they
8 just said -- the Court said we're -- we're not going to
9 take up the question of severability and therefore not
10 resolve it in these other situations, it certainly seems
11 to me that in enforcement actions, for example, if the
12 time comes in -- in 2014 and somebody applies to an
13 insurance company for a policy -- and the insurance
14 company says, well, we're not going to issue a policy,
15 we don't think your risks are ones that we're willing to
16 cover, that -- it seems to me that they could sue the
17 insurance company and the insurance company could raise
18 as a defense that this provision, the guaranteed-issue
19 provision of the statute, is not enforceable because it
20 was inseverable from the decision -- from the provision
21 that the Court held unconstitutional in 2012.

22 JUSTICE SCALIA: Mr. Farr, let's -- let's
23 consider how -- how your approach, severing as little as
24 possible there -- thereby increases the deference that
25 we're showing to -- to Congress. It seems to me it puts

1 Congress in -- in this position: This Act is still in
2 full effect. There is going to be this deficit that
3 used to be made up by the mandatory coverage provision.
4 All that money has to come from somewhere.

5 You can't repeal the rest of the Act because
6 you're not going to get 60 votes in the Senate to repeal
7 the rest. It's not a matter of enacting a new act.
8 You've got to get 60 votes to repeal it. So the rest of
9 the Act is going to be the law.

10 So you're just put to the choice of I guess
11 bankrupting insurance companies and the whole system
12 comes tumbling down, or else enacting a Federal subsidy
13 program to the insurance companies, which is what the
14 insurance companies would like, I'm sure.

15 Do you really think that that is somehow
16 showing deference to Congress and -- and respecting the
17 democratic process?

18 It seems to me it's a gross distortion of
19 it.

20 MR. FARR: Well, Your Honor, the -- the
21 difficulty is that it seems to me the other possibility
22 is for the Court to make choices, particularly based on
23 what it expects the difficulties of Congress altering
24 the legislation after a Court ruling would be.

25 I'm not aware of any severability decision

1 that is --

2 JUSTICE SCALIA: No, I -- that wouldn't be
3 my approach. My approach would say if you take the
4 heart out of the statute, the statute's gone. That
5 enables Congress to -- to do what it wants in -- in the
6 usual fashion. And it doesn't inject us into the
7 process of saying, "this is good, this is bad, this is
8 good, this is bad."

9 It seems to me it reduces our options the
10 most and increases Congress's the most.

11 MR. FARR: I guess to some extent I have to
12 quarrel with the premise, Justice Scalia, because at
13 least the -- the position that I'm advocating today,
14 under which the Court would only take out the minimum
15 coverage provision, I don't think would fit the
16 description that you have given of taking out the heart
17 of the statute.

18 Now, I do think once you take out
19 guaranteed-issue and community rating, you are getting
20 closer to the heart of the statute. And one of the --
21 one of the difficulties I think with the government's
22 position is that I think it's harder to cabin that, to
23 draw that bright line around it. It's harder than the
24 government thinks it is.

25 I mean, to begin with, even the government

1 seems to acknowledge, I think, that the exchanges are
2 going to be relatively pale relatives of -- of the
3 exchanges as they're intended to be, where you're going
4 to have standardized products, everybody can come and
5 make comparisons based on products that look more or
6 less the same.

7 But the other thing that's going to happen
8 is with the subsidy program. The -- the way that the
9 subsidy program is -- is set up, the subsidy is
10 calculated according to essentially a benchmark plan.
11 And this -- if the Court wants to look at the
12 provisions, they're -- they begin at page 64A of the
13 Private Plaintiffs' brief -- again, in the appendix.
14 The particular provision I'm talking about's at 68A, but
15 there's a -- there's a question -- you -- you're looking
16 essentially to calculate the premium by looking at a --
17 at a standardized silver plan.

18 First question, obviously, is, is there
19 going to be any such plan if you don't have
20 guaranteed-issue and community rating, if the plans can
21 basically be individualized? But the second problem is
22 that, in the provision on 68A, the -- the provision
23 that's used for calculating the subsidy, what -- what is
24 anticipated in the provision under the -- the Act as it
25 is now, is that you do have the floor of the income, you

1 would -- you would take this benchmark plan, and the
2 government would pay -- pay the difference.

3 And as we talked about earlier, the
4 benchmark plan can change for age, and -- and the
5 provision says it can be adjusted only for age. So if
6 in fact you even have such a thing as a benchmark plan
7 anymore -- if the rates of people in poor health go up
8 because of individual insurance underwriting, the
9 government subsidy is not going to pay for that.

10 JUSTICE KAGAN: Mr. Farr, I understood that
11 the answer that you gave to Justice Scalia was
12 essentially that the minimum coverage provision was not
13 the heart of the Act. Instead, the minimum coverage
14 provision was a tool to make the nondiscrimination
15 provisions, community rating guaranteed-issue, work.

16 So if you assume that, that all the minimum
17 coverage is is a tool to make those provisions work,
18 then I guess I would refocus Justice Scalia's question
19 and say, if we know that something is just a tool to
20 make other provisions work, shouldn't that be the case
21 in which those other provisions are severed along with
22 the tool?

23 MR. FARR: No. I don't think so, because
24 there are -- there are many other tools to make the same
25 things work. That's I think the point.

1 And if one -- the case that comes to mind is
2 New York v. the United States, where the Court struck
3 down the take title provision but left other -- two
4 other incentives essentially in place.

5 Even without the minimum coverage provision,
6 there will be a lot of other incentives still to bring
7 younger people into the market and to keep them in the
8 market. And if -- if my reading of the finding is
9 correct, and that's all that Congress is saying, that
10 this would be useful, it doesn't mean that it's
11 impossible.

12 JUSTICE BREYER: But would you -- I would
13 just like to hear before you leave your argument, if you
14 want to, against what Justice Scalia just said, let's
15 assume, contrary to what you want, that the government's
16 position is accepted by the majority of this Court. And
17 so we now are rid, quote, of the true "heart" of the
18 bill. Now still there are a lot of other provisions
19 here like the Indian Act, the Black Lung Disease, the
20 Wellness Program, that restaurants have to have a
21 calorie count of major menus, et cetera.

22 Now, some of them cost money. And some of
23 them don't. And there are loads of them. Now, what is
24 your argument that just because the heart of the bill is
25 gone, that has nothing to do with the validity of these

1 other provisions, both those that cost money, or at
2 least those that cost no money. Do you want to make an
3 argument in that respect, that destroying the heart of
4 the bill does not blow up the entire bill; it blows up
5 the heart of the bill. I just would like to hear what
6 you have to say about that.

7 MR. FARR: Well, Justice Breyer, I think
8 what I would say is if one goes back to the, what I
9 think is the proper severability standard and say, would
10 Congress rather have not -- no bill as opposed to the
11 bill with whatever is severed from it. It seems to me
12 when you are talking about provisions that don't have
13 anything to do with the minimum coverage provision,
14 there is no reason to answer that question as any other
15 way than yes, Congress would have wanted the --

16 JUSTICE KENNEDY: The -- the real Congress
17 or a hypothetical Congress?

18 (Laughter.)

19 MR. FARR: An objective Congress, Your
20 Honor, not the -- specific not with a vote count.

21 JUSTICE SCALIA: Why put -- why put Congress
22 to that false choice?

23 MR. FARR: Well --

24 JUSTICE SCALIA: You only have two choices,
25 Congress. You have the whole bill or you can have, you

1 can have parts of the bill or no bill at all. Why that
2 false choice?

3 MR. FARR: I think the reason is because
4 severability is by necessity a blunt tool. The Court
5 doesn't have, even if it had the inclination, doesn't
6 essentially have the authority to retool the statute --

7 JUSTICE BREYER: I would say stay out of
8 politics. That's for Congress; not us. But the, the
9 question here is, you've read all these cases, or
10 dozens, have you ever found a severability case where
11 the Court ever said: Well, the heart of the thing is
12 gone; and, therefore, we strike down these other
13 provisions that have nothing to do with it which could
14 stand on their feet independently and can be funded
15 separately or don't require money at all.

16 MR. FARR: I think the accurate answer would
17 be, I am not aware of a modern case that says that. I
18 think there probably are cases in the '20s and '30s that
19 would be more like that.

20 If I could just take one second to raise the
21 economist brief because Justice Alito raised it earlier.
22 I just want to make one simple point. Leaving aside the
23 whole balancing thing, if one looks at the economist
24 brief, it's very important to note that when they are
25 talking about one side of the balance -- if may I

1 finish.

2 CHIEF JUSTICE ROBERTS: Certainly.

3 MR. FARR: When they are talking about the
4 balance, they are not just talking about the minimum
5 coverage provision. They very carefully word it to say
6 the minimum coverage provision and the subsidy programs.
7 And then so when you are doing the mathematical
8 balancing, the subsidy programs are extremely large.
9 They -- in the year 2020, they are expected to be over
10 \$100 billion in that one year alone. So if you are
11 looking at the numbers, please consider that. Thank
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Farr.
14 Mr. Clement, you have four minutes
15 remaining.

16 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
17 ON BEHALF OF THE PETITIONERS

18 JUSTICE SOTOMAYOR: -- Amicis' point, he
19 says that Congress didn't go into this Act to impose
20 minimum coverage. They went into the Act to have a
21 different purpose, i.e., to get people coverage jury
22 when they needed it, to increase coverage for people,
23 but this is only a tool. But other States -- going back
24 to my original point, that are other tools besides
25 minimum coverage that Congress can achieve these goals.

1 So if we strike just a tool, why should we strike the
2 whole Act, when Congress has other tools available?

3 MR. CLEMENT: Mr. Chief Justice, I will make
4 four points in rebuttal, but I will start with Justice
5 Sotomayor's question; which is to simply say this isn't
6 just a tool; it's the principal tool, Congress
7 identified it as an essential tool. It's not just a
8 tool to make it work. It's a tool to pay for it, to
9 make it affordable. And again, that's not my
10 characterization; that's Congress's characterization in
11 subfinding I on page 43a of the government's brief.

12 Now, that bring me to my first point in
13 rebuttal, which is Mr. Kneedler says quite correctly,
14 tells this Court, don't look at the budgetary
15 implications. The problem with that, though, is once
16 it's common ground, that the individual mandate is in
17 the statute at least in part to make community rating
18 and guaranteed-issue affordable, that really is all you
19 have to identify. That establishes the essential link
20 that it's there to pay for it. You don't have to figure
21 out exactly how much that is and which box -- I mean, it
22 clearly is a substantial part of it, because what they
23 were trying to do was take healthy individuals and put
24 them into the risk pool, and this is quoting their
25 finding, which is in order -- they put people into the

1 market "which will lower premiums." So that's what
2 their intent was.

3 So you don't have to get to the -- the final
4 number. You know that's what was going on here, and
5 that's reason alone to sever it.

6 Now the government -- Mr. Kneedler also says
7 there is an easy dividing line between what they want to
8 keep and what they want to dish out. The problem with
9 that is that, you know, you read their brief and you
10 might think oh, there is a guaranteed-issue and a
11 community rating provision subtitle in the bill. There
12 is not.

13 To figure out what they are talking about
14 you have to go to page 6 of their brief, of their
15 opening severability brief, where they tell you what is
16 in and what's out. And the easy dividing line they
17 suggest is actually between 300g(a)(1) and 300g(a)(2),
18 because on community rating they don't -- they say that
19 (a)(1) goes, but then they say (a)(2) has to stay,
20 because that's the way that you'll have some sort of,
21 kind of Potemkin community rating for the exchanges.
22 But if you actually look at those provisions, (a)(2)
23 makes all these references to (a)(1). It just doesn't
24 work.

25 Now, in getting back to the -- an inquiry

1 that I think this Court actually can approach, is to
2 look at what Congress was trying to do, you need look no
3 further than look than the title of this statute:
4 Patient Protection and Affordable Care. I agree with
5 Mr. Farr that community rating and guaranteed-issue were
6 the crown jewels of this Act. They were what was trying
7 to provide patient protection. And what made it
8 affordable? The individual mandate. If you strike down
9 guaranteed-issue, community rating and the individual
10 mandate, there is nothing left to the heart of the Act.

11 And that takes me to my last point, which is
12 simply this court in Buckley created a halfway house and
13 it took Congress 40 years to try to deal with the
14 situation, when contrary to any time of their intent,
15 they had to try to figure out what are we going to do
16 when we are stuck with this ban on contributions, but we
17 can't get at expenditures because the Court told us we
18 couldn't? And for 40 years they worked in that halfway
19 house. Why make them do that in health care? The
20 choice is to give Congress the task of fixing this
21 statute, the residuum of this statute after some of it
22 is struck down, or giving them the task of simply fixing
23 the problem on a clean slate. I don't think that is a
24 close choice. If the individual mandate is
25 unconstitutional, the rest of the Act should fall.

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

3 Mr. Farr, you were invited by this Court to
4 brief and argue in these cases in support of the
5 decision below on severability. You have ably carried
6 out responsibility for which we are grateful.

7 Case Number 11-393 is submitted. We will
8 continue argument in Case Number 11-400 this afternoon.

9 (Whereupon, at 11:49 a.m., the case in the
10 above-entitled matter was submitted.)

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A	59:20 61:23 62:7,20 65:8,8 66:11,22 67:4 68:7,11 70:1 72:1,5,7,9 74:24 75:13 76:19 79:19,20 80:2 82:6,10,25	55:3 adverse 40:24 54:14 56:18 59:3,11,14 60:7 62:3 66:23 67:3 67:12 advisory 13:14 advocating 69:18 69:24 70:9 71:2 73:13 affect 36:20 52:8 affirmative 29:20 afford 56:24 57:10 affordable 4:22 7:1 14:22 49:18 50:16,17,21 51:2 55:2 56:14 56:17 57:3 65:8 80:9,18 82:4,8 afternoon 83:8 age 61:12,19,22 75:4,5 ages 70:20 agree 8:25 10:25 46:11 63:16 67:24 68:15 82:4 aims 63:23 airline 17:12 AL 1:4,8,12,16 aligned 30:11 Alito 24:25 25:3 25:16 33:17 41:10 52:20 78:21 Alito's 34:7 42:25 53:11 allied 31:3 allow 33:12 altering 72:23 altogether 19:19 51:10 Amendment 38:2	Americans 23:25 Amicis 79:18 amicus 2:6 3:10 25:11 41:11 53:1 55:21 amount 24:13,14 31:18 60:10,23 amounts 48:8 analogies 47:12 analysis 18:4 33:14 68:21 and-a-half 47:23 48:13 Angeles 34:13 annual 59:17 answer 7:8 9:21 9:25 20:4,4 22:16 25:22 26:11 33:5 37:18 38:12 40:4,7 42:24 70:25,25 75:11 77:14 78:16 answered 19:24 answers 37:8 anticipated 69:7 74:24 Anticipation 48:1 Anti-Injunction 30:3,21 33:11 anybody 30:8 anymore 75:7 apart 29:8 appear 53:20 APPEARANC... 1:24 appendix 6:8 62:17 74:13 applied 18:4 applies 57:5 71:12 apply 17:7,24 18:10 23:7 28:24,25 31:13 34:3	appoint 23:3 approach 13:21 15:2 18:11 66:2 71:23 73:3,3 82:1 appropriations 16:9 areas 22:25 23:18 46:15 argue 28:16 83:4 argued 23:4 36:9 65:9 arguing 15:10 66:15 argument 1:22 3:2,5,8,11 4:4,8 6:19 16:3 23:10 23:14 25:17 28:10 41:11 42:13 46:8,19 46:20 47:8 55:20 76:13,24 77:3 79:16 83:8 arises 33:14 Article 28:17 34:3,6 articulated 49:10 aside 78:22 asked 17:25 19:24 37:15,19 44:7 69:6 asking 9:1 17:6 24:4 50:20 68:22,23 aspect 44:11 aspects 13:18 assess 43:17 Association 54:3 assume 6:20 43:1,4,13 64:10 75:16 76:15 assuming 41:18 67:23 assumption 37:1 48:22 51:24
----------	--	--	--	---

<p>54:22 assumptions 52:4,5 attach 16:21 attractive 60:1 augment 51:22 authority 78:6 authorized 59:20 authorizes 59:17 available 8:4 80:2 average 60:1,8 avoid 28:4 aware 72:25 78:17 awesome 43:18 a.m 1:23 4:2 83:9</p> <hr/> <p style="text-align: center;">B</p> <p>B 17:11 64:16 back 5:5 21:2 23:4 34:18 47:7 61:3 68:20,23 77:8 79:23 81:25 background 54:2 bad 10:18 73:7,8 balance 34:19 35:14 53:20 78:25 79:4 balanced 50:19 balancing 53:4 78:23 79:8 ballpark 41:19 ban 22:3,4 82:16 band 61:22 70:22 bankrupt 48:2,6 48:12 bankrupting 72:11 bar 33:11 BARTOW 2:5 3:9 55:20 based 12:23 13:4 18:10 38:22</p>	<p>48:22 51:24 60:4 72:22 74:5 basic 4:21 9:2 10:20 47:18 basically 12:23 13:25 20:7 25:25 38:23 74:21 basis 11:4,8 33:13 62:23 bear 29:8 becoming 57:3 beginning 7:23 64:14 behalf 1:25 2:3 3:4,7,13 4:9 28:11 79:17 believe 28:22 33:8 65:25,25 70:4 believed 62:23 believer 18:8 benchmark 74:10 75:1,4,6 benefits 14:18 16:14 best 8:17 13:4,10 44:15 56:2 better 7:17 12:6 12:8 14:23 22:7 26:11 35:11 67:9 beyond 30:23 37:7 41:24 big 18:8 20:4 26:14,15 bigger 26:4 bill 38:9,21 42:1 76:18,24 77:4,4 77:5,10,11,25 78:1,1 81:11 billion 41:13,15 41:16,17,22 43:2,2 47:25 53:2 79:10</p>	<p>biosimilar 23:18 biosimilarity 22:24 Biosimilars 15:12 bit 9:17 66:21 68:3 bitter 6:24 black 16:13 24:1 27:9 76:19 Blackmun 19:7 blend 37:13,16 37:16,17 blow 77:4 blows 77:4 blunt 78:4 Booker 13:10,17 13:19 14:8 44:15,16 49:10 bottom 7:6,8 box 80:21 Brady 31:11 bragging 68:13 branch 19:25 brand 10:24 breast 22:24 23:16 Breyer 22:14 23:13,16 27:6 31:16 45:23 46:13 76:12 77:7 78:7 Breyer's 25:24 33:5 brief 6:8 13:7 41:11 53:1 60:25 62:17 74:13 78:21,24 80:11 81:9,14 81:15 83:4 briefed 36:19 bright 73:23 bring 32:3 33:21 70:7,9 76:6 80:12</p>	<p>bringing 29:5 32:9 59:15 broad 49:15 69:12 broader 21:8,20 broadly 12:14 68:9 Brock 14:9 19:8 brokered 39:9 bronze 13:2 Buckley 21:24 21:25 28:5 82:12 budget 42:1 budgetary 43:10 80:14 bugaboo 37:10 built 51:12 burned 58:21 burns 58:14 business 1:4 4:5 31:12 businesses 29:1 49:19,21 buy 51:17</p> <hr/> <p style="text-align: center;">C</p> <p>C 3:1 4:1 cabin 73:22 calculate 74:16 calculated 74:10 calculating 74:23 call 10:9 20:12 calorie 76:21 campaign 21:12 care 4:22 7:2,17 27:8 29:4 32:17 39:20,21 48:19 49:18 50:16,17 51:2,4 55:2 65:8 82:4,19 carefully 79:5 carried 31:22 83:5 carry 50:24</p>	<p>case 4:4,5 7:10 15:7 21:8 28:15 31:9,10,10 32:3 32:9 33:9,14 34:9 40:7 41:2 44:6 45:2,10,11 55:25 75:20 76:1 78:10,17 83:7,8,9 cases 9:15 13:10 19:5 20:10 21:22 31:6 44:11 49:11 78:9,18 83:4 cause 4:25 29:15 29:16,20 40:24 caused 59:14 CBO 66:21,23 67:2 center 16:24 centered 37:8 central 44:17 49:24 56:12 68:7 certain 18:11 26:6,8,10 52:1 certainly 14:9 48:23 56:11 58:17 71:10 79:2 cetera 76:21 challenge 30:6 30:14,19 31:25 33:12 70:2 challenged 30:20 35:18 62:22 challenges 69:25 challenging 33:21 chance 22:11 change 29:22 34:2 60:8 69:8 69:9 70:10,21 75:4 changes 14:17</p>
---	--	---	---	---

48:15	8:2,13,20,25	4:24 5:24 11:5	conclusion 18:14	71:25 72:1,16
characteristics	9:4,14,19,24	11:11,20,24	67:13	72:23 73:5 76:9
58:2	10:19 11:2,13	12:24 22:18,19	condition 22:20	77:10,15,16,17
characterization	12:11 13:6,16	24:8,9,23 25:10	conductive 63:22	77:19,21,25
80:10,10	14:14 15:4	28:1 40:11	conference 47:1	78:8 79:19,25
charge 55:13	16:16 18:2,8,22	61:18 66:6,15	confronted 45:12	80:2,6 82:2,13
61:14	19:4 20:3,11,14	68:10,18 73:19	Congress 4:14	82:20
charged 61:18	20:20 21:1,5	74:20 75:15	4:17,20 5:15,22	congressional
61:19	22:13 23:12	80:17 81:11,18	5:25 6:4,9,19	9:20 10:21
Chief 4:3,10 16:6	24:5 25:1,2,15	81:21 82:5,9	6:25 7:7,12,13	20:24 35:7,8
16:16 18:18	26:4,10,18,25	community-rat...	7:13,16,21,21	66:4
26:3,7,8,24	27:16 28:8 46:5	4:19 6:3,11	7:25 8:4,5,9,21	Congress's 4:21
27:1,17 28:7,12	46:10 79:14,16	52:16,22 54:20	9:3,6,7,13,25	6:6,25 40:20
29:2,15 33:4	80:3 83:2	55:11 56:1,5	10:6,14 12:5,10	49:10 50:18,23
35:23 40:1,14	clerks 38:7 39:16	59:8	12:19 13:14	51:1,7 52:10,12
40:18 41:1,9	39:21	companies 36:6	14:4,18,23 16:4	53:23 54:22
42:6,16 48:21	climb 58:9	42:4 48:3 52:24	16:11 17:9,17	58:19 73:10
50:13 55:17,22	close 23:5 82:24	53:5,5 56:20	18:23,23 19:2	80:10
69:1,6,18 70:2	closely 22:2 26:1	58:8 67:7,9,13	19:12,16,21	connected 15:22
71:1 79:2,13	30:11 31:3	72:11,13,14	22:5,11,17	15:22,23,24
80:3 83:1	closer 73:20	company 61:13	26:13 27:13	32:1
choice 14:25	cobble 27:14	70:4 71:13,14	32:15,16,17,21	consequence
32:8 72:10	code 51:13 55:4	71:17,17	32:23 33:23	10:5,7
77:22 78:2	coherent 22:1	comparable 13:5	34:17,18,18	consequences
82:20,24	colleagues 19:20	compare 11:24	35:9 36:6,8	34:9 43:22,25
choices 72:22	collecting 31:24	31:6	38:16 40:12,22	69:9,13
77:24	colloquial 63:9	comparisons	41:6 42:20 43:7	conservative
choose 7:24 8:22	colloquy 17:4	74:5	44:18 45:24	15:2
chop 19:1	combat 62:2	competence	47:19 48:15,17	consider 28:15
cited 16:13	combination 14:1	43:17	49:3,23 50:3,6	28:23 32:2,25
citizens 29:1	come 31:20	completely 17:12	50:8,9,11,18	33:15 34:18
clarify 18:6	54:16 72:4 74:4	17:17 45:18	51:12,14,16,17	35:14 36:8
CLASS 23:1,19	comes 48:4	complex 39:11	51:22 52:4 53:3	71:23 79:11
clause 10:1 34:2	71:12 72:12	complimentary	53:4,19 54:5,7	consistent 13:9
62:24 63:8,9,19	76:1	50:15	54:16,25 55:3,7	14:8,9 28:17
63:20 64:21	commerce 62:19	compromise 39:9	55:9,14 56:11	50:18
clean 26:13	62:24 63:8,9	concede 14:16	56:12,22 59:6	conspicuously
82:23	64:18,21	concedes 4:14	59:13 61:5,7,10	41:7
clear 10:14 11:23	Commissioners	conceivable	61:23 62:2,12	constant 60:11
62:15 66:24	54:4	65:17	62:14,20 63:16	Constitution
clearly 13:12	committee 42:1	concerned 6:19	63:24 64:14,15	22:10 28:17
32:14 80:22	47:2	57:13	64:19,23 65:13	constitutional
Clement 1:25 3:3	common 10:23	concerted 27:3	65:18 66:1,5,12	10:11 15:17,19
3:12 4:7,8,10	46:1 80:16	conclude 28:18	66:19 68:23	31:8 48:23
5:20 6:22 7:8	community 4:15	concluded 67:11	70:5,10,11 71:3	consumers 67:8

<p>contemplate 29:5 contemplated 51:18 context 62:14,19 63:8,9 64:18 contexts 19:20 continue 4:3 30:13 49:9,12 51:7 83:8 continues 30:9 continuing 29:12 contradicted 66:20 contrary 45:9 52:12,12 76:15 82:14 contributes 60:11 contribution 21:13,15,18 22:4,10 contributions 22:1 82:16 control 54:17,19 controversial 26:22 convenient 16:10 convert 38:24 core 25:18 27:21 27:25 corn 10:9,17 17:5 correct 38:16,17 54:8 67:24 69:5 76:9 correctly 80:13 cost 4:25 6:17,18 29:8 51:25 52:4 52:5,25 53:2 76:22 77:1,2 costs 6:20 41:12 41:14 48:7 52:23 54:19 61:8 Counsel 5:4 66:3</p>	<p>count 38:24 76:21 77:20 counteract 4:21 country 51:20 couple 5:20,21 6:22 20:17 26:15 course 6:6,7 8:2 19:9 69:3,20 70:9 court 1:1,22 4:11 8:15,19,23 9:1 10:22,24 12:16 13:24 14:3,10 18:16 20:1 21:11,14,15,25 22:3,8 23:4 28:13,14,18,22 29:1 30:17 31:11 32:20,21 32:22,25 33:16 34:10 35:17 36:7,18,19,21 37:4,22 38:6,24 40:22 41:24 44:18,20 46:24 47:5 48:15 50:7 55:23 62:11,15 62:21,23 63:11 63:20 65:13,14 68:5,22 69:17 69:19 70:7,8,10 70:12 71:3,6,8 71:21 72:22,24 73:14 74:11 76:2,16 78:4,11 80:14 82:1,12 82:17 83:3 courts 48:17 Court's 9:15 18:3 32:12 34:8 35:6 37:2,11 38:20 38:25 43:6,10 44:1 53:17 64:20</p>	<p>Court-appointed 2:6 3:10 55:21 cover 48:7,7 58:8 59:25 71:16 coverage 5:13 7:22 28:16 33:2 40:9,10,21 42:20,22 47:20 47:22 48:2,4 49:4,16 51:19 52:7,13,15 54:8 54:21 56:4,13 56:13 57:15 58:22,24 59:9 59:11 61:15 62:1,21 63:18 65:1,11 66:8,14 66:16,25 68:12 68:17 69:20 70:5,11 72:3 73:15 75:12,13 75:17 76:5 77:13 79:5,6,20 79:21,22,25 covered 48:19 52:18 56:23 63:6 covers 60:6 crashed 58:21 crashes 58:13 create 60:4 created 82:12 creates 40:8 creating 63:3 credit 24:13 28:3 49:19 credits 15:22 24:13 30:19 51:5,6 55:7 67:8 criminalizing 65:22 critical 24:12 crown 68:11 82:6 crux 62:5</p>	<p>curiae 2:6 3:10 55:21 current 12:22 currently 46:18 cut 7:3 14:2,7 34:25 43:3 50:4 54:25</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 1:25 3:3,12 4:1 4:8 79:16 Daimler/Chrys... 34:15 dare 21:24 Davis 34:12 day 8:6 23:20 days 26:15 deal 26:15 59:14 82:13 dealing 31:7 59:10 death 66:7,20 67:21 debate 5:1,2,3 68:1 decades 21:2,2,2 22:5 decide 14:23 17:13 27:22 29:20 38:10 decided 13:11 decision 35:6 45:12 71:20 72:25 83:5 declared 17:16 25:5 declaring 7:25 decline 60:24 deemed 40:12 defense 71:18 deference 71:24 72:16 deferred 71:7 deficit 72:2 definition 19:1</p>	<p>64:3 degree 34:11 delighted 11:14 democracy 19:25 21:21 democratic 22:7 72:17 denies 31:7 Department 1:15 2:3 4:6 Deputy 2:2 description 73:16 designed 49:17 desired 50:5 destroying 77:3 detail 14:13 determination 48:24 dictionary 63:25 64:5,8 differ 23:8 difference 39:13 52:21 62:25 75:2 different 10:22 13:13 14:6 15:10,16 17:19 20:1 35:3 45:19 46:6 55:13 57:4 59:22 62:2 67:4 70:20 79:21 differential 61:12 differently 9:17 12:4 difficulties 15:17 72:23 73:21 difficulty 15:19 72:21 direct 33:11 directed 52:8 68:9 direction 5:2 directly 19:21</p>
--	---	--	--	--

<p>31:9 71:1 disagree 41:17 50:25 disappear 68:20 discreet 51:3 discretion 37:3 37:11,17 discretionary 71:7 discriminate 55:12 discuss 47:14 71:4 discussion 32:11 67:1 disease 24:1 76:19 dish 24:19 81:8 dispassionately 34:19 disposition 25:8 25:9 dispositions 25:7 disproportionate 24:20 disputing 60:22 dissent 13:21 distort 35:6 distortion 72:18 district 23:4 dividing 10:22 11:10 40:9 81:7 81:16 doctors 22:25 23:17 doing 5:7 43:20 46:24 55:14,14 79:7 dollars 47:25 doubt 52:2 dozen 59:13 dozens 78:10 draw 73:23 drawn 49:7 dream 46:22</p>	<p>driving 56:3 drug 23:18 65:15 65:15,16,22 dug 26:21 D.C 1:18,25 2:3 2:5</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 3:1 4:1,1 earlier 35:25 70:16,19 75:3 78:21 easy 12:25 26:13 26:20 34:2,4 39:16,21,21 40:7 63:23 81:7 81:16 echoing 35:25 economic 63:13 65:2 67:13 69:9 economist 78:21 78:23 economists 5:5 5:16,16 41:11 42:2 53:1 economy 64:17 EDWIN 2:2 3:6 28:10 effect 34:22,23 42:12,14 44:9 44:14 47:22 48:4,16 49:20 67:12 72:2 effective 63:4 effectively 55:11 63:10 effectiveness 70:23 effects 55:3 64:17 effectuating 50:3 efficient 60:22 effort 27:4 Eighth 38:2 either 61:17</p>	<p>65:22 67:21,22 eliminate 35:13 embodied 50:11 employees 24:17 employer 15:23 24:15,16,16 49:18 51:19 55:12 employers 51:3 51:5,12,16,17 51:21,23 55:5,6 enables 73:5 enact 62:24 70:24 enacted 10:6 30:25 31:2,5 53:19 enacting 61:23 72:7,12 enforceable 71:19 enforcement 71:11 English 64:10 enhance 49:17 enormous 38:9 enormously 35:2 enrollment 59:17 entire 28:19 77:4 entirety 65:10 envisioned 12:10 equals 43:2 equitable 35:16 ERISA 65:7 especially 7:15 ESQ 1:25 2:2,5 3:3,6,9,12 essential 4:17 6:10,13 11:19 38:16 40:13 41:6,8 44:24 63:3,7,10,12 64:4,24 65:1,7 65:7,16 66:13 80:7,19</p>	<p>essentially 57:8 59:11 67:8 74:10,16 75:12 76:4 78:6 establishes 80:19 establishing 61:10,12 et 1:4,8,12,16 76:21 etcetera 23:1 everybody 10:21 10:25 57:5 61:18,19 68:13 74:4 evidence 66:5,11 evident 51:1 exact 65:3,5 exactly 8:13 19:10 36:17 39:10,24 40:2 61:15 80:21 example 12:8 13:10 21:7,24 29:21 44:16 45:5,6 52:25 56:2 61:13,21 65:12 71:11 examples 5:23 21:6 exchange 24:14 exchanges 6:14 6:14 11:19,21 11:22,25 12:2,7 12:9,15,20,21 15:21 24:11,12 24:15,17 28:2 31:20 67:6 74:1 74:3 81:21 excised 45:3 excluded 56:7 excuse 57:18 62:16 68:17 exercise 27:20 34:8 36:10 37:3</p>	<p>43:5,18 exercising 36:3 existing 54:10 expand 51:2 expanded 42:20 expanding 56:12 expansion 41:16 42:3,7,9,17 expect 38:5,6 expected 79:9 expects 72:23 expenditure 30:7 expenditures 22:2,4,9,10 82:17 expensive 7:4 experience 51:13 54:2 59:7 expertise 53:9 53:11 explain 34:9 explicitly 53:23 exploring 46:11 extent 73:11 extraordinary 45:20,20 extreme 36:10 extremely 79:8</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facilities 6:15 fact 5:16 34:1 47:21 68:4 69:21 75:6 fair 60:17 66:17 fairness 20:14 fall 10:17 11:15 12:20 25:6 27:23 28:20 41:2 47:17,19 49:3 54:24 65:10,23 82:25 fallback 25:3,19 falls 25:19 29:7 false 77:22 78:2</p>
---	---	---	---	--

<p>far 16:25 23:14 24:6 46:18 Farr 2:5 3:9 55:19,20,22 56:25 57:20,23 58:4,15,17 59:1 60:17 64:2,6,11 66:17 67:16,19 67:24 69:5,17 70:8 71:22 72:20 73:11 75:10,23 77:7 77:19,23 78:3 78:16 79:3,13 82:5 83:3 fashion 73:6 federal 4:14 21:9 30:7 59:24 60:15 61:6 65:4 72:12 Federation 1:3 4:5 feeding 22:24 23:17 feet 78:14 fell 33:23 fewer 46:18 52:18 56:19 60:25 fighting 27:18 figure 25:18 37:23 39:10,12 41:25 46:19 62:10 80:20 81:13 82:15 figures 5:6 42:3 final 81:3 finance 21:12 finances 41:25 financial 53:19 53:20 find 10:10 11:9 21:3 finding 6:7,7 11:17,18 40:22</p>	<p>59:2 62:4,10,14 62:15,18 63:1 64:22,22 65:24 76:8 80:25 findings 5:8 11:7 40:20 52:14 58:20 62:20 64:13,15 66:4 67:23 fine 27:24 finish 16:20 26:8 38:18 79:1 first 5:21 11:16 13:19 29:18 33:10 41:23 45:11 57:2 59:23 64:13 67:5 69:3 74:18 80:12 fit 73:15 fix 7:7,24 8:8 19:22 22:5,12 fixing 5:19 7:14 7:16 82:20,22 floor 60:4 74:25 Florida 1:12 4:6 focus 17:8 18:16 46:15 follow 15:25 16:25 18:6 23:13 24:6 25:17 57:19 68:4 following 23:13 24:6 64:15 follows 68:5 70:8 footnote 19:8 force 4:24 7:25 forever 31:24 formulate 9:16 formulation 19:5 forth 5:5 fortify 18:14 found 4:14,17 5:10,10 6:9</p>	<p>14:11 45:9 46:2 70:22 78:10 four 79:14 80:4 frankly 14:21 full 72:2 fully 28:16 function 12:1,3,4 12:4 17:8,22 38:7,24 43:6 44:2 53:17 functionally 14:12 fundamental 49:2 fundamentally 15:9 41:18 funded 78:14 further 49:6 51:7 58:12 82:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 4:1 gather 27:4 gathering 6:15 General 2:2 generally 71:5 General's 25:8 62:16 generous 59:24 germane 16:17 getting 10:15 23:17 60:5,10 61:1,2 73:19 81:25 Ginsburg 14:14 15:4 32:8 53:22 56:16,25 give 7:13,13,16 17:25 22:11 26:12 37:9 38:6 44:6 55:6 64:4 70:5 82:20 given 22:16 39:15 67:8 73:16</p>	<p>gives 64:1 giving 82:22 go 16:25 17:20 21:2 23:4 27:10 30:12 33:4 38:2 38:9 39:11 40:3 41:24 44:4 45:15 52:17 58:12 61:3,25 68:20,23 70:10 71:2 75:7 79:19 81:14 goal 4:21 6:25 49:10 51:8 52:10,13 goals 56:12 79:25 goes 31:18 63:13 67:2 77:8 81:19 going 5:5 6:23,25 7:4,10,11 8:9 8:14 12:25 13:4 14:1,2 16:20,21 19:17 29:8 30:20 32:20 34:21,21 35:6 35:10 38:9,18 39:8,9 42:5 43:3 48:2,6,6 48:12 50:22 56:10,20 57:23 57:25 58:5 62:22 68:6 69:15 70:14 71:8,14 72:2,6 72:9 74:2,3,7 74:19 75:9 79:23 81:4 82:15 gold 13:2 good 14:19 56:3 61:21 73:7,8 gotten 27:21 47:24 governing 51:12</p>	<p>government 4:14 24:7 31:23 42:8 56:15 60:6,9,20 60:23,24 63:1 73:24,25 75:2,9 81:6 government's 6:8 42:17 55:25 62:5 68:5,6,19 69:2 73:21 76:15 80:11 governs 10:21 gradually 58:6 grateful 83:6 great 21:7,24 greater 29:8 gross 72:18 ground 80:16 groups 57:4 guaranteed 54:12 68:10 guaranteed-iss... 66:6 guaranteed-iss... 4:15,18,25 5:24 6:2,11 11:5,11 11:20 24:8,9,24 25:10 28:2 40:11 52:16,21 53:10 54:19 55:11 56:1,5 59:8 63:5 66:15 68:17,18 71:18 73:19 74:20 75:15 80:18 81:10 82:5,9 guess 13:10 25:19 29:6 72:10 73:11 75:18 guide 37:10 guidelines 13:12 44:21 guts 50:4</p>
--	---	---	---	--

H				
H 2:5 3:9 55:20 64:22	76:17,24 77:3,5 78:11 82:10	identified 36:18 80:7	increasing 5:10	71:20
habit 5:7	held 28:20 31:3 33:19 71:21	identify 15:6 80:19	independent 1:3 4:5 14:13	insignificant 67:12
half 12:5,6,8,12 21:23 31:19,20 31:21,22,24 43:3 47:11 59:13	help 17:25	ignore 9:9	independently 12:18 17:17 78:14	instance 5:11 46:2
halfway 82:12,18	helpful 71:5	ignoring 66:4	Indian 14:17	instituting 61:17
hand 11:12 24:22 26:5 52:22	helping 23:24	II 22:19 25:13	23:24 27:8 76:19	institution 32:14
handful 21:18 25:25	HHS 4:6	III 2:5 3:9 34:3,6	indicate 62:21,22	instruction 23:3
hands 5:18	high 52:25 56:8 57:13 58:3	illnesses 63:5	indication 49:2,6 52:4	insurance 11:25 12:23 24:17 36:6 40:24 41:12,13,21 42:4,4 47:24,24 48:2,11,14,19 51:9,21,23 52:24 53:5,5 54:3,13 55:5 56:6,20 57:7,7 57:12 58:7 60:5 61:13 63:4 67:6 67:9,13 70:4,20 71:13,13,17,17 72:11,13,14 75:8
happen 41:20 42:9 69:19 74:7	hip 15:18 22:11	imaginative 64:4	indications 47:16	insured 60:11
happened 38:1 39:10 59:12	history 17:20 18:13,14 37:23 41:25 53:18 54:23 68:8	imagine 31:18	indispensable 65:18,20	insurer 13:3
happens 60:19	hoc 66:11	imagining 46:18	individual 4:12 4:16,17,23 5:25 6:3,9 8:5 11:18 24:7,9 41:15,19 42:8 43:3 52:6 52:6,18 58:2 60:21 70:6 75:8 80:16 82:8,9,24	insurers 6:15 29:6
happy 18:10,16	hold 46:19,20	immediately 8:8	individualized 12:23,24 74:21	intended 4:20 12:19 17:18 18:24 22:18 36:6 43:7 47:19 74:3
hard 15:14 34:4 45:22	holding 13:18 32:13	implications 43:11 80:15	industry 41:13 41:21	intent 9:3,6,20 10:21,23 17:9 19:19 20:24 49:1,2 50:3,11 50:18,19 81:2 82:14
harder 73:22,23	hole 41:22	important 27:24 36:19 47:15 57:3 59:23 60:7 62:8 78:24	inertia 8:12,16	interconnected 15:21 16:24
head 64:15	hollow 16:1,4,7	impose 5:24,25 36:5 41:12 43:6 55:6 79:19	inextricably 32:1	interpret 19:6
headed 64:17	hollowed-out 17:1 23:15 25:20	imposed 24:16 59:8	infected 32:12 32:17	interpretation 37:21 38:20 39:25 40:3
health 1:8,15 7:16 12:22 27:8 49:15,15 52:25 56:9 58:2 63:4 65:8 75:7 82:19	Honor 72:20 77:20	impossible 6:2 76:11	infinite 57:8 60:16	
healthcare 14:17 14:22	hospital 59:18	impression 24:3 45:11	information 6:14 6:21 66:18 70:13	
healthy 48:10 58:1,10 59:15 80:23	hospitals 24:19 24:20	Improvement 14:17	initial 28:22	
hear 23:5 46:5 76:13 77:5	house 50:9 82:12 82:19	incentives 76:4,6	initially 35:4	
heard 29:16 40:4	huge 45:17	inclination 78:5	inject 73:6	
heart 7:15 15:19 16:5 24:10 26:2 26:12 34:24 44:8 45:3,13,16 47:8,10 73:4,16 73:20 75:13	HUMAN 1:8,16	inclined 18:12	inquiry 9:2 18:16 18:17 19:11 50:23 53:9 81:25	
	hurt 30:7	include 28:2	inseverable 33:1	
	husker 10:9,18 17:5	included 59:13		
	hypothesis 52:1 52:2 69:20	includes 10:1		
	hypothetical 17:5 34:7 77:17	income 60:4,5,12 74:25		
	I	inconsistent 20:22,25		
	idea 9:1 29:3 66:18,19 68:10	increase 52:23 55:2 60:9,21 79:22		
		increases 36:1 71:24 73:10		

<p>interrupted 33:7 interstate 62:19 64:16,18 65:16 65:21 intrastate 65:15 65:20 intrusive 17:21 invalidation 69:22 invited 83:3 invoking 55:4 involve 20:1 44:11 involved 42:4 involves 21:9 issue 5:6 10:2 29:22 31:1 36:23 37:2,8 68:10 69:4 71:5 71:14 issues 28:15 item 38:9,9 i.e 53:10 79:21</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 11:17 jewel 68:11 jewels 82:6 job 15:2 join 60:2 joined 22:11 judge 44:25 judges 14:2 judgment 14:6 20:2 27:20,21 34:9 judicial 20:13 35:16,24 36:1,4 36:10 43:18 judiciary 36:1 juries 14:1 jurisdictional 34:3,7 jurisprudence 18:7</p>	<p>jury 79:21 Justice 2:3 4:3 4:10 5:4,21 6:12 7:6,19 8:3 8:11,14,18,21 9:4,15,18,22 10:5,13,19 11:2 11:13 12:2,11 13:6,16 14:14 15:4 16:6,16 17:2,3,5,25 18:2,5,9,18,20 18:25 19:4,7,14 19:18 20:3,8,12 20:15,18,25 21:6 22:13,14 22:16 23:13,16 24:25 25:3,16 25:24 26:3,7,8 26:24 27:1,6,17 28:7,12 29:2,15 30:4,17,24 31:15,16,17 32:8,10 33:4,5 33:17 34:6,7,14 34:16 35:20,21 35:23,23,24 36:13,15,22 37:1,7,14 38:1 38:5,12,15 39:1 39:4,7,16,20 40:1,5,7,14,18 41:1,9,10 42:6 42:16,23,25 43:12,16,20 44:5,22 45:6,10 45:23 46:13 47:1,7,10 48:1 48:9,21 49:22 50:2,13 51:15 51:24 52:20 53:8,11,14,22 55:17,22 56:16 56:25 57:18,21 58:4,16,18 59:6</p>	<p>60:14,18 63:25 64:2,3,7,9 66:3 67:10,17,20 68:25 69:1,6,18 70:2 71:1,22 73:2,12 75:10 75:11,18 76:12 76:14 77:7,16 77:21,24 78:7 78:21 79:2,13 79:18 80:3,4 83:1 justices 18:11 37:19 justiciability 32:24 37:13</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 11:2,13 12:2,11 13:6,16 20:25 21:6 22:13 39:1,4,7 40:7 58:4,16,18 59:6 75:10 KATHLEEN 1:7 keep 17:1 27:23 57:3 76:7 81:8 Kennedy 17:3 18:2,5,9,20 22:16 34:6 35:20,23,24 36:13,15 42:23 43:12,16,20 51:15,24 53:8 53:14 67:10,17 68:25 77:16 key 24:13,15 kickback 10:10 10:18 kind 43:6,8 81:21 kinds 15:5 22:22 Kneedler 2:2 3:6 28:9,10,12 29:11,18 30:4 30:16 31:9 32:5</p>	<p>32:22 33:5,8 34:1,10,14,15 35:15,21 36:12 36:15,22,25 37:6,12,16 38:1 38:11,14,17 39:1,3,6,18,23 40:6,17,20 41:5 41:23 42:11,19 43:9,15,19,23 44:5,15 45:5,8 45:15 46:23 47:4,9,13 48:5 48:13,25 50:1,7 50:25 51:19 52:3 53:3,13,16 53:25 55:18 56:17 69:6 80:13 81:6 know 5:9 9:7 13:3 14:3 17:6 17:17,23 19:9 22:21 23:8 24:2 25:23,25 26:11 37:9 40:14 44:11 45:11 50:2 54:12 58:19 64:9,12 64:16,18 68:7 70:19 75:19 81:4,9 knowing 62:21 knows 50:5,5</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 43:16 laid 54:10 large 55:12 57:16 79:8 largely 22:6 larger 63:12 65:2 laugh 26:19 Laughter 10:12 26:17 38:4 39:17,22 46:12</p>	<p>47:3 67:18 77:18 law 19:15 21:12 29:9 30:15 32:9 35:1,4,13 38:7 39:4 50:8,10,11 53:19,21 62:24 65:22 69:8 72:9 laws 55:10 lawsuit 33:21 leave 25:20 26:5 32:21,23 34:17 35:8 44:9,9 45:14 52:15 58:12,13 76:13 leaving 5:18 78:22 led 66:19 left 10:4 22:4,5 23:15 25:20 44:14 54:9 76:3 82:10 legislation 10:9 21:3 27:3 39:9 69:13 72:24 legislative 5:7 8:12,16 10:23 14:13 16:19 17:20 18:12,13 19:19 20:2 37:23 38:21 41:24 49:1,2 50:11 53:18 54:23 66:9 68:8 legislator 21:17 legitimately 30:25 31:2,5 let's 7:23 11:2 22:17 26:12 37:7 71:7,22,22 76:14 level 20:21 23:22 light 8:17 limit 22:9 35:17 limits 21:15 22:1</p>
---	--	--	--	---

35:16	78:23	12:19 13:8,13	means 10:15	27:5
limp 12:17	Lopez 63:11 65:3	14:4 18:23	40:3 63:10,16	misconceptions
line 7:6,9 11:10	65:5	19:10	63:21	59:5
16:20 29:10	Los 34:13	March 1:19	meant 68:14	mix 60:8
40:4,9,15,19	lost 41:20 68:1,3	market 4:24	Medicaid 15:25	model 6:1,4 7:23
49:7 59:25 61:7	68:6	11:24 45:18	28:3 41:16 42:3	modern 78:17
73:23 81:7,16	lot 13:7 16:8 27:5	51:10 52:7,19	42:7,9,17,20	moment 45:16
link 80:19	34:22 46:8 62:2	53:6 54:7,15,18	51:8 53:6	59:1
links 11:20 19:12	76:6,18	55:14 58:12,13	Medicare 24:19	monetary 43:24
list 46:13	lower 56:8 57:14	76:7,8 81:1	28:3 29:21,23	money 7:3 30:7
litigation 29:5,10	57:22,23 81:1	markets 56:6	29:24 48:16,18	31:22,24 72:4
29:13 69:14	lowered 51:25	63:4	48:18	76:22 77:1,2
little 9:16 44:11	lung 16:13 24:1	market-based	member 10:24	78:15
66:20 68:3	27:10 76:19	54:17	mentioned 15:13	months 66:22
71:23	Lyons 34:13	Massachusetts	67:5	morning 4:4
loads 76:23		5:12 61:21	menus 76:21	move 35:14
loaf 12:6,6,6,8,8	M	70:24	merits 37:17	36:16,22 37:7
12:12 21:23	magnitude 5:1	master 23:3	middle 16:11	37:15 62:6,7
47:11	main 44:13	materials 66:9	milk 17:13	moving 16:22
long 14:17 51:14	major 76:21	mathematical	million 41:19	must-hire 14:12
55:5	majority 13:21	79:7	47:23 48:13,19	
longer 69:25	28:24 44:23	matter 1:21 7:9	51:20	N
look 6:25 7:21	50:8 76:16	8:3 10:2 17:7	millions 28:25	N 3:1,1 4:1
9:5,6,15 11:10	making 20:2	17:22 28:22	46:25 48:17	narrow 70:22
11:16 15:20	32:24	35:15 37:20	56:6,7	national 1:3 4:4
18:13 20:7 22:9	mandate 4:12,16	38:19 72:7	mind 57:4 76:1	54:3 64:17 65:7
22:17,21 24:18	4:17,23 5:25	83:10	minimum 7:5	Native 23:25
37:23 38:15,21	6:3,10 7:11 8:5	matters 37:12	28:16 33:2 40:9	necessary 10:16
39:8,14,15	11:6,18 12:4	52:17	40:10,21 42:22	33:15 63:19,19
43:10 44:2	22:18,19 24:7,9	mean 6:13,16,23	47:20,22 48:1,3	63:21
49:11 50:16,19	24:15,16,23	10:8 13:17	49:4,16 52:7,13	necessity 78:4
53:17 58:20	25:5 28:1 29:7	14:18 16:3,8,12	52:15 54:8,21	need 17:6 48:11
62:15 65:24	41:15,20 42:8	16:13,22 20:5	56:3 57:15	70:14 82:2
74:5,11 80:14	43:3 48:22	21:1,21 23:2,6	58:22,24 59:9	needed 79:22
81:22 82:2,2,3	60:19 70:6	25:23 26:5,18	59:10 61:25	needy 24:21
looked 6:4 21:25	80:16 82:8,10	27:2,17 29:4	62:21 63:18	never 29:16
40:15 58:21	82:24	30:22 37:24	65:1,11 66:8,14	34:23 35:9 36:6
looking 6:13 9:12	mandated 51:17	39:7 41:23 44:4	66:16,25 68:12	39:7 46:2
14:9 16:19	70:5	46:13 49:3 50:2	68:17 69:20	new 20:6,8 36:7
37:21 43:25	mandates 15:23	60:17 63:20	70:11 73:14	41:15 72:7 76:2
44:1 61:24	70:24	68:2,7,17 69:22	75:12,13,16	nice 56:22
66:12 74:15,16	mandatory 5:13	73:25 76:10	76:5 77:13 79:4	nondiscriminat...
79:11	7:22 13:15 24:7	80:21	79:6,20,25	58:24 75:14
looks 9:2 58:20	44:16,19 72:3	meaning 63:9	minutes 79:14	non-severability
64:21 68:8	manner 4:20	66:13	miscellaneous	33:18

<p>note 78:24 notes 60:24 notion 47:18 notwithstanding 13:12 November 66:21 number 4:4 17:11,11 57:16 81:4 83:7,8 numbers 41:17 79:11 numerous 63:21 nurses 22:25</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 3:1 4:1 objective 17:21 17:22 18:9,10 18:15,17,20 19:17 23:7 77:19 objectively 22:17 objectives 63:22 obligations 36:21 obvious 29:6 obviously 57:7 74:18 occasion 28:14 occasions 63:21 offer 51:4 offering 51:5,6 offset 41:14 offsets 15:24 off-the-cuff 24:3 25:24 oh 81:10 okay 10:7,10,11 13:1 14:15 19:18 22:18,20 23:21 24:1,19 old 56:9 58:9 68:20,23 older 58:6 once 19:1 27:21 50:4 58:7 65:24</p>	<p>73:18 80:15 ones 29:6 36:20 50:6 67:4 71:15 open 56:5 opening 81:15 operate 4:19 12:18,19 13:13 13:14 14:5 17:16 18:23 19:10 42:1,18 45:18 operated 13:9 14:12 operating 49:5 operation 4:18 6:10 11:19 15:1 67:6 opinion 14:10,11 19:8 21:16 67:11 opinions 18:3 20:23 46:14 opposed 66:12 77:10 opposite 36:3 opt 61:1 options 8:4,9 73:9 oral 1:21 3:2,5,8 4:8 28:10 55:20 order 5:1 80:25 ordinarily 47:5 original 79:24 ought 30:12 56:2 outset 55:24 out-of-pocket 61:8 overall 60:23 overturn 35:2</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 4:1 package 33:23 40:10,12 49:8 52:11 54:24</p>	<p>58:23 68:14 page 3:2 11:17 62:16 74:12 80:11 81:14 pages 16:12 27:9 38:3 pale 74:2 parallel 31:10 parliamentary 39:11 part 13:19 14:11 24:21 49:24 61:5 62:8 63:12 65:1,7 66:1,9 68:7,14 69:25 80:17,22 participants 53:6 participate 58:11 particular 14:7 29:12 49:8 63:2 74:14 particularly 30:19 72:22 parties 29:14 46:25,25 parts 16:7 17:8 78:1 party 17:10,11 32:12 33:15,16 pass 17:18 passage 27:2 passed 5:12 6:21 10:14 13:14 16:4,7 17:15 19:2 26:23 27:5 38:22 50:8,10 50:12 66:22 passes 45:24 path 8:1,22 patient 4:21 7:1 50:15,20 82:4,7 patients 48:20 PAUL 1:25 3:3 3:12 4:8 79:16 pay 31:19 75:2,2</p>	<p>75:9 80:8,20 peek 18:12 penalty 51:3 55:6 people 4:24 5:18 11:24 12:25 31:14 36:20,21 39:15 40:23 47:23 48:14 49:22,23 51:20 52:17,18 55:13 56:6,8,13,19 56:23 57:4,6,11 57:16,25 58:5,8 58:9,10,10,13 59:15,17,24 60:8,25 61:1,6 64:10 67:25 69:8 75:7 76:7 79:21,22 80:25 percent 5:6 59:24,25 61:6 percentage 60:11 perfect 12:7 perfectly 12:3 18:9 period 51:14 periods 59:17 peripheral 46:14 46:16,17 periphery 15:7 15:11 27:18,23 27:24 46:7 person 60:5,10 Petitioners 1:5 1:13 2:1 3:4,13 4:9 28:19,25 79:17 pick 13:3 62:6 picks 60:9 61:7 picture 20:5 piece 19:1 21:3 27:2 pieces 19:11 pipe 46:22</p>	<p>place 11:16 22:4 29:18,23 32:10 33:10 35:8 43:10 45:14 76:4 plain 66:13 plaintiff 35:19 plaintiffs 62:6 65:9 74:13 plan 74:10,17,19 75:1,4,6 plans 53:1 55:12 74:20 play 69:15 played 69:10 pleas 71:2 please 4:11 28:13 35:22 37:14 55:23 79:11 plus 43:2 67:5 point 7:10 13:17 13:20 16:2 20:15 21:8,20 25:24 26:6,9,10 26:19,25 29:19 30:17 32:23 34:3 43:13 45:16 46:9,17 46:19 47:23,25 50:10 52:9,11 60:18,22 61:4 64:6,23 68:16 75:25 78:22 79:18,24 80:12 82:11 pointed 11:7 22:23 40:8 70:16 points 56:16 67:3 80:4 policies 6:16 51:25 policy 13:1,2,2 24:14 37:9</p>
--	---	--	---	--

61:14 71:13,14 political 38:23 politics 78:8 pool 57:25 58:5 80:24 poor 56:9 75:7 portion 7:25 position 25:4 33:25 42:9,17 53:15 55:25 62:5 69:2,11,18 69:24 71:1 72:1 73:13,22 76:16 positively 10:3 possibility 43:5 72:21 possible 46:10 56:22 59:9 71:24 possibly 16:3 30:15 31:22 65:9 post 66:11 postpone 59:2 Potemkin 81:21 poverty 59:25 61:7 power 7:21 8:19 8:23 34:8 35:16 36:1,4,10 37:5 37:8 43:18 62:24 powers 21:22 22:8 practical 22:15 25:22 practice 21:1 preceding 64:22 precisely 56:11 61:11 preexisting 55:10 63:5 preferred 44:18 premise 35:25 36:14 73:12	premium 56:24 60:1,10 61:19 61:20 74:16 premiums 4:25 7:4 56:21 57:2 60:8 81:1 present 54:7,11 presumably 27:12 presume 19:15 20:9 presumption 19:15 20:9,16 pretty 23:5 preventive 48:19 previous 16:10 pre-existing 22:20 price 12:23 24:14 27:7 55:3 56:17 57:8,9,10 prices 5:10,17 56:8,14 principal 80:6 Printz 31:10 36:17 prior 44:6 51:13 56:7 57:24 private 51:9 74:13 probability 43:2 probably 78:18 problem 8:8 22:12 34:7 50:14 54:5,15 56:18 58:4 62:1 62:13 66:3 74:21 80:15 81:8 82:23 problems 19:23 34:3 40:25 procedural 17:14 procedure 30:1 69:7 proceed 32:6	process 16:1 35:7,8 38:21 69:7 72:17 73:7 products 74:4,5 program 72:13 74:8,9 76:20 programs 61:17 70:23 79:6,8 promise 22:23 promote 50:22 promoted 19:20 promotes 50:17 50:20 promoting 22:25 proper 32:6,11 43:5 63:19 68:21 77:9 properly 32:25 proposal 17:11 17:11 29:3 68:19 propose 23:9,12 proposed 25:7,7 proposition 9:12 10:6,20 25:4 28:19 proscription 10:11 prosecutors 14:2 protection 4:22 7:1 50:15,20 82:4,7 protections 55:10 prove 5:16,16 proven 6:16 proves 21:7 30:16 provide 11:24 12:24 36:8 60:24 82:7 provides 13:3 60:20 providing 4:21 7:1	provision 5:13 7:15,20,22 10:7 14:12 15:11 22:11 24:19 25:6 27:8,10 28:16,20 29:12 29:14 30:6 33:2 33:9,18,19,22 34:20,20 35:17 36:4 40:9,11,21 40:23 41:2 42:22 44:19 47:20,23 48:4 49:4,16,19 50:19 51:23 52:7,13 54:9,23 56:4 57:15 58:22,24 59:9 59:11 62:1,22 63:15,18 65:1 65:11 66:25 68:12 69:20,23 70:11 71:18,19 71:20 72:3 73:15 74:14,22 74:22,24 75:5 75:12,14 76:3,5 77:13 79:5,6 81:11 provisions 4:15 5:14 9:8,8,10 10:3 11:6 13:5 13:11 14:7 15:6 15:12,17,18 16:18 19:12 21:11,13,18 25:10 26:1 27:6 27:11,19,22,25 28:24 30:5,25 31:1,11,13 32:13,16 33:1 34:22 35:1 36:2 41:4,7,8 44:3 44:17 45:17,21 47:21 49:5,8,9	49:12,17,24 51:11 52:1,22 52:23 54:9 55:1 56:1,4 58:25 59:14 67:4 74:12 75:15,17 75:20,21 76:18 77:1,12 78:13 81:22 public 49:14,15 punishment 45:1 purchase 51:23 purchasers 51:6 pure 61:17 purpose 31:19 31:19,21 44:13 50:23 51:1 79:21 purposes 49:13 49:15 50:15 put 27:8,9,11,14 35:4 61:25 72:10 77:21,21 80:23,25 puts 71:25 <hr/> Q <hr/> quarrel 73:12 quest 62:9 question 6:1 7:9 7:12 8:10,15,16 9:25 12:5,16 13:8 14:19 16:23,25 17:24 20:4,5,5 22:15 22:15 28:23 32:19 33:6 35:3 36:23 37:18,19 39:24 40:2,5 42:25 44:12 46:5 49:1 50:7 53:11 66:18 68:2,22 71:1,9 74:15,18 75:18 77:14 78:9 80:5
--	---	--	--	---

questioning 70:3	rational 17:7,22	references 81:23	13:18 34:8	rid 19:18 27:21
questions 5:20	reach 18:15	referring 65:6	35:16	76:17
34:4,4 36:18	reached 14:10	69:2	repeal 72:5,6,8	right 5:17 6:1 8:2
37:3 70:16	reaching 48:24	reflected 52:14	repeatedly 30:17	9:23,24 10:5,18
quickly 26:23	read 11:17 22:22	58:19	report 47:2 66:21	11:4 20:11 21:1
quite 6:1 26:22	40:16 78:9 81:9	refocus 75:18	request 44:9	21:5 23:12
36:3 51:15	reading 23:10	reforms 40:10	requesting 15:1	27:16 36:25
53:23 62:8,15	76:8	41:12 45:18	require 78:15	37:6 39:24 40:2
80:13	real 62:13 68:22	refused 21:4	required 13:22	47:13 50:13
quote 65:3,5	77:16	refuted 47:21	requirement	59:19 60:15
76:17	realistic 46:24	Regan 49:11	63:3 64:25 65:4	67:16
quoting 64:20	reality 8:17 9:11	regardless 61:19	requirements	rights 36:20
80:24	18:3 27:2 56:23	regime 36:7	47:25	rise 54:24 60:9
<hr/>	really 7:12 9:9	regulate 65:20	requiring 51:23	rising 6:20
R	12:20 16:13	65:21	resembles 44:6	risk 36:5 43:6,8
R 4:1	19:13 26:2	regulation 17:13	reserve 28:6	43:17 67:12,25
Raich 65:14	32:10 38:2,5	23:18 65:2,5,15	residuum 82:21	68:24 80:24
raise 56:20 71:17	44:13 45:7,10	65:16	resolve 71:10	risks 54:7,11
78:20	50:5 72:15	regulatory 63:12	resolved 37:21	70:13 71:15
raised 56:8 78:21	80:18	63:14 66:1	respect 37:24	ROBERTS 4:3
raising 61:8	reason 21:4,21	reimbursed 42:5	50:25 59:21	16:6 18:18 26:3
rampant 59:12	36:7 44:22,23	reimbursement	62:25 77:3	26:8,24 27:1
Randall 21:10	48:5 52:5 63:7	29:21,23,25	respecting 72:16	28:7 29:2,15
range 69:12	77:14 78:3 81:5	48:18	Respondents 2:4	33:4 35:23 40:1
ratchet 20:16	reasons 32:23	reject 28:18 46:7	3:7 28:11	40:14,18 41:1,9
rated 11:25	64:12 71:7	rejected 5:25 6:5	responses 5:21	42:6,16 48:21
rates 17:12	reauthorization	rejects 13:21	9:14 15:5	50:13 55:17
29:23,25 48:16	16:8	related 22:2 26:1	responsibility	69:1,6 70:2
48:18 52:17	reauthorized	26:1 31:1	49:18 83:6	79:2,13 83:1
54:17 55:13	16:9	relatively 74:2	rest 4:13 8:7	roles 48:14
57:14,14,21,23	reauthorizing	relatives 74:2	22:20,21 25:6	roughly 41:13
58:1,3,9,12	14:16	relevant 5:22	29:9 42:14,15	rule 20:6,8
75:7	rebuttal 3:11	relief 33:15	42:18 44:10,12	rules 17:14
rating 4:15,24	79:16 80:4,13	34:12 35:19	44:14,20 62:7	ruling 72:24
5:24 24:8,10,23	rebutted 20:9	rely 14:10 19:8	72:5,7,8 82:25	run 52:12
25:10 28:1	recognize 8:15	62:11	restaurants	runs 59:12
40:12 61:18	recommended	relying 53:22	76:20	<hr/>
68:10,18 73:19	25:9	63:2	restraint 35:16	S
74:20 75:15	reconsider 35:10	remainder 28:6	35:20,25	S 2:2 3:1,6 4:1
80:17 81:11,18	35:11	remained 36:5	result 8:17 48:20	28:10
81:21 82:5,9	record 66:9	44:21	retool 78:6	salvage 15:2,3
ratings 11:6,11	redo 14:18	remaining 9:10	revenue 15:24	save 7:3
11:21 12:25	reduces 73:9	69:25 79:15	41:15	saver 6:17,18
66:6,15	redux 28:4	remains 60:11	review 30:1	saying 6:2 11:5
ratio 70:20	reenacted 26:14	remedial 9:2	revolution 39:2	22:16 29:5 46:2

46:6 48:10,25 51:16 53:8 65:18 67:11 73:7 76:9 says 9:7 19:9,15 19:18 20:7 25:11,12 31:18 44:8 58:21 63:3 63:11,11 64:14 64:24 65:25 71:14 75:5 78:17 79:19 80:13 81:6 scale 20:17 Scalia 8:11,14 9:4,15,18,22 10:5,13,19 17:5 17:25 19:18 30:4,17,24 31:17 34:14,16 38:1,5 39:20 44:5,22 45:6,10 47:1 48:1 49:22 50:2 57:18,21 60:14,18 63:25 64:2,3,7,9 71:22 73:2,12 75:11 76:14 77:21,24 Scalia's 39:16 40:5 75:18 scheme 63:12,14 66:1 scratch 14:20 Sebelius 1:7 4:5 second 31:21 32:25 59:3 61:4 64:24 65:12 69:2 74:21 78:20 SECRETARY 1:7 section 63:11 65:14 see 31:25 38:21	63:23 seek 70:10 seeking 51:22 seeks 35:19 seen 59:6 70:18 segue 21:8 selection 40:25 54:14 56:18 59:3,11,14 60:7 62:3 66:23 67:3 67:7 selections 67:9 selling 61:13 Senate 10:16 72:6 sending 34:18 sense 21:21 64:8 sentence 63:2 64:24 sentencing 13:12 13:25 44:17,20 separate 17:7 33:21 separated 33:24 separately 16:12 78:15 separation 21:22 22:8 serve 22:25 23:17 24:20 56:12 service 13:4 65:8 SERVICES 1:8 1:16 set 48:7 58:1 74:9 sever 13:11 19:16,22 21:4 21:22 81:5 severability 9:2 9:16 10:1 15:15 19:6 20:23 28:15 29:16 31:13 32:7 33:13,14 36:18	37:18,20,24 39:4 44:10 46:8 62:17 68:21 71:9 72:25 77:9 78:4,10 81:15 83:5 severable 9:9 19:22 43:14 67:14 severed 20:7 75:21 77:11 severing 15:8 71:23 SG 23:6 66:14 share 24:20 sharp 11:10 40:8 40:18 sheet 53:20 shell 16:2,4,7 17:1 23:15 25:20 shenanigans 39:11 shifting 54:6,10 show 47:11 59:18 59:18 70:13 showing 71:25 72:16 shown 54:22 sick 54:13 58:8 58:11 side 21:19 32:19 44:8 68:4 78:25 sign 59:19 significance 67:25 significant 43:4 silver 13:1 74:17 simple 78:22 simplest 19:17 simply 8:25 30:6 59:8 61:24 65:17 71:2 80:5 82:12,22 single 13:23 25:6	33:20,22 sit 31:23 situation 7:18 12:22 36:17 38:23 82:14 situations 12:12 71:6,10 skyrocket 5:1 slate 26:13 82:23 slightly 10:22 small 49:19,20 51:5 smaller 20:21 Solicitor 2:2 25:8 62:16 solution 54:17 solutions 5:11 solve 62:1 somebody 32:2 46:20 71:12 somebody's 16:21 somewhat 63:17 Sorrell 21:11 sorry 26:6 64:2 sort 8:23 16:1 21:7 25:17,22 37:9 62:9 67:7 68:8 81:20 Sotomayor 5:4 5:21 6:12 7:6 7:19 8:3,18,21 17:2 18:25 19:4 19:14 20:3,8,12 20:15,18 31:15 32:11 35:21 36:22 37:1,7,14 38:12,15 47:7 47:10 48:9 66:3 67:20 79:18 Sotomayor's 80:5 sought 34:12 sound 67:16 speak 64:10	speaking 64:10 special 23:3 29:25 specific 20:4,5 77:20 specifically 6:4,9 62:18 spend 23:10 27:17 spiral 5:17 66:7 67:21 spirals 66:20 spoke 56:18 square 9:11 stand 4:13,16,19 23:23 32:17 62:10 78:14 standard 17:6 77:9 standardized 74:4,17 standing 25:21 30:6,9,18,21 32:14,14 34:11 36:23 standpoint 22:8 start 7:23 10:25 11:2 14:20 60:8 80:4 started 32:11 starting 25:24 state 6:14 21:9 54:2 58:22 statement 20:22 statements 64:21 states 1:1,22 5:9 5:23 6:17 48:3 58:20 59:7 61:10,11,16,20 61:24 65:19 70:17,21 76:2 79:23 statute 7:14 8:8 10:17 13:22
---	---	--	---	--

15:7,11 18:22 18:25 19:2 21:9 21:9,25 22:6 31:7 40:4 44:18 45:3 49:25 65:13 66:25 71:19 73:4,17 73:20 78:6 80:17 82:3,21 82:21 statute's 73:4 statutory 29:25 37:20 38:19 39:25 40:2 stay 78:7 81:19 staying 32:9 stick 12:14 stop 24:18 48:23 straight 9:1 50:14 strains 18:4 strange 33:12 street 39:12 stricken 36:5 43:4 44:24 strike 7:10,20 8:5,7 10:3,13 15:13 21:15,19 22:1 25:9,11,12 26:5 28:4 35:7 36:10 44:7 45:20 78:12 80:1,1 82:8 strikes 36:1 striking 6:18 36:11 47:10 strong 16:2 strongest 15:8 struck 10:8 13:23 21:11 22:3 23:6 26:12 29:9 30:11 31:11 33:10,13 42:10,18 44:13 44:20 45:2 46:3	55:15 56:2 70:12 76:2 82:22 structure 37:22 37:24 44:2 47:15,16 53:18 60:3 66:11 structured 19:25 stuck 82:16 stuff 22:22 23:19 23:25 55:7 subfinding 80:11 submit 38:20 submitted 83:7 83:10 subsidies 59:21 59:23 60:3,20 60:23 61:2,4,22 subsidized 51:14 55:5 subsidizes 61:7 subsidy 59:25 72:12 74:8,9,9 74:23 75:9 79:6 79:8 substantial 43:1 67:12 80:22 substantially 52:23 substantive 44:3 subtitle 81:11 sue 71:16 sufficient 66:2 suggest 10:23 11:3 16:13 18:6 23:2 25:14,16 36:2 64:12 81:17 suggested 39:8 49:7 suggesting 8:18 67:1 suggestion 68:5 68:6 suggests 24:8	45:9 53:11 suit 33:11 suitable 51:4 support 60:15 83:4 supports 13:17 13:20 suppose 17:10 33:17,18 supposed 11:22 11:23 12:17 17:24 23:7 41:14 47:17 Supreme 1:1,22 sure 9:6,18 17:3 18:2 21:3 23:23 25:2 52:2 72:14 surely 16:18 suspect 26:20,21 27:5 31:17 sweeping 28:19 sweet 6:24 system 56:7,9,10 57:14,24 58:13 58:21 61:1 63:17 68:20,24 72:11 systems 70:17	talked 42:7 75:3 talking 16:15 23:20 27:6 32:10 43:24 64:16,19,25 68:24 70:19 74:14 77:12 78:25 79:3,4 81:13 talks 9:19 46:7 66:23 67:3 task 7:12,14,16 9:16 38:20 82:20,22 tautological 19:7 tax 15:22 24:13 24:13 28:2 30:19 31:18,18 33:9,9,12 51:5 51:6,13 52:25 55:4,6,6 taxes 30:19 taxpayer 30:8,8 tell 6:15 16:17 41:3 81:15 telling 10:16 43:21 tells 19:21 80:14 tended 70:21 term 65:19 terms 47:14 test 17:4,19,23 18:6,20 19:17 23:7 49:10 testimony 54:3 tests 18:9 text 10:25 11:3 11:10,14,23 37:22,23 39:14 39:15 41:24 44:2 47:14 53:18 54:1,22 textual 11:4,8 18:15,17 62:9 textually 15:20	18:10 Thank 28:7,12 55:17 79:11,13 83:1 theory 21:14 thing 8:6,11 14:3 20:17,20 21:19 21:23 23:18,24 29:7 30:2 32:21 46:1 47:17 55:9 58:7 60:13 61:5 74:7 75:6 78:11 78:23 things 6:22 7:3,3 11:15 14:15,21 16:15 20:1 29:22 35:12 46:7,14 52:10 52:11 53:4,7,23 54:24 57:1,12 59:22 60:18 62:2 70:18 75:25 think 5:22 6:22 6:23 7:2,17 8:14,24 10:19 11:3,21 12:11 12:16,20 13:4,9 13:17,19 14:8 14:16,22 15:5,9 15:13,14 16:2,3 18:3,11,13 20:14 21:5,6,7 21:10,17,21 22:7 25:15,23 26:11 27:11,19 27:19,24 28:4 29:11 30:16 31:17 32:5,22 33:1,7 34:16 35:15 36:12,15 37:12,20 39:18 39:18,23,23 40:6 41:5,5 42:2,11,13 43:9
--	---	--	--	--

T

T 3:1,1
take 6:24 7:2
8:19,22 9:1
11:14 18:12
22:15 29:4
32:12,17 45:13
52:15 54:20
60:19 68:24
71:9 73:3,14,18
75:1 76:3 78:20
80:23
taken 7:15
takes 82:11
talk 20:23 57:2
59:2,3

43:23 44:15,22 44:23 45:2,19 45:23 46:10,23 47:11 48:5 51:1 52:3,6 53:4,17 54:24 55:25 58:18 59:5 62:5 62:13 63:23 64:6,11 65:24 66:2,7,17 68:1 68:3,9,21 69:18 70:25 71:5,15 72:15 73:15,18 73:21,22 74:1 75:23,25 77:7,9 78:3,16,18 81:10 82:1,23 thinking 31:16 31:17 61:24 thinks 46:16,16 73:24 third 60:13 thought 9:6 14:4 38:12,18 48:9 thoughts 69:15 three 37:15 47:25 52:11 53:23 59:22 61:12 throw 16:11 throwing 15:3 thrown 48:14 ticks 20:17 tied 11:6 15:18 24:7 time 27:18 28:6 38:23 51:14 59:19,20 66:24 71:12 82:14 times 18:4 37:15 42:21 title 24:21 25:11 25:12,12,25 50:14 65:14 76:3 82:3	titles 22:19 45:25 45:25 46:1 today 48:11 70:3 73:13 told 62:12 82:17 tool 75:14,17,19 75:22 78:4 79:23 80:1,6,6 80:7,8,8 tools 75:24 79:24 80:2 top 54:10 total 24:3 totally 38:8 toto 35:12 touched 21:14 traditional 55:4,7 traffic 65:15,21 65:22,23 tried 5:23 6:17 16:17 21:25 22:5 true 5:5 9:22 30:2 52:20 60:19 64:8 76:17 try 8:8 20:3 39:10 41:25 46:20,20 62:2 82:13,15 trying 54:16,25 62:10 80:23 82:2,6 tumbling 72:12 turn 24:12 37:17 46:17 62:4 turns 21:10 two 9:14 13:18 15:4 19:12 32:23 37:3 47:12,23,25 48:13 50:14 54:9 56:4 57:1 61:22 66:16 67:22 76:3	77:24 tying 53:23 type 70:6 typically 61:16 <hr/> U <hr/> unable 11:9 56:13,14 uncommon 45:24 unconstitutional 4:13 5:12 15:13 17:16 25:5 28:21 31:4,21 33:20 35:18 69:21,22 71:21 82:25 undercut 63:14 63:17 undercuts 65:4 underserved 22:25 23:17,25 understand 10:24 18:19 42:24 51:15,18 53:14 understood 75:10 underwriting 12:24 75:8 unhealthier 58:6 unhealthy 57:11 uninsured 54:12 United 1:1,22 65:19 76:2 unobjectionable 27:12 unquestionably 14:15 49:14 unrealistic 34:17 38:8 50:4 unrelated 17:12 45:18 49:16 51:9 unresponsive 25:17	unsuccessfully 22:6 unsustainable 58:14 60:15 unwind 48:17 upward 5:2 usage 65:12 use 25:24 29:21 55:4 66:13 useful 63:10,22 66:1 76:10 uses 64:23 65:19 usual 73:6 Utah 12:3 <hr/> V <hr/> v 1:6,14 4:5,6 34:13 76:2 validity 29:12,24 76:25 value 61:8 variance 61:20 variety 51:7 various 5:10 6:15 18:3 21:11 vary 5:6 vast 28:23 vehicle 16:19 venality 10:11 Vermont 21:12 21:17 view 11:14 31:10 69:10 violate 10:10 virtually 20:22 vision 12:21 visits 48:19 volume 26:4,14 vote 10:16 27:7,9 77:20 voted 17:15 34:24 49:24 votes 27:4,14 35:2,3 72:6,8	<hr/> W <hr/> wait 40:23 59:19 want 7:6,13,13 7:16 8:24 9:4 10:4 12:5,13 17:20 18:6 19:16 25:16,22 26:19 27:17,23 28:4 32:16 38:2 38:18 47:11 53:9 65:21 66:24 67:10,14 67:20,22,22 76:14,15 77:2 78:22 81:7,8 wanted 8:7 9:13 21:17 34:23,24 54:8 56:11 62:20,22 77:15 wanting 20:15 wants 14:23 17:10,11 62:15 73:5 74:11 Washington 1:18 1:25 2:3,5 wasn't 68:12 way 10:22 11:22 14:8 21:16 22:1 32:6 35:5,9 46:19 49:20 58:7 59:9 65:3 65:19 67:16 70:5 74:8 77:15 81:20 ways 45:19 51:3 51:7 Wednesday 1:19 Wellness 76:20 went 31:12 79:20 weren't 50:6 we're 9:12 29:8 32:10,20 50:3 64:25 70:3 71:8 71:8,14,15,25 we've 20:7,9
--	--	---	--	---

<p>23:20 26:12 42:7 whatnot 51:12 whimsical 68:2 whip 38:24 willing 71:15 wise 37:4 woodenly 19:6 word 13:23 22:23 37:10 63:7,19 64:24 66:7 79:5 work 7:23 9:10 9:11 11:22 19:13 24:11,22 29:3 46:9 54:19 54:21 56:11 58:23 70:18,18 75:15,17,20,25 80:8 81:24 worked 22:7 70:22 82:18 works 7:2 58:7 world 30:13 worse 12:12 21:23 52:17 54:15 67:7 wouldn't 6:20 15:14 19:16 27:13 39:5 73:2 wreck 32:20 wrecking 15:1 write 67:10 wrong 5:17 19:14 20:18,20 41:18 42:3</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,9,11,17 31:19,19,21</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Y 31:18 year 23:10 59:20 79:9,10 years 16:10</p>	<p>41:22 53:2 67:6 82:13,18 yesterday 23:20 48:11 York 76:2 young 58:9 younger 76:7</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$100 79:10 \$12,000 61:15 \$217 53:2 \$350 41:22 \$4,000 61:14 \$700 41:13</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 17:11 61:21 81:19,23 1.5 61:20 10 5:6 16:10 41:22 53:2 10-year 41:12 10:19 1:23 4:2 11-393 1:5 4:4 83:7 11-400 1:13 4:6 83:8 11:49 83:9 150 51:19</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 17:11 47:23 81:19,22 2,700 38:3 2.5 48:13 20s 78:18 200 59:24 2009 66:21 2012 1:19 71:21 2014 71:12 2020 79:9 21 65:14 25-year-old 61:14</p>	<p>250 61:6 26 47:24 26-year-olds 48:10 2700 16:12 27:9 28 1:19 3:7</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 67:5 30 5:7 30s 78:18 300g(a)(1) 81:17 300g(a)(2) 81:17 32 48:19 350 41:14,16,16 41:19 43:2,2</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 3:4 22:5 66:22 40 82:13,18 42 62:16 64:23 43 11:17 64:23 43a 62:16 80:11 43(a)of 6:8</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 16:10 55 3:10</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 81:14 60 72:6,8 60-year-old 61:14 64A 74:12 68A 74:14,22</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 19:8 43:3 79 3:13</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>80 59:25 801 65:14</p> <hr/> <p style="text-align: center;">9</p>	<p>90s 59:7 61:16 922(q) 63:11</p>
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