

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:

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1 Petitioners.

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

3 Department of Justice, Washington, D.C.; for

4 Respondents.

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

6 Court-appointed amicus curiae.

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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.

You can -- if you do not have the individual mandate to force people into the market, then community

1 rating and guaranteed issue will cause the cost of
2 premiums to skyrocket. We can debate the order of
3 magnitude of that, but we can't debate that the
4 direction will be upward. We also can't debate --

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

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

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

21 MR. CLEMENT: Well, a couple of questions --
22 a couple of responses, Justice Sotomayor. First of all,
23 I think that it's very relevant here that Congress had
24 before it as examples some of the States that had tried
25 to impose guaranteed issue and community rating, and did

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

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

13 JUSTICE SOTOMAYOR: That's all it said it
14 was essential to. I mean, I'm looking at it. The
15 exchanges. The State exchanges are information-
16 gathering facilities that tell insurers what the various
17 policies actually mean. And that has proven to be a
18 cost saver in many of the States who have tried it. So,
19 why should we be striking down a cost saver --

20 MR. CLEMENT: Well --

21 JUSTICE SOTOMAYOR: -- when, if what your
22 argument is -- was that Congress was concerned about
23 costs rising?

24 MR. CLEMENT: Well --

25 JUSTICE SOTOMAYOR: Why should we assume

1 they wouldn't have passed an information --

2 MR. CLEMENT: I think a couple of things.
3 One, you get -- I mean, I would think you'd sort of have
4 to take the bitter with the sweet. And if Congress --
5 if we're going to look at Congress's goal of providing
6 patient protection but also affordable care, we can't --
7 I don't think it works to just take the things that save
8 money and cut out the things that are going to make
9 premiums more expensive. But at a minimum --

10 JUSTICE SOTOMAYOR: I think on the bottom
11 line, is why don't we let Congress fix it?

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

23 JUSTICE SOTOMAYOR: We're not taking -- if
24 we strike down one provision, we're not taking that
25 power away from Congress. Congress could look at it

1 without the mandatory coverage provision and say this
2 model doesn't work; let's start from the beginning. Or
3 it could choose to fix what it has. We're not declaring
4 -- one portion doesn't force Congress into any path.

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

14 JUSTICE SCALIA: There's such a thing as
15 legislative inertia, isn't there?

16 MR. CLEMENT: Well, that's exactly --

17 JUSTICE SCALIA: I mean --

18 MR. CLEMENT: -- what I was going to say,
19 Justice Scalia, which is I think the question for this
20 Court is -- we all recognize there's legislative
21 inertia. And then the question is what's the best
22 result in light of that reality?

23 JUSTICE SOTOMAYOR: You are not suggesting
24 that we should take on more power to the Court?

25 MR. CLEMENT: No, I --

1 JUSTICE SOTOMAYOR: Because Congress would
2 choose to take one path rather than another. That's
3 sort of taking onto the Court more power than one, I
4 think, would want.

5 MR. CLEMENT: And I agree. We're simply
6 asking this Court to take on, straight on, the idea of
7 the basic remedial inquiry into severability which looks
8 to the intent of the Congress --

9 JUSTICE SCALIA: Yes, I wanted to ask you
10 about that. Why do we look to the -- are you sure we
11 look to the intent of the Congress? I thought that, you
12 know, sometimes Congress says that these provisions will
13 -- all the provisions of this Act will be severable, and
14 we ignore that when the Act really won't work, when the
15 remaining provisions just won't work. Now, how can you
16 square that reality with the proposition that what we're
17 looking for here is what would this Congress have
18 wanted?

19 MR. CLEMENT: Well, two responses,
20 Justice Scalia: We can look at this Court's cases on
21 severability, and they all formulate the test a little
22 bit differently.

23 JUSTICE SCALIA: Yes, they sure do.

24 MR. CLEMENT: But every one of them talks
25 about congressional intent. But here's the -- there's

1 the other answer --

2 JUSTICE SCALIA: That's true, but is it
3 right?

4 MR. CLEMENT: It is right. And here's how I
5 would answer your question, which is, when Congress
6 includes a severability clause, it's addressing the
7 issue in the abstract. It doesn't say, no matter which
8 provisions you strike down, we absolutely, positively
9 want what's left.

10 JUSTICE SCALIA: All right. The consequence
11 of your proposition, would Congress have enacted it
12 without this provision, okay, that's the consequence.
13 That would mean that if we struck down nothing in this
14 legislation but the -- what is it called -- the "Corn
15 Husker kickback," okay, we find that to violate the
16 constitutional proscription of venality, okay?

17 (Laughter.)

18 JUSTICE SCALIA: When we strike that down,
19 it's clear that Congress would not have passed it
20 without that. It was -- it was the means of getting the
21 last necessary vote in the Senate. And you're telling
22 us that the whole statute would fall because the
23 Cornhusker kickback is bad. That can't be right.

24 MR. CLEMENT: Well, Justice Scalia, I think
25 it can be, which is to say that the basic proposition,

1 that it's congressional intent that governs. Now,
2 everybody on this Court has a slightly different way of
3 divining legislative intent. And I would suggest the
4 one common ground among every member of this Court, as I
5 understand it, is you start with the text. Everybody
6 can agree with that.

7 JUSTICE KAGAN: So, Mr. Clement, let's start
8 with the text. And you suggest, and I think that there
9 is -- this is right, that there is a textual basis for
10 saying that the guarantee-issue and the community-rating
11 provisions are tied to the mandate. And you -- you
12 pointed to where that was in the findings.

13 Is there a textual basis for anything else?
14 Because I've been unable to find one. It seems to me
15 that if you look at the text, the sharp dividing line is
16 between guarantee issue, community ratings, on the one
17 hand; everything else, on the other.

18 MR. CLEMENT: Well, Justice Kagan, I'd be
19 delighted to take you through my view of the text and
20 why there are other things that have to fall.

21 The first place I'd ask you to look is
22 Finding (J), which is on the same page, 43a. And as I
23 read that, that's a finding that the individual mandate
24 is essential to the operation of the exchanges.

25 But there are other links between guaranteed

1 issue and community rating and the exchanges. And
2 there, I think, it's just the way that the exchanges are
3 supposed to work, and the text makes this clear, is
4 they're supposed to provide a market where people can
5 compare community-rated insurance. That's what makes
6 the exchanges function.

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

16 MR. CLEMENT: Well, Justice Kagan, I think
17 there are situations where half a loaf is actually
18 worse, and I want to address that. But before I -- more
19 broadly -- but before I do that, if I can stick with
20 just the exchanges.

21 I do think the question that this Court is
22 supposed to ask is not just whether they can limp along
23 and they can operate independently, but whether they
24 operate in the manner that Congress intended. And
25 that's where I think the exchanges really fall down,

1 because the vision of the exchanges was that if you got
2 out of this current situation where health insurance is
3 basically individualized priced based on individualized
4 underwriting and you provide community rating, then it's
5 going to be very easy for people to see, okay, well,
6 this is a silver policy, and this is a bronze policy,
7 and this is a gold policy. And we can -- you know, I
8 can just pick which insurer provides what I think is
9 going to be the best service based on those comparable
10 provisions.

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

21 MR. CLEMENT: But, Justice Kagan, I mean, I
22 actually think Booker supports our point as well,
23 because there are two aspects of the remedial holding of
24 Booker. And the first part of it, which I think
25 actually very much supports our point is where the

1 majority rejects the approach of the dissent, which
2 actually would have required nothing in the statute to
3 have been struck, not a single word.

4 But, nonetheless, this Court said, boy, if
5 you do that, then all of the sentencing is basically
6 going to be done by a combination of the juries and the
7 prosecutors, and the judges are going to be cut out.
8 And the Court said the one thing we know is that's not
9 the manner in which Congress thought that this should
10 operate.

11 Now, later they make a different judgment
12 about the -- which particular provisions to cut out.
13 But I do think Booker is consistent with this way of
14 looking at it. It's certainly consistent with Brock,
15 the opinion that we rely on, because there the Court
16 only reached that part of the opinion after they had
17 already found that the must-hire provision operated
18 functionally independent from the legislative veto.
19 So --

20 JUSTICE GINSBURG: Mr. Clement, there are so
21 many things in this Act that are unquestionably okay. I
22 think you would concede that reauthorizing -- what is it
23 -- the Indian Health Care Improvement Act, changes to
24 the Black Lung benefits. Why make Congress redo those?
25 I mean, it's a question of whether we say everything you

1 did is no good, now start from scratch, or to say, yes,
2 there are many things in here that have nothing to do,
3 frankly, with the affordable health care, and there are
4 some that we think it's better to let Congress to decide
5 whether it wants them in or out.

6 So, why should we say it's a choice between
7 a wrecking operation, which is what you are requesting,
8 or a salvage job? And the more conservative approach
9 would be salvage rather than throwing out everything.

10 MR. CLEMENT: Well, Justice Ginsburg, two
11 kinds of responses to that: One, I do think there are
12 some provisions that I would identify as being at the
13 periphery of this statute, and I'll admit that the case
14 for severing those is perhaps the strongest.

15 But I do think it's fundamentally different,
16 because if we were in here arguing that some provision
17 on the periphery of the statute, like the Biosimilars
18 Act or some of the provisions that you've mentioned, was
19 unconstitutional, I think you'd strike it down and you
20 wouldn't even think hard about severability.

21 What makes this different is that the
22 provisions that have constitutional difficulties or are
23 tied at the hip to those provisions that have the
24 constitutional difficulty are the very heart of this
25 Act. And then if you look at how they are textually

1 interconnected with the exchanges, which are then
2 connected to the tax credits, which are also connected
3 to the employer mandates, which is also connected to
4 some of the revenue offsets, which is also connected to
5 Medicaid, if you follow that through what you end up
6 with at the end of that process is just sort of a hollow
7 shell. And at that point, I think there is a strong
8 argument for not -- I mean, we can't possibly think that
9 Congress would have passed that hollow shell without the
10 heart of the Act.

11 CHIEF JUSTICE ROBERTS: Well, but it would
12 have -- it would have passed parts of the hollow shell.
13 I mean, a lot of this is reauthorization of
14 appropriations that have been reauthorized for the
15 previous 5 or 10 years, and it was just more convenient
16 for Congress to throw it in, in the middle of the
17 2700 pages than to do it separately. I mean, can you
18 really suggest -- I mean, they cite the Black Lung
19 Benefits Act, and those have nothing to do with any of
20 the things we're talking about.

21 MR. CLEMENT: Well, Mr. Chief Justice, you
22 know, they tried to make them germane. But I'm not here
23 to tell you that, you know -- some of their -- surely,
24 there are provisions that are just looking for the next
25 legislative vehicle that's going to make it across the

1 finish line, and somebody's going to attach it to
2 anything that's moving. I mean, I'll admit that.

3 But the question is -- when everything else
4 from the center of the Act is interconnected and has to
5 go, if you follow me that far, then the question is
6 would you keep this hollowed-out shell?

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

8 JUSTICE KENNEDY: But I'm still not sure,
9 what is the test -- and this was a colloquy you had with
10 Justice Scalia with the Cornhusker hypothetical. I need
11 to know what standard you're asking me to apply. Is it
12 whether as a rational matter the separate parts could
13 still function, or does it focus on the intent of the
14 Congress?

15 If you -- suppose you had party A wants
16 proposal number 1; party B wants proposal number 2.
17 Completely unrelated. One is airline rates; the other
18 is milk regulation. And we -- and they decide them
19 together. The procedural rules are these have to be
20 voted on as one. They are both passed. Then one is
21 declared unconstitutional. The other can operate
22 completely independently. Now, we know that Congress
23 would not have intended to pass one without the other.
24 Is that the end of it, or is there some different test?
25 Because we don't want to go into legislative history,

1 that's intrusive, so we ask whether or not an objective
2 -- as an objective rational matter, one could function
3 without -- I still don't know what the test is that
4 we're supposed to apply. And this is the same question
5 as Justice Scalia asked. Could you give me some help on
6 that?

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

10 JUSTICE KENNEDY: And which one -- and what
11 test do you suggest that we follow if we want to clarify
12 our jurisprudence?

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

23 CHIEF JUSTICE ROBERTS: I don't
24 understand --

25 JUSTICE KENNEDY: And that objective test is

1 what?

2 MR. CLEMENT: It is whether the statute can
3 operate in the manner that Congress -- that Congress
4 intended. And --

5 JUSTICE SOTOMAYOR: No statute can do that,
6 because once we chop off a piece of it, by definition,
7 it's not the statute Congress passed. So, it has to be
8 something more than that.

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

19 JUSTICE SOTOMAYOR: So, what is wrong with
20 the presumption that our law says, which is we presume
21 that Congress would want to sever? Wouldn't that be the
22 simplest, most objective test? Going past what
23 Justice Scalia says we have done, okay, get rid of
24 legislative intent altogether, which some of our
25 colleagues in other contexts have promoted, and just

1 say: Unless Congress tells us directly it's not
2 severable, we shouldn't sever. We should let them fix
3 their problems.

4 You still haven't asked -- answered me why
5 in a democracy structured like ours, where each branch
6 does different things, why we should involve the Court
7 in making the legislative judgment?

8 MR. CLEMENT: Justice Sotomayor, let me try
9 to answer the specific question and then answer the big
10 picture question. The specific question is -- I mean,
11 you could do that. You could adopt a new rule now that
12 basically says, look, we've sever --

13 JUSTICE SOTOMAYOR: It's not a new rule. We
14 presume. We've rebutted the presumption in some
15 cases --

16 MR. CLEMENT: Right. But --

17 JUSTICE SOTOMAYOR: -- but some would call
18 that judicial action.

19 MR. CLEMENT: I think in fairness, though,
20 Justice Sotomayor, to get to the point you're wanting to
21 get to, you'd have to ratchet up that presumption a
22 couple of ticks on the scale, but -- and because the one
23 thing --

24 JUSTICE SOTOMAYOR: And what's wrong with
25 that?

1 MR. CLEMENT: Well, one thing that's wrong
2 with that, which is still at a smaller level, is that's
3 inconsistent with virtually every statement in every one
4 of your severability opinions, which all talk about
5 congressional intent.

6 JUSTICE KAGAN: Well, it's not inconsistent
7 with our practice, right, Mr. Clement? I mean, you have
8 to go back decades and decades and decades, and I'm not
9 sure even then you could find a piece of legislation
10 that we refused to sever for this reason.

11 MR. CLEMENT: I don't think that's right,
12 Justice Kagan. I mean, I think there are more recent
13 examples. A great example I think, which sort of proves
14 and maybe is a segue to get to my broader point, is a
15 case that involves a State statute, not a Federal
16 statute, but I don't think anything turns on that, is
17 *Randall v. Sorrell*, where this Court struck down various
18 provisions of the Vermont campaign finance law. But
19 there were other contribution provisions that were not
20 touched by the theory that the Court used to strike down
21 the contribution limits. But this Court at the end of
22 the opinion said, you know, there's no way to think that
23 the Vermont legislator would have wanted these handful
24 of provisions there on the contribution side. So, we'll
25 strike down the whole thing.

1 And if I could make the broader point, I
2 mean, I think the reason it makes sense in a democracy
3 with separation of powers to in some cases sever the
4 whole thing is because sometimes a half a loaf is worse.
5 And a great example, if I dare say so, is Buckley. In
6 Buckley this Court looked at a statute that tried to, in
7 a coherent way, strike down limits on contributions and
8 closely related expenditures.

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

19 JUSTICE KAGAN: Mr. Clement --

20 JUSTICE BREYER: Can I ask you one question,
21 which is a practical question? I take as a given your
22 answer to Justice Kennedy. You're saying let's look at
23 it objectively and say would Congress have intended
24 this, okay? This is the mandate in the community --
25 this is Titles I and II, the mandate, the community,

1 pre-existing condition, okay? Here's the rest of it,
2 you know, and when I look through the rest of it, I have
3 all kinds of stuff in there. And I haven't read every
4 word of that, I promise. All right.

5 I mean, as you pointed out, there's biosimilarity,
6 there's breast feeding, there's promoting nurses and
7 doctors to serve underserved areas, there's the CLASS
8 Act, et cetera.

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

16 So, what do you propose that we do other
17 than spend a year reading all this and have you argue
18 all of it?

19 MR. CLEMENT: Right. What I would propose
20 is the following, Justice Breyer, is you follow the
21 argument this far and then you ask yourself whether what
22 you have left is a hollowed-out shell or whether you
23 have --

24 JUSTICE BREYER: I would say the Breast
25 Feeding Act, the -- getting doctors to serve underserved

1 areas, the biosimilar thing and drug regulation, the
2 CLASS Act -- those have nothing to do with the stuff
3 that we've been talking about yesterday and the day
4 before, okay?

5 So, if you tell me at that level, I'd say,
6 sure, they have nothing to do with it; they could stand
7 on their own. The Indian thing, about helping the
8 underserved Native Americans -- all that stuff has
9 nothing to do with it. Black lung disease, nothing to
10 do with it. Okay?

11 So, that's -- you know what you have there?
12 A total off-the-cuff impression. So, that's why I'm
13 asking you what should I do?

14 MR. CLEMENT: What you should do is let me
15 say the following, which is follow me this far, which is
16 the mandatory, individual mandate is tied, as the
17 Government suggests, to guaranteed issue and community
18 rating, but the individual mandate, guaranteed issue,
19 and community rating together are the heart of this Act.
20 They -- they're what make the exchanges work.

21 The exchanges in turn are critical to the
22 tax credits, because the amount of the tax credit is key
23 to the amount of the policy price on the exchange. The
24 exchanges are also key to the employer mandate, because
25 the employer mandate becomes imposed on an employer if

1 one of the employees gets insurance on the exchanges.

2 But it doesn't stop there. Look at the
3 Medicare provision for DSH hospitals, okay? These are
4 hospitals that serve a disproportionate share of the
5 needy. This isn't in Title I. It's in the other part
6 that you had in your other hand. But it doesn't work
7 without the mandate, community rating, and guaranteed
8 issue.

9 JUSTICE ALITO: Well, can I ask you this,
10 Mr. Clement?

11 MR. CLEMENT: Sure.

12 JUSTICE ALITO: If -- what would your
13 fallback position be if we don't accept the proposition
14 that if the mandate is declared unconstitutional, the
15 rest of the Act, every single provision, has to fall?
16 Other proposed -- other dispositions have been proposed.
17 There's the Solicitor General's disposition, the
18 recommended disposition to strike down the
19 guaranteed-issue and community-rating provisions. One
20 of the -- one amicus says strike down all of Title I;
21 another says strike down all of Title I and Title II.

22 What -- what would you suggest?

23 MR. CLEMENT: Well, I -- I think what I
24 would suggest, Justice Alito -- I don't want to be
25 unresponsive -- is that you sort of follow the argument

1 through and figure out what in the core of the Act
2 falls. And then I guess my fallback would be if what's
3 left is a hollowed-out shell, you could just leave that
4 standing.

5 If you want a sort of practical answer, I
6 mean, I do think you could just -- you know, you could
7 use Justice Breyer's off-the-cuff as a starting point
8 and basically say, you know, Title I and a handful of
9 related provisions that are very closely related to that
10 are really the heart of the Act.

11 CHIEF JUSTICE ROBERTS: Well, but that
12 doesn't --

13 MR. CLEMENT: The bigger volume in his other
14 hand -- I mean, you could strike one and leave the
15 other, but at a certain point -- I'm sorry,
16 Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: Finish your certain
18 point.

19 MR. CLEMENT: At a certain point, I just
20 think that, you know, the better answer might be to say
21 we've struck the heart of this Act; let's just give
22 Congress a clean slate. If it's so easy to have that
23 other big volume get re-enacted, they can do it in a
24 couple of days. It won't be a big deal. If it's not,
25 because it's very --

1 (Laughter.)

2 MR. CLEMENT: Well, but -- I mean, you can
3 laugh at me if you want, but the point is I rather
4 suspect that it won't be easy. Because I rather suspect
5 that if you actually dug into that, there'd be something
6 that was quite controversial in there and couldn't be
7 passed quickly --

8 CHIEF JUSTICE ROBERTS: But the reality --

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

10 CHIEF JUSTICE ROBERTS: The reality of the
11 passage -- I mean, this was a piece of legislation
12 which, there was -- had to be a concerted effort to
13 gather enough votes so that it could be passed. And I
14 suspect with a lot of these miscellaneous provisions
15 that Justice Breyer was talking about, that was the
16 price of a vote: Put in the Indian health care
17 provision and I will vote for the other 2700 pages. Put
18 in the black lung provision, and I'll go along with it.

19 That's why all -- many of these provisions,
20 I think, were put in, not because they were
21 unobjectionable. So, presumably, what Congress would
22 have done is they wouldn't have been able to put
23 together, cobble together the votes to get it through.

24 MR. CLEMENT: Well, maybe that's right,
25 Mr. Chief Justice. And I don't want to, I mean, spend

1 all my time on -- fighting over the periphery, because I
2 do think there are some provisions that I think you
3 would make, as an exercise of your own judgment, the
4 judgment that once you've gotten rid of the core
5 provisions of this Act, that you would then decide to
6 let the periphery fall with it.

7 But if you want to keep the periphery,
8 that's fine. What I think is important, though, as to
9 the core provisions of the Act, which aren't just the
10 mandate, community rating, and guaranteed issue, but
11 include the exchanges, the tax credit, Medicare, and
12 Medicaid -- as to all of that, I think you do want to
13 strike it all down to avoid a redux of Buckley.

14 If I could reserve the remainder of my time.

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

17 Mr. Kneedler.

18 ORAL ARGUMENT OF EDWIN S. KNEEDLER

19 ON BEHALF OF THE RESPONDENTS

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

22 There should be no occasion for the Court in
23 this case to consider issues of severability, because,
24 as we argue, the -- the minimum coverage provision is
25 fully consistent with Article I of the Constitution.

1 But if the Court were to conclude otherwise, it should
2 reject Petitioners' sweeping proposition that the entire
3 Act must fall if this one provision is held
4 unconstitutional.

5 As an initial matter, we believe the Court
6 should not even consider that question. The vast
7 majority of the provisions of this Act do not even apply
8 to the Petitioners, but instead apply to millions of
9 citizens and businesses who are not before the Court.

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

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

19 MR. KNEEDLER: Well, I -- I think the
20 continuing validity of any particular provision would
21 arise in litigation that would otherwise arise under
22 that provision by parties who are actually --

23 CHIEF JUSTICE ROBERTS: But what cause of
24 action is it? I've never heard of a severability cause
25 of action.

1 MR. KNEEDLER: Well, in the first place, I
2 don't -- the point isn't that there has to be an
3 affirmative cause of action to decide this. You
4 could -- for example, to use the Medicare reimbursement
5 issues, one of the things this Act does is change
6 Medicare reimbursement rates. Well, the place where
7 someone adjudicates the validity of Medicare
8 reimbursement rates is through the special statutory
9 review procedure for that.

10 And the same thing is true of the
11 Anti-Injunction Act --

12 JUSTICE SCALIA: Mr. Kneedler, there are
13 some provisions which nobody would have standing to
14 challenge. If the provision is simply an expenditure of
15 Federal money, it doesn't hurt anybody except the
16 taxpayer, but the taxpayer doesn't have standing. That
17 -- that just continues. Even though it is -- it should
18 -- it is so closely allied to what's been struck down
19 that it ought to go as well. But, nonetheless, that has
20 to continue because there's nobody in the world that can
21 challenge it.

22 Can that possibly be the law?

23 MR. KNEEDLER: I think that proves our
24 point, Justice Scalia. This Court has repeatedly said
25 that just because there's -- no one may have standing to

1 challenge -- and particularly like tax credits or taxes
2 which are challenged only after going through the
3 Anti-Injunction Act, just because no one has standing
4 doesn't mean someone must.

5 But beyond that --

6 JUSTICE SCALIA: But those are provisions
7 that have been legitimately enacted. The whole issue
8 here is whether these related provisions have been
9 legitimately enacted or whether they are so closely
10 allied to one that has been held to be unconstitutional
11 that they also have not been legitimately enacted.

12 You can't compare that to -- to cases
13 dealing with a statute that nobody denies is -- is
14 constitutional.

15 MR. KNEEDLER: This case is directly
16 parallel to the Printz case, in our view. In that case,
17 the Court struck down several provisions of the Brady
18 Act but went on to say it had no business addressing the
19 severability of other provisions that did not apply to
20 the people before the Court.

21 JUSTICE BREYER: But what he's thinking --

22 JUSTICE SOTOMAYOR: But is that a matter
23 of --

24 JUSTICE BREYER: What he's thinking of is
25 this: I think Justice Scalia is thinking, I suspect, of

1 -- imagine a tax which says this tax, amount Y, goes to
2 purpose X, which will pay for half of purpose X. The
3 other half will come from the exchanges somehow. That
4 second half is unconstitutional. Purpose X can't
5 possibly be carried out now with only half the money.

6 Does the government just sit there
7 collecting half the money forever because nobody can
8 ever challenge it? You see, there -- if it were
9 inextricably connected, is it enough to say, well, we
10 won't consider that because maybe somebody else could
11 bring that case and then there is no one else?

12 I mean, is that --

13 MR. KNEEDLER: Yes, we think that is the
14 proper way to proceed. Severability --

15 JUSTICE GINSBURG: Mr. Kneedler, it's not a
16 choice between someone else bringing the case and a law
17 staying in place. And what we're really talking about,
18 as Justice Sotomayor started this discussion, is who is
19 the proper party to take out what isn't infected by the
20 Court's holding? With all these provisions where there
21 may be no standing, one institution clearly does have
22 standing, and that's Congress.

23 And if Congress doesn't want the provisions
24 that are not infected to stand, Congress can take care
25 of it.

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

4 MR. KNEEDLER: We think the Court should
5 leave it to Congress for two reasons. One is the point
6 I'm making now about justiciability, or whether the
7 Court can properly consider it at all. And the second
8 is we think only a few provisions are inseverable from
9 the minimum coverage provision.

10 I just would like to --

11 CHIEF JUSTICE ROBERTS: Before you go,
12 Mr. Kneedler, I'd like your answer to Justice Breyer's
13 question.

14 I think you were interrupted --

15 MR. KNEEDLER: Yes.

16 CHIEF JUSTICE ROBERTS: -- before you had a
17 chance --

18 MR. KNEEDLER: No, we believe that in that
19 case, the tax -- the tax provision should not be struck
20 down. In the first place, the Anti-Injunction Act would
21 bar a direct suit to challenge it. And it would be very
22 strange to allow a tax to be struck down on the basis of
23 a severability analysis. Severability arises in a case
24 only where it's necessary to consider what relief a
25 party before the Court should get. The only party --

1 JUSTICE ALITO: Suppose that there was a --
2 suppose there was a non-severability provision in -- in
3 this Act. If one provision were to be held
4 unconstitutional, then every single -- someone would
5 have to bring a separate lawsuit challenging every
6 single other provision in the Act and say, well, one
7 fell and the Congress said it's all -- it's -- it's a
8 package, it can't be separated.

9 That's your position?

10 MR. KNEEDLER: The fact that -- that such a
11 clause might make it easy doesn't change the point.
12 Article III jurisdictional problems apply to easy
13 questions as well as hard questions. If I could just --

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

18 MR. KNEEDLER: But this Court had said that
19 one has to have standing for every degree of relief that
20 is sought. That was in Davis. That was Los
21 Angeles v. Lyons. That's --

22 JUSTICE SCALIA: Mr. Kneeder --

23 MR. KNEEDLER: -- Daimler/Chrysler.

24 JUSTICE SCALIA: -- don't you think it's
25 unrealistic to say leave it to Congress, as though

1 you're sending it back to Congress for Congress to
2 consider it dispassionately, on balance, should we have
3 this provision or should we not have provision? That's
4 not what it's going to be. It's going to be these
5 provisions are in effect, even though you -- a lot of
6 you never wanted them to be in effect and you only voted
7 for them because you wanted to get the heart of the --
8 of the Act, which has now been cut out. But,
9 nonetheless, these provisions are the law, and you have
10 to get the votes to overturn them.

11 That's an enormously different question from
12 whether you get the votes initially to put them into the
13 law.

14 What -- there is no way that this Court's
15 decision is not going to distort the congressional
16 process. Whether we strike it all down or leave some of
17 it in place, the congressional process will never be the
18 same. One way or another, Congress is going to have to
19 reconsider this. And why isn't it better to have them
20 reconsider it -- what should I say -- in toto, rather
21 than having some things already in the law which you
22 have to eliminate before you can move on to consider
23 everything on balance?

24 MR. KNEEDLER: We think, as a matter of
25 judicial restraint, limits on equitable remedial power

1 limit this Court to addressing the provision that has
2 been challenged as unconstitutional and anything else
3 that the plaintiff seeks as relief. Here the only
4 thing --

5 JUSTICE KENNEDY: But when you say "judicial
6 restraint" --

7 JUSTICE SOTOMAYOR: Mr. Kneedler, would you
8 please --

9 CHIEF JUSTICE ROBERTS: Justice Kennedy.

10 JUSTICE KENNEDY: When you say "judicial
11 restraint," you are echoing the earlier premise that it
12 increases the judicial power if the judiciary strikes
13 down other provisions of the Act. I suggest to you it
14 might be quite the opposite. We would be exercising the
15 judicial power, if one Act was -- one provision was
16 stricken and the others remained, to impose a risk on
17 insurance companies that Congress had never intended.
18 By reason of this Court, we would have a new regime that
19 Congress did not provide for, did not consider. That,
20 it seems to me, can be argued at least to be a more
21 extreme exercise of judicial power than to strike --
22 than striking the whole.

23 MR. KNEEDLER: I -- I think not, Justice --

24 JUSTICE KENNEDY: I just don't accept the
25 premise.

1 MR. KNEEDLER: I think not, Justice Kennedy,
2 and then I'll move on.

3 But this is exactly the situation in Printz.
4 The Court identified the severability questions that
5 were -- that were briefed before the Court as important
6 ones but said that they affect people who are -- rights
7 and obligations of people who are not before the Court.

8 JUSTICE SOTOMAYOR: Mr. Kneedler, move away
9 from the issue of whether it's a standing question or
10 not.

11 MR. KNEEDLER: Right.

12 JUSTICE SOTOMAYOR: Make the assumption
13 that's an -- that this is an issue of the Court's
14 exercise of discretion, because the last two questions
15 had to do with what's wise for the Court to do, not
16 whether it has power to do it or not.

17 MR. KNEEDLER: Right. And --

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

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

25 JUSTICE SOTOMAYOR: Would you please --

1 MR. KNEEDLER: No, I understand.

2 JUSTICE SOTOMAYOR: I've asked you three
3 times to move around that.

4 MR. KNEEDLER: -- blend into -- blend into
5 discretion and, in turn, blend into the merits of the
6 severability question. And as to that, just to answer a
7 question that several Justices have asked, we think that
8 severability is a matter of statutory interpretation.
9 It should be resolved by looking at the structure and
10 the text of the Act, and the Court may look at
11 legislative history to figure out what the text and
12 structure mean with respect to severability. We
13 don't --

14 JUSTICE SCALIA: Mr. Kneeder, what happened
15 to the Eighth Amendment? You really want us to go
16 through these 2,700 pages?

17 (Laughter.)

18 JUSTICE SCALIA: And do you really expect
19 the Court to do that? Or do you expect us to give this
20 function to our law clerks?

21 (Laughter.)

22 JUSTICE SCALIA: Is this not totally
23 unrealistic, that we're going to go through this
24 enormous bill item by item and decide each one?

25 MR. KNEEDLER: Well --

1 JUSTICE SOTOMAYOR: I thought the simple
2 answer was you don't have to because --

3 MR. KNEEDLER: Well, that is -- that is
4 the --

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

7 MR. KNEEDLER: That is correct, and I'd also
8 like to -- going -- I just wanted to finish the thought
9 I had about this being a matter of statutory
10 interpretation. The Court's task, we submit, is not to
11 look at the legislative process to see whether the bill
12 would have been -- would have passed or not based on the
13 political situation at the time, which would basically
14 convert the Court into a function such as a whip count.
15 That is not the Court's function.

16 JUSTICE KAGAN: And, Mr. Kneedler, that
17 would be a revolution --

18 MR. KNEEDLER: Yes.

19 JUSTICE KAGAN: -- in our severability law,
20 wouldn't it?

21 MR. KNEEDLER: It would.

22 JUSTICE KAGAN: I mean, we have never
23 suggested that we are going to say, look, this
24 legislation was a brokered compromise, and we're going
25 to try to figure out exactly what would have happened in

1 the complex parliamentary shenanigans that go on across
2 the street and figure out whether they would have made a
3 difference.

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

7 (Laughter.)

8 MR. KNEEDLER: I think -- I think that's --

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

11 (Laughter.)

12 MR. KNEEDLER: I think that -- I think
13 that's exactly right. As I said, it is a question of
14 statutory interpretation.

15 CHIEF JUSTICE ROBERTS: Well, how is that --
16 what's exactly right? It's a question of statutory
17 interpretation. That means you have to go through every
18 line of the statute. I haven't heard your answer to
19 Justice Scalia's question yet.

20 MR. KNEEDLER: Well, I think in this case
21 there is an easy answer, and that is -- Justice Kagan
22 pointed out that that the Act itself creates a sharp
23 dividing line between the minimum coverage provision --
24 the package of -- of reforms: The minimum coverage
25 provision along with the guaranteed issue and community

1 rating. That is one package that Congress deemed
2 essential.

3 CHIEF JUSTICE ROBERTS: How do you know
4 that? Where is this line? I looked through the whole
5 Act. I didn't read -- well --

6 MR. KNEEDLER: It is -- it is in
7 Congress's --

8 CHIEF JUSTICE ROBERTS: Where is the sharp
9 line?

10 MR. KNEEDLER: It is in Congress's findings
11 that the -- that the minimum coverage provision --
12 without it, the Court -- the Congress said, in Finding
13 (I), without that provision, people would wait to get
14 insurance, and therefore -- and cause all the adverse
15 selection problems --

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

17 MR. KNEEDLER: -- that gave rise to it.

18 CHIEF JUSTICE ROBERTS: That makes your case
19 that the one provision should fall if the other does.
20 It doesn't tell us anything about all the other
21 provisions.

22 MR. KNEEDLER: Well, I -- I think -- I think
23 it does, because Congress said it was essential to those
24 provisions, but it conspicuously did not say that it was
25 essential to other provisions.

1 CHIEF JUSTICE ROBERTS: Well --

2 JUSTICE ALITO: May I ask you about the
3 argument that's made in the economists' amicus brief?
4 They say that the insurance reforms impose 10-year costs
5 of roughly \$700 billion on the insurance industry and
6 that these costs are supposed to be offset by about 350
7 billion in new revenue from the individual mandate and
8 350 billion from the Medicaid expansion.

9 Now, if the 350 billion -- maybe you'll
10 disagree with the numbers, that they're fundamentally
11 wrong. But assuming that they're in the ballpark, if
12 the 350 billion from the individual mandate were to be
13 lost, what would happen to the insurance industry, which
14 would now be in the -- in the hole for \$350 billion over
15 10 years?

16 MR. KNEEDLER: I don't -- I mean, first of
17 all, for the Court to go beyond text and legislative
18 history to try to figure out how the finances of a bill
19 operated, it's like being the budget committee. But --
20 but we think the economists had added up the figures
21 wrong. If there's Medicaid expansion, the insurance --
22 and the insurance companies are involved in that,
23 they're going to be reimbursed for the --

24 CHIEF JUSTICE ROBERTS: But what if there
25 isn't Medicaid expansion? We've talked about the

1 individual mandate, but does the Government have a
2 position on what should happen if the Medicaid expansion
3 is struck down?

4 MR. KNEEDLER: We don't -- we don't think
5 that that would have any effect. And that could be
6 addressed in the next argument. But we don't think that
7 would have any effect on the -- on the rest of the -- on
8 the rest of the Act.

9 CHIEF JUSTICE ROBERTS: So, it -- the
10 Government's position is that if Medicaid expansion is
11 struck down, the rest of the Act can operate --

12 MR. KNEEDLER: Yes.

13 CHIEF JUSTICE ROBERTS: -- without it.

14 MR. KNEEDLER: Yes. It's -- in the past,
15 Congress has expanded Medicaid coverage without there
16 being -- it's done it many times without there being a
17 minimum coverage provision.

18 JUSTICE KENNEDY: But I still don't
19 understand where you are with the answer to
20 Justice Alito's question.

21 Assume that there is a -- a substantial
22 probability that the 350 billion plus 350 billion equals
23 7 is going to be cut in half if the individual mandate
24 is stricken. Assume there is a significant possibility
25 of that. Is it within the proper exercise of this

1 Court's function to impose that kind of risk? Can we
2 say that the Congress would have intended that there be
3 that kind of risk?

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

7 JUSTICE KENNEDY: But isn't that -- isn't
8 that the point, then, why we should just assume that it
9 is not severable?

10 MR. KNEEDLER: No.

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

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

15 JUSTICE KENNEDY: To say we're doing
16 something and we're not telling you what the
17 consequences might be?

18 MR. KNEEDLER: No, I don't think so, because
19 when you -- when you're talking about monetary
20 consequences, you're looking through the Act, you're
21 looking behind the Act, rather than -- the Court's
22 function is to look at the text and structure of the Act
23 and what the substantive provisions of the Act
24 themselves mean. And if I could go past --

25 JUSTICE SCALIA: Mr. Kneeder, could I --

1 can you give us a prior case in -- that resembles this
2 one in which we are asked to strike down what the other
3 side says is the heart of the Act, and yet leave in --
4 as you request, leave in effect the rest of it? Have we
5 ever -- most of our severability cases, you know,
6 involve one little aspect of the Act, and the question
7 is whether the rest. When have we ever really struck
8 down what was the main purpose of the Act and left the
9 rest in effect? Do you have a case for that?

10 MR. KNEEDLER: I think Booker is the best
11 example of that. In Booker, the mandatory sentencing
12 provisions were central to the Act, but the -- but the
13 Court said Congress would have preferred a statute
14 without the mandatory provision in the Act, and the
15 Court struck that, but the rest of the sentencing
16 guidelines remained.

17 JUSTICE SCALIA: I think the reason -- the
18 reason the majority said that was that they didn't think
19 that what was essential to the Act was what had been
20 stricken down, and that is the -- the ability of the
21 judge to say on his own what -- what the punishment
22 would be. I don't think that's a case where we
23 struck -- where we excised the heart of the statute.

24 You have another one?

25 MR. KNEEDLER: There's no example --

1 JUSTICE SCALIA: There is no example. This
2 is really --

3 MR. KNEEDLER: There's no example to our --
4 that we have found that suggests the contrary.

5 JUSTICE SCALIA: Is this really a case of
6 first impression?

7 MR. KNEEDLER: It's a --

8 JUSTICE SCALIA: I don't know another case
9 where we have been confronted with this -- with this
10 decision.

11 Can you take out the heart of the Act and
12 leave everything else in place?

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

21 JUSTICE BREYER: I mean, I think it's not
22 uncommon that Congress passes an act, and then there are
23 many different titles, and some of the titles have
24 nothing to do with the other titles. That's a common
25 thing. And you're saying you've never found an instance

1 where they're all struck out when they have nothing to
2 do with each other.

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

10 (Laughter)

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

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

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

24 JUSTICE SCALIA: Have a conference committee
25 report afterwards, maybe.

1 (Laughter.)

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

5 JUSTICE SOTOMAYOR: Could you get back to
6 the argument of -- of the heart?

7 MR. KNEEDLER: Yes.

8 JUSTICE SOTOMAYOR: Striking down the heart,
9 do we want half a loaf or a shell?

10 MR. KNEEDLER: Right.

11 JUSTICE SOTOMAYOR: I think those are the
12 two analogies that --

13 MR. KNEEDLER: Right. And -- and I would
14 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 most basic one is the notion that
19 Congress would have intended the whole Act to fall if
20 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, \$3.2 billion --

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's 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 that are --

9 JUSTICE SOTOMAYOR: I thought that the
10 26-year-olds were saying that they were healthy and
11 didn't need insurance yesterday.

12 MR. KNEEDLER: Two and a half --

13 JUSTICE SOTOMAYOR: So, today they're going
14 to bankrupt the --

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

23 CHIEF JUSTICE ROBERTS: All of that was
24 based on the assumption that the mandate was
25 constitutional. And if -- that certainly doesn't stop

1 us from reaching our own determination on that.

2 MR. KNEEDLER: No, but what I'm saying is
3 it's a question of legislative intent, and we have a
4 very fundamental indication of legislative intent that
5 it -- that Congress did not mean the whole Act to fall
6 if -- without the minimum coverage provision, because we
7 have many provisions that are operating now without
8 that.

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

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

25 JUSTICE SCALIA: But many people might

1 not -- many of the people in Congress might not have
2 voted for those provisions if the central part of this
3 statute was not adopted.

4 MR. KNEEDLER: But that --

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

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

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

25 So, it seems to me if you ask what is going

1 to promote Congress's purpose, that's just an inquiry
2 that you can't carry out.

3 MR. KNEEDLER: No, I -- with respect, I
4 disagree, because I think it's evident that Congress's
5 purpose was to expand access to affordable care. It did
6 it in discrete ways. It did it by the penalty on
7 employers that don't -- that don't offer suitable care.
8 It did it by offering tax credits to small employers.
9 It did it by offering tax credits to purchasers. All of
10 those are a variety of ways that continue to further
11 Congress's goal. And most of all, Medicaid, which is --
12 which is unrelated to -- to the private insurance market
13 altogether.

14 And in adopting those other provisions
15 governing employers and whatnot, Congress built on its
16 prior experience of using the tax code, which it has --
17 for a long period of time, Congress has subsidized the
18 provision of health care --

19 JUSTICE KENNEDY: I don't quite understand
20 about the employers. You're saying Congress mandated
21 employers to buy something that Congress itself has not
22 contemplated? I don't understand that.

23 MR. KNEEDLER: No. Employer coverage -- 150
24 million people in this country already get their
25 insurance through -- through their employers. What

1 Congress did in seeking to augment that was to add a
2 provision requiring employers to purchase insurance or
3 pay a tax penalty.

4 JUSTICE KENNEDY: Based on the assumption
5 that the cost of those policies would be lowered
6 by certain provisions which are, by hypothesis -- we're
7 not sure -- by hypothesis, are in doubt.

8 MR. KNEEDLER: No, I -- I think it's -- any
9 cost assumptions -- there's no indication that Congress
10 made any cost assumptions, but -- but there's no reason
11 to think that the individual -- that the individual
12 market, which is where the minimum coverage provision is
13 directed, would affect that.

14 I would like to say -- I have pointed out
15 why the other things would advance Congress's goal. The
16 point here is that the package of three things would be
17 contrary -- would run contrary to Congress's goal if you
18 took out the minimum coverage provision.

19 And here's why -- and this is reflected in
20 the findings. If you take out minimum coverage but
21 leave in the guaranteed issue and community rating, you
22 will make matters worse. Rates will go up, and people
23 -- there will be less -- fewer people covered in the
24 individual market.

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

1 is the difference between guaranteed-issue and
2 community-rating provisions, on the one hand, and other
3 provisions that increase costs substantially for
4 insurance companies?

5 For example, the tax on high cost health
6 plans, which the economists' amicus brief said will cost
7 \$217 billion over 10 years?

8 MR. KNEEDLER: Those are -- what Congress --
9 Congress did not think of those things as balancing
10 insurance companies. Insurance companies are
11 participants in the market for Medicaid and -- and other
12 things.

13 JUSTICE KENNEDY: But you're saying we have
14 -- we have the expertise to make the inquiry you want us
15 to make, i.e., the guaranteed issue, but not the
16 expertise that Justice Alito's question suggests we must
17 make.

18 MR. KNEEDLER: Well --

19 JUSTICE KENNEDY: I just don't understand
20 your position.

21 MR. KNEEDLER: -- that's because -- that's
22 because I think this Court's function is to look at the
23 text and structure and the legislative history of the
24 law that Congress enacted, not the financial -- not a
25 financial balance sheet, which doesn't appear anywhere

1 in the law. And just --

2 JUSTICE GINSBURG: You're relying on
3 Congress's quite explicitly tying these three things
4 together.

5 MR. KNEEDLER: We do. That's -- that's --
6 and it's not just the text of the Act, but the
7 background of the Act, the experience in the States, the
8 testimony of the National Association of Insurance
9 Commissioners.

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

21 And so, what -- and Congress, trying to come
22 up with a market-based solution to control rates in that
23 market, has adopted something that would -- that would
24 work to control costs by guaranteed issue and community
25 rating, but if you -- if -- if you take out the minimum

1 coverage, that won't work. That was Congress's
2 assumption, again, shown by the text and legislative
3 history of this provision. And that's why we think
4 those things rise or fall in a package, because they cut
5 against what Congress was trying to do.

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

14 And the other thing Congress has done, those
15 pre-existing laws had their own protections for
16 guaranteed issue and community rating. Effectively,
17 within the large employer plans, they can't discriminate
18 among people. They can't charge different rates. What
19 Congress was doing, was doing that in the other market.
20 If it can't, that's all that should be struck from the
21 Act.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Kneedler.

24 Mr. Farr.

25 ORAL ARGUMENT OF H. BARTOW FARR, III,

1 AS THE COURT-APPOINTED AMICUS CURIAE

2 MR. FARR: Mr. Chief Justice, and may it
3 please the Court:

4 At the outset, I would just like to say I
5 think that the Government's position in this case that
6 the community-rating and guaranteed-issue provisions
7 ought to be struck down is an example of the best
8 driving out the good, because, even without the minimum
9 coverage provision, those two provisions, guaranteed
10 issue and community rating, will still open insurance
11 markets to millions of people that were excluded under
12 the prior system and for millions of people will lower
13 prices, which were raised high under the old system
14 because of their poor health.

15 So, even though the system is not going to
16 work precisely as Congress wanted, it would certainly
17 serve central goals that Congress had of expanding
18 coverage for people who were unable to get coverage or
19 unable to get it at affordable prices.

20 So, when the government --

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

1 premiums.

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

5 MR. FARR: Well, Justice Ginsburg, let me
6 say two things about that.

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

11 For people who were not able to get
12 insurance before, obviously, their insurance beforehand
13 was -- the price was essentially infinite. They were
14 not able to get it at any price. They will now be able
15 to get it at a price that they can afford.

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

21 Also, you have a large number of people who,
22 under the Act --

23 JUSTICE SCALIA: Excuse me. Why do you
24 say -- I didn't follow that. Why?

25 MR. FARR: Because --

1 JUSTICE SCALIA: Why would their rates be
2 lower?

3 MR. FARR: Their rates are going to be lower
4 than they were under the prior system because they are
5 going into a pool of people, rather than -- some of whom
6 are healthy, rather than having their rates set
7 according to their individual health characteristics.
8 That's why their rates were so high.

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

20 MR. FARR: Well, that's --

21 JUSTICE KAGAN: And this is not --

22 MR. FARR: Sorry.

23 JUSTICE KAGAN: -- like what I think. What
24 do I know? It's just what -- what's reflected in
25 Congress's findings, that it's -- it looks at some

1 States and says this system crashed and burned. It
2 looked at another State with the minimum coverage
3 provision and said this one seems to work; so, we'll
4 package the minimum coverage provision with the
5 nondiscrimination provisions.

6 MR. FARR: Well, in a moment, I'd like to
7 talk about the finding, but if I could just postpone
8 that for a second and talk about adverse selection
9 itself.

10 I think one of the misconceptions here,
11 Justice Kagan, is that Congress, having seen the
12 experience of the States in the '90s with community
13 rating and guaranteed issue, simply imposed the minimum
14 coverage provision as a possible way of dealing with
15 that, and if you don't have the minimum coverage
16 provision, then, essentially, adverse selection runs
17 rampant. But that's not what happened.

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

21 There are -- to begin with, the Act
22 authorizes annual enrollment periods so people can't
23 just show up at the hospital. If they don't show up and
24 sign up at the right time, they at least have to wait to
25 the -- to the time next year. That's authorized by the

1 Act.

2 There -- with respect to the subsidies,
3 there are three different things that make this
4 important. First of all, the subsidies are very
5 generous. For people below 200 percent of the Federal
6 poverty line, the subsidy will cover 80 percent, on
7 average, of the premium, which makes it attractive to
8 them to join.

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

19 And the third thing --

20 JUSTICE SCALIA: There is nothing about
21 Federal support that is unsustainable, right? That is
22 infinite.

23 (Laughter.)

24 MR. FARR: Well, I mean, that's a fair
25 point, Justice Scalia, although one of the things that

1 happens, if you take the mandate out, while it is true
2 that the subsidies that the government provides to any
3 individual will increase, and they will be less
4 efficient -- I'm not disputing that point -- actually,
5 the overall amount of the subsidies that the government
6 will provide will decline, as the Government notes
7 itself in its brief, because there will be fewer people
8 getting them. Some people will opt out of the system
9 even though they're getting subsidies.

10 But I'd just like to go back for one more
11 second to the point about how the subsidies are part of
12 what Congress was using, because the other thing is that
13 for people below 250 percent of the Federal poverty
14 line, Congress also picks up and subsidizes the
15 out-of-pocket costs, raising the actuarial value.

16 So, you have all of that, and then you have
17 Congress also, unlike the States, establishing -- or I
18 should be precisely accurate -- unlike almost all the
19 States, establishing an age differential of up to three
20 to one. So, an insurance company, for example, that is
21 selling a 25-year-old a policy for \$4,000 can charge a
22 60-year-old \$12,000 for exactly the same coverage.

23 The States typically in the '90s, when they
24 were instituting these programs, they either had pure
25 community rating, where everybody is charged the same

1 premium -- everybody regardless of their age is charged
2 the same premium. Some States had a variance of 1.5
3 to 1. Massachusetts, for example, which did have good
4 subsidies, but their age band was two to one.

5 So, when Congress is enacting this Act, it's
6 not simply looking at the States and thinking: Well,
7 that didn't go very well. Why don't we put in a minimum
8 coverage provision? That will solve the problem.

9 Congress did a lot of different things to
10 try to combat the adverse selection.

11 Now, if I could turn to the finding, because
12 I think this is the crux of the Government's position,
13 and then the plaintiffs pick up on that and then move --
14 move from that to the rest of the Act. And it seems to
15 me, quite honestly, it's an important part because that
16 is textual. You know, in this whole sort of quest for
17 what we're trying to figure out, the finding seems to
18 stand out as something that the Court can rely on and
19 say here's something Congress has actually told us.

20 But I think the real problem with the
21 finding is the -- the context in which Congress made it.
22 It's quite clear. If the Court wants to look, the
23 finding is on page 42 -- 43a, excuse me, of the
24 Solicitor General's severability brief, in the appendix.

25 But the finding is made specifically in the

1 context of interstate commerce. That is why the
2 findings are in the Act at all. Congress wanted to
3 indicate to the Court, knowing that the minimum coverage
4 provision was going to be challenged, wanted to indicate
5 to the Court the basis on which it believed it had the
6 power under the Commerce Clause to enact this law.

7 Why does that make a difference with respect
8 to Finding (I), which is the one that the Government is
9 relying on, and in particular the last sentence, which
10 says this requirement "is essential to creating
11 effective health insurance markets" in which guaranteed
12 issue and pre-existing illnesses can be covered.

13 And the reason is because the word
14 "essential" in the Commerce Clause context doesn't have
15 the colloquial meaning. In the Commerce Clause context,
16 "essential" effectively means useful. So that when one
17 says -- in Lopez, when the Court says section 922(q) is
18 not an essential part of a larger regulatory scheme of
19 economic activity, it goes on to say: In which the
20 regulatory scheme would be undercut if we didn't have
21 this provision.

22 Well, if that's all Congress means, I agree
23 with that. The system will be undercut somewhat if you
24 don't have the minimum coverage provision. It's like
25 the word "necessary" in the Necessary and Proper Clause

1 Clause. It doesn't mean, as the Court has said on
2 numerous occasions, absolutely necessary. It means
3 conducive to, useful, advancing the objectives,
4 advancing the aims. And it's easy to see, I think, that
5 that's what Congress did.

6 JUSTICE SCALIA: Is there any dictionary
7 that gives that --

8 MR. FARR: I'm sorry, Justice Scalia.

9 JUSTICE SCALIA: -- that definition of
10 "essential"? It's very imaginative.

11 (Laughter.)

12 JUSTICE SCALIA: Just give me one
13 dictionary.

14 MR. FARR: Well -- but I think my point,
15 Justice Scalia, is that they're not using it in the true
16 dictionary sense.

17 JUSTICE SCALIA: How do we know that? When
18 people speak, I assume they're speaking English.

19 MR. FARR: Well --

20 (Laughter.)

21 MR. FARR: I think that there are several
22 reasons that I would suggest that we would know that
23 from. The first is, as I say, the findings themselves.
24 Congress says at the very beginning -- the head of it is
25 Congress makes the following findings. And they're

1 talking about the interstate -- you know, (B) is headed
2 "Effects on the national economy and interstate
3 commerce." So, we know the context that Congress is
4 talking about. It is more or less quoting from the
5 Court's Commerce Clause statement.

6 But if one looks at the very preceding
7 finding, which is Finding (H), which is on 42 over onto
8 43, Congress at that point also uses the word
9 "essential." In the second sentence, it says this
10 requirement -- and again, we're talking about the
11 minimum coverage provision -- "is an essential part of
12 this larger regulation of economic activity," which is,
13 by the way, an exact quote from Lopez, in which "the
14 absence of the requirement would undercut Federal
15 regulation," also an exact quote from Lopez.

16 But what it's referring to is essential --
17 an essential part of ERISA, the National Health Service
18 Act, and the Affordable Care Act. It can't possibly be,
19 even the plaintiffs haven't argued, that those acts
20 would all fall in their entirety if you took out the
21 minimum coverage provision.

22 And as a second example of the same usage by
23 Congress, the statute that was before the Court in
24 Raich, section 801 of Title 21, the Court said that the
25 regulation of intrastate drug activity, drug traffic,

1 was essential to the regulation of interstate drug
2 activity. Again, it is simply not conceivable that
3 Congress was saying one is so indispensable to the
4 other, the way the United States uses the term here, so
5 indispensable that if we can't regulate the intrastate
6 traffic, we don't want to regulate the interstate
7 traffic, either. The whole law criminalizing drug
8 traffic would fall.

9 So, I think once you look at the finding for
10 what I believe it says, which is we believe this is a
11 useful part of our regulatory scheme, which the Congress
12 would think in its own approach would be sufficient --

13 JUSTICE SOTOMAYOR: Counsel --

14 MR. FARR: Yes, Justice.

15 JUSTICE SOTOMAYOR: The problem I have is
16 that you're ignoring the congressional findings and all
17 of the evidence Congress had before it that community
18 ratings and guaranteed issuance would be a death
19 spiral -- I think that was the word that was used --
20 without minimum coverage. Those are all of the
21 materials that are part of the legislative record here.

22 So, even if it might not be because of the
23 structure of the Act, that's post hoc evidence. Why
24 should we be looking at that as opposed to what Congress
25 had before it and use "essential" in its plain meaning:

1 You can't have minimum coverage without, what the SG is
2 arguing, community ratings and guaranteed issue. You
3 can't have those two without minimum coverage.

4 MR. FARR: Well, I think that's a fair
5 question. But the idea that -- that all the information
6 before Congress only led to the idea that if -- that you
7 would have death spirals seems to me to be contradicted
8 a little bit at least by the CBO report in November of
9 2009, which is about 4 months before the Act passed,
10 where the CBO talks about adverse selection.

11 Now, I want to be clear. This is at a time
12 when the minimum coverage provision was in the statute.
13 So, I'm not suggesting that this is a discussion without
14 that in it. But, nonetheless, the CBO goes through and
15 talks about adverse selection and -- and points out the
16 different provisions in the Act, the ones I have
17 mentioned plus one other, actually, where in the first 3
18 years of the operation of the exchanges, those insurance
19 companies that get sort of a worse selection of -- of
20 consumers will be given essentially credits from
21 insurance companies that get better selection.

22 JUSTICE KENNEDY: So, do you want us to
23 write an opinion saying we have concluded that there is
24 an insignificant risk of a substantial adverse effect on
25 the insurance companies -- that's our economic

1 conclusion -- and therefore not severable? That's what
2 you want me to say?

3 MR. FARR: It doesn't sound right the way
4 you say it, Justice Kennedy. So --

5 (Laughter.)

6 MR. FARR: No, I --

7 JUSTICE SOTOMAYOR: But you don't want them
8 to say, either, that there is a death spiral. Do you
9 want -- you don't want us to make either of those two
10 findings, I'm assuming.

11 MR. FARR: That's correct. Now, I -- I
12 agree that there's a risk and the significance of it
13 people can debate. But what I think is -- is lost in
14 that question -- and I didn't mean to be whimsical about
15 it. I think what is lost in it a little bit is what's
16 on the other side, which is the fact that if you follow
17 the Government's suggestion, if the Court follows the
18 Government's suggestion, what is going to be lost is
19 something we know is a central part of the Act. I mean,
20 indeed, if one sort of looks at the legislative history
21 more broadly, I think much of it is directed toward the
22 idea that guaranteed issue and community rating were the
23 crown jewel of the Act.

24 The minimum coverage provision wasn't
25 something that everybody was bragging about. It was

1 something that was meant to be part of this package. I
2 agree with that.

3 But the -- but the point of it was to have
4 guaranteed issue and minimum coverage. I mean -- excuse
5 me -- guaranteed issue and community rating. And that's
6 -- under the Government's proposal, those would
7 disappear. We would go back to the old system.

8 And under what I think is the proper
9 severability analysis, the -- the real question the
10 Court is asking, should be asking, is, would Congress
11 rather go back to the old system than to take perhaps
12 the risk that you're talking about, Justice Kennedy?

13 CHIEF JUSTICE ROBERTS: You -- you're
14 referring to the Government's second position. Their
15 first, of course, is that we shouldn't address this
16 issue at all.

17 MR. FARR: That's correct.

18 CHIEF JUSTICE ROBERTS: I asked Mr. Kneedler
19 about what procedure or process would be anticipated for
20 people who are affected by the change in -- in the law
21 and the change in the economic consequences. Do you
22 have a view on how that could be played out? It does
23 seem to me that if we accept your position, something --
24 there have to -- there has to be a broad range of
25 consequences, whether it's additional legislation,

1 additional litigation.

2 Any thoughts on how that's going to play
3 out?

4 MR. FARR: Well, if the Court adopts the
5 position that I'm advocating, Mr. Chief Justice, I think
6 what would happen is that the Court would say that the
7 minimum coverage provision, by hypothesis of course, is
8 unconstitutional, and the fact of that being
9 unconstitutional does not mean the invalidation of any
10 other provision.

11 So, under the position I'm advocating, there
12 would no longer be challenges to the remaining part of
13 the Act. The --

14 CHIEF JUSTICE ROBERTS: But if the challenge
15 is what we're questioning today, whether -- if you're an
16 insurance company and you don't believe that you can
17 give the coverage in the way Congress mandated it
18 without the individual mandate, what -- what type of
19 action do you bring in court?

20 MR. FARR: You -- if the Court follows the
21 course that I'm advocating, you do not bring an action
22 in court. You go to Congress and you seek a change from
23 Congress to say the minimum coverage provision has been
24 struck down by the Court: Here is our -- here -- here's
25 the information that we have to show you what the risks

1 are going to be. Here are the adjustments you need to
2 make.

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

6 You know, as I was talking earlier about the
7 -- the different ratio for ages in insurance. The
8 States have tended to change that because they found
9 that having too narrow a band worked against the
10 effectiveness of their programs. But they -- except for
11 in Massachusetts, they didn't enact mandates.

12 So, to answer -- I think to answer your
13 question directly, Mr. Chief Justice, the position I'm
14 advocating would simply have those -- those pleas go to
15 Congress, not in court.

16 Now, if one -- just to discuss the issue
17 more generally, if that's helpful, I think that if there
18 were situations where the Court deferred -- let's say
19 for discretionary reasons, they just said -- the Court
20 said we're not going to take up the question of
21 severability and therefore not resolve it in these other
22 situations, it certainly seems to me that in enforcement
23 actions, for example, if the time comes in 2014 and
24 somebody applies to an insurance company for a
25 policy and the insurance company says, well, we're not

1 going to issue a policy, we don't think your risks are
2 ones that we're willing to cover -- it seems to me that
3 they could sue the insurance company and the insurance
4 company could raise as a defense that this provision,
5 the guaranteed-issue provision of the statute, is not
6 enforceable because it was inseverable from the decision
7 -- from the provision that the Court held
8 unconstitutional in 2012.

9 JUSTICE SCALIA: Mr. Farr, let's consider
10 how -- how your approach, severing as little as
11 possible, thereby increases the deference that we're
12 showing to Congress. It seems to me it puts Congress in
13 this position: This Act is still in full effect. There
14 is going to be this deficit that used to be made up by
15 the mandatory coverage provision. All that money has to
16 come from somewhere. You can't repeal the rest of the
17 Act because you're not going to get 60 votes in the
18 Senate to repeal the rest. It's not a matter of
19 enacting a new Act. You got to get 60 votes to repeal
20 it. So, the rest of the Act is going to be the law.

21 So, you're just put to the choice of, I
22 guess, bankrupting insurance companies and the whole
23 system comes tumbling down, or else enacting a Federal
24 subsidy program to the insurance companies, which is
25 what the insurance companies would like, I'm sure.

1 Do you really think that that is somehow
2 showing deference to Congress and respecting the
3 democratic process?

4 It seems to me it's a gross distortion of
5 it.

6 MR. FARR: Well, Your Honor, the difficulty
7 is that it seems to me the other possibility is for the
8 Court to make choices particularly based on what it
9 expects the difficulties of Congress altering the
10 legislation after a Court ruling would be. I'm not
11 aware of any severability decision that has ever looked
12 anything like that.

13 JUSTICE SCALIA: No, I -- that wouldn't be
14 my approach. My approach would say, if you take the
15 heart out of the statute, the statute's gone. That
16 enables Congress to do what it wants in the usual
17 fashion. And it doesn't inject us into the process of
18 saying: This is good, this is bad, this is good, this
19 is bad.

20 MR. FARR: Well --

21 JUSTICE SCALIA: It seems to me it reduces
22 our options the most and increases Congress's the most.

23 MR. FARR: And I guess to some extent I have
24 to quarrel with the premise, Justice Scalia, because at
25 least the position that I'm advocating today, under

1 which the Court would only take out the minimum coverage
2 provision, I don't think would fit the description that
3 you have given of taking out the heart of the statute.

4 Now, I do think once you take out guaranteed
5 issue and community rating, you're getting closer to the
6 heart of the statute. And one of the -- one of the
7 difficulties I think with the Government's position is
8 that I think it's harder to cabin that, to draw that
9 bright line around it. It's harder than the Government
10 thinks it is.

11 I mean, to begin with, even the Government
12 seems to acknowledge, I think, that the exchanges are
13 going to be relatively pale relatives of the exchanges
14 as they're intended to be, where you're going to have
15 standardized products, everybody can come and make
16 comparisons based on products that look more or less the
17 same.

18 But the other thing that's going to happen
19 is with the subsidy program. The way that the subsidy
20 program is set up, the subsidy is calculated according
21 to essentially a benchmark plan. And this -- if one --
22 if the Court wants to look at the provisions, they're --
23 they begin at page 64a of the private plaintiffs' brief.
24 Again, in the appendix. The particular provision I'm
25 talking about's at 68a. But there's a -- there's a

1 question -- you -- you're looking essentially to
2 calculate the premium by looking at a -- at a
3 standardized silver plan.

4 First question, obviously, is: Is there
5 going to be any such plan if you don't have guaranteed
6 issue and community rating, if the plans can basically
7 be individualized? But the second problem is that, in
8 the provision on 68a, the -- the provision that's used
9 for calculating the subsidy, what -- what is anticipated
10 in the provision under the Act, as it is now, is that
11 you do have the floor of the income. You would -- you
12 would take this benchmark plan, and the government would
13 pay the difference.

14 And as we talked about earlier, the
15 benchmark plan can change for age, and -- and the
16 provision says it can be adjusted only for age. So, if
17 in fact you even have such a thing as a benchmark plan
18 anymore, if the rates of people in poor health go up
19 because of individual insurance underwriting, the
20 government subsidy is not going to pay for that.

21 JUSTICE KAGAN: Mr. Farr, I understood that
22 the answer that you gave to Justice Scalia was
23 essentially that the minimum coverage provision was not
24 the heart of the Act. Instead, the minimum coverage
25 provision was a tool to make the nondiscrimination

1 provisions -- community rating, guaranteed issue --
2 work.

3 So, if you assume that, that all the minimum
4 coverage is, is a tool to make those provisions work,
5 then I guess I would refocus Justice Scalia's question
6 and say, if we know that something is just a tool to
7 make other provisions work, shouldn't that be the case
8 in which those other provisions are severed along with
9 the tool?

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

13 And if one -- and the case that comes to
14 mind is New York v. The United States, where the Court
15 struck down the "take title" provision but left other --
16 two other incentives essentially in place.

17 Even without the minimum coverage provision,
18 there will be a lot of other incentives still to bring
19 younger people into the market and to keep them in the
20 market. And if -- if my reading of the finding is
21 correct -- and that's all that Congress is saying, that
22 this would be useful -- it doesn't mean that it's
23 impossible to have --

24 JUSTICE BREYER: But would you -- I'd just
25 like to hear before you leave your argument, if you want

1 to, against what Justice Scalia just said. Let's
2 assume, contrary to what you want, that the Government's
3 position is accepted by the majority of this Court. And
4 so, we now are rid, quote, of the true "heart" of the
5 bill. Now, still there are a lot of other provisions
6 here like the Indian Act, the black lung disease, the
7 wellness program, that restaurants have to have a
8 calorie count of major menus, et cetera.

9 Now, some of them cost money, and some of
10 them don't. And there are loads of them. Now, what is
11 your argument that just because the heart of the bill is
12 gone, that has nothing to do with the validity of these
13 other provisions, both those that cost money or at least
14 those that cost no money? Do you want to make an
15 argument in that respect, that destroying the heart of
16 the bill does not blow up the entire bill; it blows up
17 the heart of a bill? And I'd just like to hear what you
18 have to say about that.

19 MR. FARR: Well, Justice Breyer, I think
20 what I would say is, if one goes back to the -- what I
21 think is the proper severability standard and say, would
22 Congress rather have not -- no bill as opposed to the
23 bill with whatever is severed from it, it seems to me
24 when you're talking about provisions that don't have
25 anything to do with the minimum coverage provision,

1 there's no reason to answer that question as any other
2 way than yes, Congress would want these provisions.

3 JUSTICE KENNEDY: Is that the real Congress
4 or a hypothetical Congress?

5 (Laughter.)

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

8 JUSTICE BREYER: Have you come across --

9 MR. FARR: Excuse me.

10 JUSTICE SCALIA: Why put -- why put Congress
11 to that false choice?

12 MR. FARR: Well --

13 JUSTICE SCALIA: You know -- you only have
14 two choices, Congress. You can have the whole bill or
15 you can have -- you can have parts of the bill or no
16 bill at all. Why that false choice?

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

21 JUSTICE BREYER: Yes. Oh, I know. So, you
22 -- I would say stay out of politics. That's for
23 Congress, not us.

24 MR. FARR: Right.

25 JUSTICE BREYER: But the -- the question

1 here is -- you've read all these cases or dozens -- have
2 you ever found a severability case where the Court ever
3 said: Well, the heart of the thing is gone, and,
4 therefore, we strike down these other provisions that
5 have nothing to do with it, which could stand on their
6 feet independently and can be funded separately or don't
7 require money at all.

8 MR. FARR: I think the accurate answer would
9 be I am not aware of a modern case that says that. I
10 think there probably are cases in the '20s and '30s that
11 would be more like that.

12 If I could just take one second to address
13 the economists' brief because Justice Alito raised it
14 earlier. I just want to make one simple point. Leaving
15 aside the whole balancing thing, if one looks at the
16 economists' brief, I think it's very important to note
17 that when they're talking about one side of the balance
18 -- may I finish?

19 CHIEF JUSTICE ROBERTS: Certainly.

20 MR. FARR: When they're talking about the
21 balance, they're not just talking about the minimum
22 coverage provision. They very carefully word it to say
23 the minimum coverage provision and the subsidy programs.
24 And then, so when you're doing the mathematical
25 balancing, the subsidy programs are extremely large.

1 They -- in year 2020, they're expected to be over
2 \$100 billion in that one year alone. So, if you're
3 looking at the numbers, please consider that.

4 Thank you, Your Honors.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Farr.

6 Mr. Clement, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 JUSTICE SOTOMAYOR: Mr. Clement, could you
10 respond to amici's point? He says that Congress didn't
11 go into this Act to impose minimum coverage. They went
12 into the Act to have a different purpose, i.e., to get
13 people coverage when they needed it, to increase
14 coverage for people, that this is only a tool. But
15 other States -- going back to my original point, that
16 there are other tools besides minimum coverage that
17 Congress can achieve the same goals. So, if we strike
18 just a tool, why should we strike the whole Act --

19 MR. CLEMENT: Mr. Chief --

20 JUSTICE SOTOMAYOR: -- when Congress has
21 other tools available?

22 MR. CLEMENT: Mr. Chief Justice, I'll make
23 four points in rebuttal, but I'll start with Justice
24 Sotomayor's question, which is to simply say this isn't
25 just a tool; it's the principal tool. Congress

1 identified it as an essential tool. It's not just a
2 tool to make it work. It's a tool to pay for it, to
3 make it affordable. And, again, that's not my
4 characterization; that's Congress's characterization in
5 Sub-finding (I) on page 43a of the Government's brief.

6 Now, that brings me to my first point in
7 rebuttal, which is Mr. Kneedler says, quite correctly --
8 tells this Court don't look at the budgetary
9 implications. Well, the problem with that, though, is
10 once it's common ground that the individual mandate is
11 in the statute at least in part to make community rating
12 and guaranteed issue affordable, that really is all you
13 have to identify. That establishes the essential link
14 that it's there to pay for it.

15 You don't have to figure out exactly how
16 much that is and which box -- I mean, it clearly is a
17 substantial part of it, because what they were trying to
18 do was take healthy individuals and put them into the
19 risk pool -- and this is quoting their finding -- which
20 is in order -- they put people into the market, which
21 will lower premiums. So, that's what their intent was.

22 So, you don't have to get to the final
23 number. You know that's what was going on here, and
24 that's reason alone to sever it.

25 Now, the Government -- Mr. Kneedler also

1 says there's an easy dividing line between what they
2 want to keep and what they want to dish out. The
3 problem with that is that, you know, you read their
4 brief and you might think, oh, there's a
5 guaranteed-issue and a community-rating provision
6 subtitle in the bill. There's not.

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

18 Now, in getting back to the -- an inquiry
19 that I think this Court actually can approach is, to
20 look at what Congress was trying to do, you need look no
21 further than the title of this statute: Patient
22 Protection and Affordable Care. I agree with Mr. Farr
23 that community rating and guaranteed issue were the
24 crown jewels of this Act. They were what was trying to
25 provide patient protection. And what made it

1 affordable? The individual mandate. If you strike down
2 guaranteed issue, community rating, and the individual
3 mandate, there is nothing left to the heart of the Act.

4 And that takes me to my last point, which is
5 simply this Court in Buckley created a halfway house,
6 and it took Congress 40 years to try to deal with the
7 situation, when contrary to any time of their intent,
8 they had to try to figure out what are we going to do
9 when we're stuck with this ban on contributions, but we
10 can't get at expenditures because the Court told us we
11 couldn't. And for 40 years, they worked in that halfway
12 house.

13 Why make them do that in health care? The
14 choice is to give Congress the task of fixing this
15 statute, the residuum of this statute after some of it
16 is struck down, or giving them the task of simply fixing
17 the problem on a clean slate. I don't think that's a
18 close choice. If the individual mandate is
19 unconstitutional, the rest of the Act should fall.

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

22 Mr. Farr, you were invited by this Court to
23 brief and argue in these cases in support of the
24 decision below on severability. You have ably carried
25 out that responsibility, for which we are grateful.

1 Case No. 11-393 is submitted. We will
2 continue argument in Case Number 11-400 this afternoon.

3 (Whereupon, at 11:50 a.m., the case in the
4 above-entitled matter was submitted.)

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