

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x

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.; on behalf of

4       Respondents.

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

6       Court-appointed amicus curiae.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	EDWIN S. KNEEDLER, ESQ.	
7	On behalf of the Respondents	28
8	ORAL ARGUMENT OF	
9	H. BARTOW FARR, III, ESQ.	
10	For Court-appointed amicus curiae	56
11	REBUTTAL ARGUMENT OF	
12	PAUL D. CLEMENT, ESQ.	
13	On behalf of the Petitioners	80
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2  
3  
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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 costs  
23 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're going 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 guess, 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 situation

22 --

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're 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: Well, there's such a thing  
15 as 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: Are you suggesting that  
24 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. We  
14 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 other answer

1 --

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's it called, the Cornhusker  
15 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 the means of getting the last  
21 necessary vote in the Senate. And you are telling us  
22 that the whole statute would fall because the Cornhusker  
23 kickback is bad. That can't be right.

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

1 congressional intent that governs. Now everybody on  
2 this Court has a slightly different way of divining  
3 legislative intent. And I would suggest the one common  
4 ground among every member of this Court, as I understand  
5 it, is you start with the text. Everybody can agree  
6 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 said -- 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 would 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 would ask you to look is  
22 finding J, which is on the same page 43A. And as I read  
23 that, that's a finding that the individual mandate is  
24 essential to the operation of the exchanges.

25 But there are other links between guaranteed

1 issue and community rating and the exchanges. And there  
2 I think it's just the way that the exchanges are  
3 supposed to work, and the text makes this clear, is they  
4 are 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 do it  
19 -- more broadly. But before I do that, if I could stick  
20 with 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  
2 if you got out of this current situation where health  
3 insurance is basically individualized price based on  
4 individualized underwriting. And you provide community  
5 rating, then it's going to be very easy for people to  
6 see, okay, well, this is a silver policy, and this is a  
7 bronze policy, and this is a gold policy. And we can,  
8 you know, just pick which insurer provides what I think  
9 is going to be the best service based on those  
10 comparable 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's not consistent with our  
15 cases. And I guess the best example would be Booker,  
16 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 very  
25 much actually supports our point is where the majority

1 rejects the approach of the dissent, which actually  
2 would have required nothing in the statute to have been  
3 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, and certainly consistent with Brock, the  
15 opinion that we rely on, because there the Court only  
16 reached that part of the opinion after they had already  
17 found that the must-hire provision operated functionally  
18 independent from the legislative veto, so --

19 JUSTICE GINSBURG: Mr. Clement, there is so  
20 many things in this Act that are unquestionably okay. I  
21 think you would concede that reauthorizing what is the  
22 Indian Healthcare Improvement Act, changes to Black Lung  
23 benefits, why make Congress redo those? I mean, it's a  
24 question of whether we say everything you did is no  
25 good, now start from scratch, or to say, you know, there

1 are many things in here that have nothing to do,  
2 frankly, with the affordable healthcare, and there are  
3 some that we think it's better to let Congress to decide  
4 whether it wants them in or out.

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

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

14 But I do think it is fundamentally  
15 different, because if we were here arguing that some  
16 provision on the periphery of the statute, like the  
17 Biosimilars Act or some of the provisions that you've  
18 mentioned was unconstitutional, I think you'd strike it  
19 down and you wouldn't even think hard about  
20 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 to 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, you can't possibly think  
9 that Congress would have passed that hollow shell  
10 without the 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've cited the Black Lung  
19 Benefits Act and those have nothing to do with any of  
20 the things we are talking about.

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



1 somebody's going to attach it to anything that is  
2 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 the colloquy you had  
10 with Justice Scalia with the corn husker hypothetical.  
11 So I need to know what standard you are asking me to  
12 apply. Is it whether as a rational matter separate  
13 parts could still function, or does it focus on the  
14 intent of the 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 we  
4 are supposed to apply. And this is the same question as  
5 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 would 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 understand  
24 --

25 JUSTICE KENNEDY: And that objective test is

1 what?

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

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 when Congress links two provisions together and  
18 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, you  
11 could do that. You could adopt a new rule now that  
12 basically says, look, we've severed --

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.

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

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

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

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

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

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

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

25 And if I could make the broader point, I

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

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

18           JUSTICE KAGAN: Mr. Clement --

19           JUSTICE BREYER: Could I ask you one  
20 question, which is a practical question. I take as a  
21 given your answer to Justice Kennedy, you are saying  
22 let's look at it objectively and say what Congress has  
23 intended, okay? This is the mandate in the community,  
24 this is Titles I and II, the mandate, the community,  
25 pre-existing condition, okay? Here's the rest of it,

1 you know, and when I look through the rest of it, I have  
2 all kinds of stuff in there. And I haven't read every  
3 word of that, I promise. As you pointed out, there is  
4 biosimilarity, there is breast feeding, there is  
5 promoting nurses and doctors to serve underserved areas,  
6 there is the CLASS Act, etcetera.

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

14           So what do you propose that we do other than  
15 spend a year reading all this and have you argument all  
16 this?

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

21           JUSTICE BREYER: I would say the Breast  
22 Feeding Act, the getting doctors to serve underserved  
23 areas, the biosimilar thing and drug regulation, the  
24 CLASS Act, those have nothing to do with the stuff that  
25 we've been talking about yesterday and the day before,

1 okay?

2 So if you ask me at that level, I would say,  
3 sure, they have nothing to do with it, they could stand  
4 on their own. The Indian thing about helping the  
5 underserved Native Americans, all that stuff has nothing  
6 to do. Black lung disease, nothing to do with it, okay?

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

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

17 The exchanges in turn are critical to the  
18 tax credits, because the amount of the tax credit is key  
19 to the amount of the policy price on the exchange. The  
20 exchanges are also key to the employer mandate, because  
21 the employer mandate becomes imposed on an employer if  
22 one of the employees gets insurance on the exchanges.

23 But it doesn't stop there. Look at the  
24 Medicare provision for DISH hospitals, okay? These are  
25 hospitals that serve a disproportionate share of the



1 needy. This isn't in Title I. It's in the other part  
2 that you had in your other hand. But it doesn't work  
3 without the mandate, community rating and  
4 guaranteed-issue.

5 JUSTICE ALITO: Well, can I ask you this,  
6 Mr. Clement.

7 MR. CLEMENT: Sure.

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

18 What -- what would you suggest?

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

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

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

8                   MR. CLEMENT: -- the bigger volume -- on the  
9 other hand, I mean, you could strike one and leave the  
10 other, but at a certain point -- I'm sorry,  
11 Mr. Chief Justice.

12                  CHIEF JUSTICE ROBERTS: Finish your certain  
13 point.

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

21                  (Laughter.)

22                  MR. CLEMENT: -- well, but -- I mean, you  
23 can laugh at me if you want, but the point is, I rather  
24 suspect that it won't be easy. Because I rather suspect  
25 that if you actually dug into that, there'd be something

1 that was quite controversial in there and it couldn't be  
2 passed quickly --

3 CHIEF JUSTICE ROBERTS: But the reality --

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

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

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

20 MR. CLEMENT: Well, maybe that's right,  
21 Mr. Chief Justice. And I don't want to, I mean, spend  
22 all my time on -- fighting over the periphery, because I  
23 do think there are some provisions that I think you  
24 would make, as an exercise of your own judgment, the  
25 judgment that once you've gotten rid of the core

1 provisions of this Act, that you would then decide to  
2 let the periphery fall with it.

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

10 If I could reserve the remainder of my time.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
12 Clement.

13 Mr. Kneedler.

14 ORAL ARGUMENT OF EDWIN S. KNEEDLER

15 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

15           MR. KNEEDLER: Well, I -- I think the  
16 continuing validity of any particular provision would  
17 arise in litigation that would otherwise arise under  
18 that provision by parties who are actually --

19           CHIEF JUSTICE ROBERTS: But what cause of  
20 action is it? I've never heard of a severability cause  
21 of action.

22           MR. KNEEDLER: Well, in the first place, I  
23 don't -- the point isn't that there has to be an  
24 affirmative cause of action to decide this. You  
25 could -- for example, to use the Medicare reimbursement

1 issue is one of the things that this Act does is change  
2 Medicare reimbursement rates. Well, the place where  
3 someone adjudicates the validity of Medicare  
4 reimbursement rates is through the special statutory  
5 review procedure for that.

6 And the same thing is true of the  
7 Anti-Injunction Act --

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

14 Even though it is -- it should -- it is so  
15 closely allied to what's been struck down that it ought  
16 to go as well. But nonetheless, that has to continue  
17 because there's nobody in the world that can challenge  
18 it.

19 Can that possibly be the law?

20 MR. KNEEDLER: I think that proves our  
21 point, Justice Scalia. This Court has repeatedly said  
22 that just because there's -- no one may have standing to  
23 challenge -- and particularly like tax credits or taxes  
24 which are challenged only after going through the  
25 Anti-Injunction Act, just because no one has standing

1 doesn't mean that someone must.

2 But beyond that --

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

9 You can't compare that to -- to cases  
10 dealing with a statute that nobody denies is  
11 constitutional.

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

18 JUSTICE SOTOMAYOR: But --

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

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

7                   I mean, is that --

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

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

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

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

24                  MR. KNEEDLER: We think the Court should  
25     leave it to Congress for two reasons. One is the point



1 I'm making now about justiciability, or whether the  
2 Court can properly consider it at all. And the second  
3 is, we think only a few provisions are inseverable from  
4 the minimum coverage provision.

5 I just would like to --

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

9 I think you were interrupted before you had  
10 a chance --

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

20 JUSTICE ALITO: Suppose that there was --  
21 suppose there was a non-severability provision in this  
22 Act. If one provision were to be held unconstitutional,  
23 then every single -- someone would have to bring a  
24 separate lawsuit challenging every single other  
25 provision in the Act and say, well, one fell and the

1 Congress said it's all -- it's a package, it can't be  
2 separated.

3 That's your position?

4 MR. KNEEDLER: The fact that -- that such a  
5 clause might make it easy doesn't change the point.

6 Article III jurisdictional problems apply to easy  
7 questions as well as hard questions. If I could just --

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

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

16 JUSTICE SCALIA: Mr. Kneeder --

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

18 JUSTICE SCALIA: -- don't you think it's  
19 unrealistic to say leave it to Congress, as though  
20 you're sending it back to Congress for Congress to  
21 consider it dispassionately: On balance, should we have  
22 this provision or should we not have provision? That's  
23 not what it's going to be. It's going to be these  
24 provisions are in effect; even though you -- a lot of  
25 you never wanted them to be in effect, and you only

1 voted for them because you wanted to get the heart of  
2 the -- of the Act, which has now been cut out; but  
3 nonetheless these provisions are the law, and you have  
4 to get the votes to overturn them.

5 That's an enormously different question from  
6 whether you get the votes initially to put them into the  
7 law.

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

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

23 JUSTICE KENNEDY: But when you say "judicial  
24 restraint" --

25 JUSTICE SOTOMAYOR: Mr. Kneedler, would you

1 please --

2 CHIEF JUSTICE ROBERTS: Justice Kennedy.

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

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

17 JUSTICE KENNEDY: I just don't accept the  
18 premise.

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

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

1 JUSTICE SOTOMAYOR: Mr. Kneedler, move away  
2 from the issue of whether it's a standing question or  
3 not.

4 MR. KNEEDLER: Right.

5 JUSTICE SOTOMAYOR: Make the assumption  
6 that's an -- that this is an issue of the Court's  
7 exercise of discretion, because the last two questions  
8 had to do with what's wise for the Court to do, not  
9 whether it has power to do it or not.

10 MR. KNEEDLER: Right. That --

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

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

18 JUSTICE SOTOMAYOR: Would you please --

19 MR. KNEEDLER: No, I understand.

20 JUSTICE SOTOMAYOR: I've asked you three  
21 times to move around that.

22 MR. KNEEDLER: -- blend into -- blend into  
23 discretion and, in turn, blend into the merits of the  
24 severability question. And as to that, just to answer a  
25 question that several Justices have asked, we think that

1 severability is a matter of statutory interpretation.  
2 It should be resolved by looking at the structure and  
3 the text of the Act, and the Court may look at  
4 legislative history to figure out what the text and  
5 structure mean with respect to severability. We don't  
6 --

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

10 (Laughter.)

11 JUSTICE SCALIA: And do you really expect  
12 the Court to do that? Or do you expect us to give this  
13 function to our law clerks?

14 (Laughter.)

15 JUSTICE SCALIA: Is this not totally  
16 unrealistic? That we're going to go through this  
17 enormous bill item by item and decide each one?

18 MR. KNEEDLER: Well --

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

21 MR. KNEEDLER: Well, that is -- that is  
22 the --

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

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

1 like to -- going -- I just want to finish the thought I  
2 had about this being a matter of statutory  
3 interpretation. The Court's task, we submit, is not to  
4 look at the legislative process to see whether the bill  
5 would have been -- would have passed or not based on the  
6 political situation at the time, which would basically  
7 convert the Court into a function such as a whip count.  
8 That is not the Court's function.

9 JUSTICE KAGAN: And, Mr. Kneedler, that  
10 would be a revolution --

11 MR. KNEEDLER: Yes.

12 JUSTICE KAGAN: -- in our severability law,  
13 wouldn't it?

14 MR. KNEEDLER: It would.

15 JUSTICE KAGAN: I mean, we have never  
16 suggested that we're going to say, look, this  
17 legislation was a brokered compromise, and we're going  
18 to try to figure out exactly what would have happened in  
19 the complex parliamentary shenanigans that go on across  
20 the street and figure out whether they would have made a  
21 difference.

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

25 (Laughter.)

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

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

4 (Laughter.)

5 MR. KNEEDLER: I think that -- I think  
6 that's exactly right. As I said, it is a question of  
7 statutory interpretation.

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

13 MR. KNEEDLER: Well, I think in this case  
14 there is an easy answer, and that is, Justice Kagan  
15 pointed out that, that the Act itself creates a sharp  
16 dividing line between the minimum coverage provision --  
17 the package of -- of reforms: the minimum coverage  
18 provision along with the guaranteed issue and community  
19 rating. That is one package that Congress deemed  
20 essential.

21 CHIEF JUSTICE ROBERTS: How do you know  
22 that? Where is this line? I looked through the whole  
23 Act; I didn't read -- well --

24 MR. KNEEDLER: It is in --

25 CHIEF JUSTICE ROBERTS: Where is the sharp



1 line?

2 MR. KNEEDLER: It is in Congress's findings  
3 that the -- that the minimum coverage provision --  
4 without it, the Court -- the Congress said, in Finding  
5 (I), without that provision, people would wait to get  
6 insurance, and therefore -- and cause all the adverse  
7 selection problems that arise.

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

12 MR. KNEEDLER: Well, I -- I think -- I think  
13 it does, because Congress said it was essential to those  
14 provisions, but it conspicuously did not say that it was  
15 essential to other provisions.

16 CHIEF JUSTICE ROBERTS: Well --

17 JUSTICE ALITO: May I ask you about the  
18 argument that's made in the economists' amicus brief?  
19 They say that the insurance reforms impose 10-year costs  
20 of roughly \$700 billion on the insurance industry, and  
21 that these costs are supposed to be offset by about 350  
22 billion in new revenue from the individual mandate and  
23 350 billion from the Medicaid expansion.

24 Now, if the 350 billion -- maybe you'll  
25 disagree with the numbers, that they're fundamentally

1 wrong; but assuming that they're in the ballpark, if the  
2 350 million from the individual mandate were to be lost,  
3 what would happen to the insurance industry, which would  
4 now be in the -- in the hole for \$350 billion over 10  
5 years?

6 MR. KNEEDLER: I don't -- I mean, first of  
7 all, for the Court to go beyond text and legislative  
8 history to try to figure out how the finances of the  
9 bill operate, it's like being the budget committee. But  
10 -- but we think the economists had added up the figures  
11 wrong. If there's Medicaid expansion, the insurance --  
12 and the insurance companies are involved in that,  
13 they're going to be reimbursed for the --

14 CHIEF JUSTICE ROBERTS: But what if there  
15 isn't Medicaid expansion? We've talked about the  
16 individual mandate, but does the Government have a  
17 position on what should happen if the Medicaid expansion  
18 is struck down?

19 MR. KNEEDLER: We don't -- we don't think  
20 that that would have any effect. And that could be  
21 addressed in the next argument. But we don't think that  
22 would have any effect on the -- on the rest of the -- on  
23 the rest of the Act.

24 CHIEF JUSTICE ROBERTS: So, did -- the  
25 Government's position is that if Medicaid expansion is

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

2 MR. KNEEDLER: Yes.

3 CHIEF JUSTICE ROBERTS: -- without it.

4 MR. KNEEDLER: Yes. It's -- in the past,  
5 Congress has expanded Medicaid coverage without there  
6 being -- it's done it many times without there being a  
7 minimum coverage provision --

8 JUSTICE KENNEDY: But I still don't  
9 understand where you are with the answer to  
10 Justice Alito's question.

11 Assume that there is a -- a substantial  
12 probability that the 350 billion plus 350 billion equals  
13 7 is going to be cut in half if the individual mandate  
14 is stricken. Assume there is a significant possibility  
15 of that. Is it within the proper exercise of this  
16 Court's function to impose that kind of risk? Can we  
17 say that the Congress would have intended that there be  
18 that kind of risk?

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

22 JUSTICE KENNEDY: But isn't that -- isn't  
23 that the point, then, why we should just assume that it  
24 is not severable?

25 MR. KNEEDLER: No.

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

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

5 JUSTICE KENNEDY: To say we're doing  
6 something and we're not telling you what the  
7 consequences might be?

8 MR. KNEEDLER: No, I don't think so, because  
9 when you -- when you're talking about monetary  
10 consequences, you're looking through the Act, you're  
11 looking behind the Act, rather than -- the Court's  
12 function is to look at the text and structure of the Act  
13 and what the substantive provisions of the Act  
14 themselves mean. And if I could go past --

15 JUSTICE SCALIA: Mr. Kneedler, can I -- can  
16 you give us a prior case in -- that resembles this one  
17 in which we are asked to strike down what the other side  
18 says is the heart of the Act, and yet leave in -- as you  
19 request, leave in effect the rest of it? Have we  
20 ever -- most of our severability cases, you know,  
21 involve one little aspect of the Act. The question is  
22 whether the rest. When have we ever really struck down  
23 what was the main purpose of the Act, and left the rest  
24 in effect?

25 MR. KNEEDLER: I think Booker is the best

1 example of that. In Booker the mandatory sentencing  
2 provisions were central to the act, but the Court said,  
3 Congress would have preferred a statute without the  
4 mandatory provision in the Act, and the Court struck  
5 that, but the rest of the sentencing guidelines  
6 remained.

7 JUSTICE SCALIA: I think the reason -- the  
8 reason the majority said that was that they didn't think  
9 that what was essential to the Act was what had been  
10 stricken down, and that is the ability of the judge to  
11 say on his own what -- what the punishment would be. I  
12 don't think that's a case where we struck -- where we  
13 excised the heart of the statute.

14 You have another one?

15 MR. KNEEDLER: There is no example --

16 JUSTICE SCALIA: There is no example. This  
17 is really --

18 MR. KNEEDLER: -- to our -- that we have  
19 found that suggests the contrary.

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

23 Can you take out the heart of the Act and  
24 leave everything else in place?

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

1 heart of the Act point in a moment. But what I'd like  
2 to say is this is a huge act with many provisions that  
3 are completely unrelated to market reforms and operate  
4 in different ways. And we think it would be  
5 extraordinary in this extraordinary act to strike all of  
6 that down because there are many provisions and it would  
7 be too hard to do it.

8 JUSTICE BREYER: I mean, I think it's not  
9 uncommon that Congress passes an act, and then there are  
10 many titles, and some of the titles have nothing to do  
11 with the other titles. That's a common thing. And  
12 you're saying you've never found an instance where they  
13 are all struck out when they have nothing to do with  
14 each other.

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

22 (Laughter)

23 JUSTICE BREYER: -- I mean, on a list of  
24 things that are, in both your opinions, peripheral.  
25 Then you would focus on those areas where one of you

1 thinks it's peripheral and one of you thinks it's not  
2 peripheral. And at that point, it might turn out to be  
3 far fewer than we are currently imagining, at which  
4 point we could hold an argument or figure out some way  
5 or somebody hold an argument and try to -- try to get  
6 those done.

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

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

11 JUSTICE SCALIA: You can have a conference  
12 committee report afterwards, maybe.

13 (Laughter.)

14 MR. KNEEDLER: No, I just -- it just is not  
15 something that a court would ordinarily do. But I would  
16 like --

17 JUSTICE SOTOMAYOR: Could you get back to  
18 the argument of -- of the heart?

19 MR. KNEEDLER: Yes.

20 JUSTICE SOTOMAYOR: Striking down the heart,  
21 do we want half a loaf or a shelf. I think those are  
22 the two analogies --

23 MR. KNEEDLER: Right. And -- and I would  
24 like to discuss it again in terms of the text and  
25 structure of the Act. We have very important

1 indications from the structure of this Act that the  
2 whole thing is not supposed to fall.

3           The most basic one is, the notion that  
4 Congress would have intended the whole Act to fall if  
5 there couldn't be a minimum coverage provision is  
6 refuted by the fact that there are many, many provisions  
7 of this Act already in effect without a minimum coverage  
8 provision. Two point -- 2 and-a-half million people  
9 under 26 have gotten insurance by one of the insurance  
10 requirements. Three point two billion dollars --

11           JUSTICE SCALIA: In anticipation of the  
12 minimum coverage. That's going to bankrupt the  
13 insurance companies, if not the States, unless this  
14 minimum coverage provision comes into effect.

15           MR. KNEEDLER: There is no reason to think  
16 it's going to -- it's going to bankrupt anyone. The  
17 costs will be set to cover those -- to cover those  
18 amounts.

19           JUSTICE SOTOMAYOR: I thought that the  
20 26-year-olds were saying that they were healthy and  
21 didn't need insurance yesterday. So today they are  
22 going to bankrupt the --

23           MR. KNEEDLER: Two and a half million people  
24 would be thrown off the insurance roles if the Court  
25 were to say that. Congress made many changes to



1 Medicare rates that have gone into effect. For  
2 Congress -- for the courts to have to unwind millions of  
3 Medicare reimbursement rates. Medicare has covered 32  
4 million insurance -- preventive care visits by patients  
5 as a result of this Act.

6 CHIEF JUSTICE ROBERTS: All of that was  
7 based on the assumption that the mandate was  
8 constitutional. And if -- that certainly doesn't stop  
9 us from reaching our own determination on that.

10 MR. KNEEDLER: No, but what I'm saying is  
11 it's a question of legislative intent, and we have a  
12 very fundamental indication of legislative intent that  
13 Congress did not mean the whole Act to fall if --  
14 without the minimum coverage provision, because we have  
15 many provisions that are operating now without that.

16 But there's a further indication about why  
17 the line should be drawn where I've suggested, which is  
18 the package of these particular provisions. All the  
19 other provisions of the Act would continue to advance  
20 Congress's goal, the test that was articulated in  
21 Booker, but it's been said in Regan and other cases.  
22 You look to whether the other provisions can continue to  
23 advance the purposes of the Act.

24 Here they unquestionably can. The public  
25 health -- the broad public health purposes of the Act

1 that are unrelated to the minimum coverage provision,  
2 but also that the other provisions designed to enhance  
3 access to affordable care. The employer responsibility  
4 provision, the credit for small businesses, which is  
5 already in effect, by the way, and affecting many small  
6 businesses --

7 JUSTICE SCALIA: But many people might  
8 not -- many of the people in Congress might not have  
9 voted for those provisions if the central part of this  
10 statute was not adopted.

11 MR. KNEEDLER: But that --

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

17 MR. KNEEDLER: The question for the Court is  
18 Congress having passed the law by whatever majority  
19 there might be in one house or the other, Congress  
20 having passed the law, what at that point is -- is the  
21 legislative intent embodied in the law Congress has  
22 actually passed?

23 CHIEF JUSTICE ROBERTS: Well, that's right.  
24 But the problem is, straight from the title, we have two  
25 complementary purposes, patient protection and

1 affordable care. And you can't look at something and  
2 say this promotes affordable care, therefore, it's  
3 consistent with Congress's intent. Because Congress had  
4 a balanced intent. You can't look at another provision  
5 and say this promotes patient protection without asking  
6 if it's affordable.

7 So, it seems to me if you ask what is going  
8 to promote Congress's purpose, that's just an inquiry  
9 that you can't carry out.

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

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

25 JUSTICE KENNEDY: I don't quite understand

1 about the employers. You're -- you are saying Congress  
2 mandated employers to buy something that Congress itself  
3 has not contemplated? I don't understand that.

4 MR. KNEEDLER: No. Employer coverage -- 150  
5 million people in this country already get their  
6 insurance through -- through their employers. What  
7 Congress did in seeking to augment that was to add a  
8 provision requiring employers to purchase insurance --

9 JUSTICE KENNEDY: Based on the assumption  
10 that the cost of those policies would be lowered  
11 by certain provisions which are, by hypothesis -- we are  
12 not sure -- by hypothesis, are in doubt.

13 MR. KNEEDLER: No, I -- I think it's -- any  
14 cost assumptions -- there is no indication that Congress  
15 made any cost assumptions, but there is no reason to  
16 think that the individual -- that the individual market,  
17 which is where the minimum coverage provision is  
18 directed, would affect that.

19 I would like to say -- I would point out why  
20 the other things would advance Congress's goal. The  
21 point here is that the package of three things would be  
22 contrary -- would run contrary to Congress's goal if you  
23 took out the minimum coverage provision. And here's  
24 why -- and this is reflected in the findings.

25 If you take out minimum coverage, but leave

1 in the guaranteed issue and community rating, you will  
2 make matters worse. Rates will go up, and people will  
3 be less -- fewer people covered in the individual  
4 market.

5 JUSTICE ALITO: Well, if that is true, what  
6 is the difference between guaranteed issue and community  
7 rating provisions, on the one hand, and other provisions  
8 that increase costs substantially for insurance  
9 companies?

10 For example, the tax on high cost health  
11 plans, which the economists in the amicus brief said  
12 will cost \$217 billion over 10 years?

13 MR. KNEEDLER: Those are -- what Congress --  
14 Congress did not think of those things as balancing  
15 insurance companies. Insurance companies are  
16 participants in the market for Medicaid and -- and other  
17 things.

18 JUSTICE KENNEDY: But you are saying we have  
19 -- we have the expertise to make the inquiry you want us  
20 to make, i.e., the guaranteed-issue, but not the  
21 expertise that Justice Alito's question suggests we must  
22 make.

23 MR. KNEEDLER: Well --

24 JUSTICE KENNEDY: I just don't understand  
25 your position.

1 MR. KNEEDLER: -- that's because -- that's  
2 because I think this Court's function is to look at the  
3 text and structure and the legislative history of the  
4 law that Congress enacted, not the financial -- not a  
5 financial balance sheet, which doesn't appear anywhere  
6 in the law. And just --

7 JUSTICE GINSBURG: You are relying on  
8 Congress's quite explicitly tying these three things  
9 together.

10 MR. KNEEDLER: We do. That's -- that's --  
11 and it's not just the text of the act, but the  
12 background of the act, the experience in the state, the  
13 testimony of the National Association of Insurance  
14 Commissioners.

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

1                   And so what -- and Congress, trying to come  
2 up with a market-based solution to control rates in that  
3 market, has adopted something that would -- that would  
4 work to control costs by guaranteed-issue and  
5 community-rating; but, if you -- if -- if you take out  
6 the minimum coverage, that won't work. That was  
7 Congress's assumption, again, shown by the text and  
8 legislative history of this provision. And that's why  
9 we think those things rise or fall in a package because  
10 they cut against what Congress was trying to do.

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

19                   And the other thing Congress has done, those  
20 preexisting laws had their own protections for  
21 guaranteed-issue and community-rating. Effectively,  
22 within the large employer plans, they can't discriminate  
23 among people, they can't charge different rates. What  
24 Congress was doing, was doing that in the other market.  
25 If it can't, that's all that should be struck from the

1 act.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Mr. Kneedler.

4 Mr. Farr?

5 ORAL ARGUMENT OF H. BARTOW FARR, III,  
6 FOR COURT-APPOINTED AMICUS CURIAE

7 MR. FARR: Mr. Chief Justice and may it  
8 please the Court:

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

20 So even though the system is not going to  
21 work precisely as Congress wanted, it would certainly  
22 serve central goals that Congress had of expanding  
23 coverage for people who were unable to get coverage or  
24 unable to get it at affordable prices.

25 So when the government --



1 JUSTICE GINSBURG: One of the points that  
2 Mr. Kneedler made is that the price won't be affordable  
3 because -- he spoke of the adverse selection problem,  
4 that there would be so fewer people in there, the  
5 insurance companies are going to have to raise the  
6 premiums.

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

10 MR. FARR: Well, Justice Ginsburg, let me  
11 say two things about that.

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

16 For people who were not able to get  
17 insurance before, obviously, their insurance beforehand  
18 was -- the price was essentially infinite. They were  
19 not able to get it at any price. They will now be able  
20 to get it at a price that they can afford.

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

1                   Also, you have a large number of people who,  
2 under the Act --

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

5                   MR. FARR: Because --

6                   JUSTICE SCALIA: Why would their rates be  
7 lower?

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

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

25                   MR. FARR: Well --

1 JUSTICE KAGAN: And this is not --

2 MR. FARR: Certainly.

3 JUSTICE KAGAN: -- like what I think. What  
4 do I know? It's just what's reflected in Congress's  
5 findings, that it's look -- it looks at some states and  
6 says, this system crashed and burned. It looked at  
7 another state with the minimum coverage provision and  
8 said, this one seems to work. So we will package the  
9 minimum coverage provision with the nondiscrimination  
10 provisions.

11 MR. FARR: Well, in a moment, I'd like to  
12 talk about the finding; but, if I could just postpone  
13 that for a second and talk about adverse selection  
14 itself.

15 I think one of the misconceptions here,  
16 Justice Kagan, is that Congress, having seen the  
17 experience of the states in the '90s with  
18 community-rating and guaranteed-issue, simply imposed  
19 the minimum coverage provision as a possible way of  
20 dealing with that; and, if you don't have the minimum  
21 coverage provision, then, essentially, adverse selection  
22 runs rampant. But that's not what happened.

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

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

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

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

23                   And the third thing --

24                   JUSTICE SCALIA: And there is nothing about  
25 federal support that is unsustainable, right? That is

1 infinite.

2 MR. FARR: Well, I mean, that's a fair  
3 point, Justice Scalia; although, one of the things that  
4 happens, if you take the mandate out, while it is true  
5 that the subsidies that the government provides to any  
6 individual will increase, and they will be less  
7 efficient -- I'm not disputing that point -- actually,  
8 the overall amount of the subsidies that the government  
9 will provide will decline, as the government notes  
10 itself in its brief, because there will be fewer people  
11 getting them. Some people will opt out of the system  
12 even though they are getting subsidies.

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

20 So you have all of that, and then  
21 you have Congress also, unlike the States,  
22 establishing -- or I should be precisely accurate --  
23 unlike almost all the States, establishing an age  
24 differential of up to three to one. So an insurance  
25 company, for example, that is selling a 25 -year-old a

1 policy for \$4,000 can charge a 60-year-old \$12,000 for  
2 exactly the same coverage.

3                   The States typically in the '90s,  
4 when they were instituting these programs, they either  
5 had pure community rating, where everybody is charged  
6 the same premium -- everybody regardless of their age is  
7 charged the same premium. Some states had a variance of  
8 1.5 to 1. Massachusetts, for example, which did have  
9 good subsidies, but their age band was two to one.

10                   So when Congress is enacting this  
11 Act, it's not simply looking at the States and thinking:  
12 Well, that didn't go very well; why don't we put in a  
13 minimum coverage provision; that will solve the problem.  
14 Congress did a lot of different things to try to combat  
15 the adverse selection.

16                   Now, if I could turn to the  
17 finding, because I think this is the crux of the  
18 government's position, and then the plaintiffs pick up  
19 on that, and then move --move from that to the rest of  
20 the Act. And it seems to me, quite honestly, it's an  
21 important part because that is textual. In this whole  
22 sort of quest for what we are trying to figure out, the  
23 finding seems to stand out as something that the Court  
24 could rely on and say here's something Congress has  
25 actually told us.

1                   But I think the real problem with  
2 the finding is that the context in which Congress made  
3 it. It's quite clear. If the Court wants to look, the  
4 finding is on page 42 -- 43A, excuse me, of the  
5 Solicitor General's severability brief in the appendix.

6                   But the finding is made  
7 specifically in the context of interstate commerce.  
8 That is why the findings are in the Act at all.  
9 Congress wanted to indicate to the Court, knowing that  
10 the minimum coverage provision was going to be  
11 challenged, wanted to indicate to the Court the basis on  
12 which it believed it had the power under the Commerce  
13 Clause to enact this law.

14                   Why does that make a difference  
15 with respect to finding I, which is the one that the  
16 government is relying on, and in particular the last  
17 sentence, which says "this requirement is essential to  
18 creating effective health insurance markets in which  
19 guaranteed issue and preexisting illnesses can be  
20 covered."

21                   The reason is because the word  
22 "essential" in the Commerce Clause context doesn't have  
23 the colloquial meaning. In the Commerce Clause context,  
24 "essential" effectively means useful. So that when one  
25 says -- in Lopez, when the Court says section 922(q) is

1 not an essential part of a larger regulatory scheme of  
2 economic activity, it goes on to say, in which the  
3 regulatory scheme would be undercut if we didn't have  
4 this provision.

5 Well, if that's all Congress means,  
6 I agree with that. The system will be undercut somewhat  
7 if you don't have the minimum coverage provision. It's  
8 like the word "necessary" in the Necessary and Proper  
9 Clause clause. It doesn't mean, as the Court has said  
10 on numerous occasions, absolutely necessary. It means  
11 conducive to, useful, advancing the objectives,  
12 advancing the aims. And it's easy to see, I think, that  
13 that's what Congress --

14 JUSTICE SCALIA: Is there any dictionary  
15 that gives that --

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

17 JUSTICE SCALIA: -- that definition of  
18 "essential"? It's very imaginative. Just give me one  
19 dictionary.

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

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

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



1 several reasons that I would suggest that we would know  
2 that from. The first is, as I say, the findings  
3 themselves. Congress says at the very beginning, the  
4 head of it, is Congress makes the following findings,  
5 and they are talking about the interstate -- you know, B  
6 is headed "Effects on the national economy and  
7 interstate commerce." So we know the context that  
8 Congress is talking about.

9           It is more or less quoting from the Court's  
10 Commerce Clause statements. But if one looks at the  
11 very preceding finding, which is finding H, which is on  
12 42 over onto 43, Congress at that point also uses the  
13 word "essential." In the second sentence, it says,  
14 "this requirement" -- and again, we're talking about the  
15 minimum coverage provision -- is an essential part of  
16 this larger regulation of economic activity, which is,  
17 by the way, an exact quote from Lopez, in which "the  
18 absence of the requirement would undercut Federal  
19 regulation," also an exact quote from Lopez.

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

1                   And as a second example of the same usage by  
2 Congress, the statute that was before the Court in  
3 Raich, section 801 of Title 21, the Court said that the  
4 regulation of intrastate drug activity, drug traffic,  
5 was essential to the regulation of interstate drug  
6 activity. Again, it is simply not conceivable that  
7 Congress was saying one is so indispensable to the  
8 other, the way the United States uses the term here, so  
9 indispensable that if we can't regulate the intrastate  
10 traffic, we don't want to regulate the interstate  
11 traffic, either. The whole law criminalizing drug  
12 traffic would fall.

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

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

24                   So even if it might not be because of the  
25 structure of the Act, that's post hoc evidence. Why

1 should we be looking at that as opposed to what Congress  
2 had before it and use "essential" in its plain meaning:  
3 You can't have minimum coverage without what the SG is  
4 arguing, community ratings and guaranteed issue. You  
5 can't have those two without minimum coverage.

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

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

24 JUSTICE KENNEDY: So do you want us to write  
25 an opinion saying we have concluded that there is an

1 insignificant risk of a substantial adverse effect on  
2 the insurance companies, that's our economic conclusion,  
3 and therefore not severable? That's what you want me to  
4 say?

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

7 (Laughter.)

8 MR. FARR: No, I --

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

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

1           The minimum coverage provision wasn't  
2 something that everybody was bragging about. It was  
3 something that was meant to be part of this package. I  
4 agree with that.

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

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

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

19           MR. FARR: That's correct.

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

1 have to -- there has to be a broad range of  
2 consequences, whether it's additional legislation,  
3 additional litigation.

4 Any thoughts on how that's going to play  
5 out?

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

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

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

22 MR. FARR: You -- if the Court follows the  
23 course that I'm advocating, you do not bring an action  
24 in court. You go to Congress and you seek a change from  
25 Congress to say the minimum coverage provision has been

1 struck down by the Court, here is our -- here -- here's  
2 the information that we have to show you what the risks  
3 are going to be. Here are the adjustments you need to  
4 make.

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

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

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

19 Now, if one -- just to discuss the issue  
20 more generally, if that's helpful, I -- I think that --  
21 that if there were situations where the Court  
22 deferred -- let's say for discretionary reasons, they  
23 just said -- the Court said we're -- we're not going to  
24 take up the question of severability and therefore not  
25 resolve it in these other situations, it certainly seems

1 to me that in enforcement actions, for example, if the  
2 time comes in -- in 2014 and somebody applies to an  
3 insurance company for a policy and the insurance company  
4 says, well, we're not going to issue a policy, we don't  
5 think your risks are ones that we're willing to cover --  
6 it seems to me that they could sue the insurance company  
7 and the insurance company could raise as a defense that  
8 this provision, the guaranteed-issue provision of the  
9 statute, is not enforceable because it was inseverable  
10 from the decision -- from the provision that the Court  
11 held unconstitutional in 2012.

12 JUSTICE SCALIA: Mr. Farr, let's -- let's  
13 consider how -- how your approach, severing as little as  
14 possible, thereby increases the deference that we're  
15 showing to -- to Congress. It seems to me it puts  
16 Congress in -- in this position: This Act is still in  
17 full effect. There is going to be this deficit that  
18 used to be made up by the mandatory coverage provision.  
19 All that money has to come from somewhere.

20 You can't repeal the rest of the Act because  
21 you're not going to get 60 votes in the Senate to repeal  
22 the rest. It's not a matter of enacting a new Act.  
23 You've got to get 60 votes to repeal it. So the rest of  
24 the Act is going to be the law.

25 So you're just put to the choice of, I



1 guess, bankrupting insurance companies and the whole  
2 system comes tumbling down, or else enacting a Federal  
3 subsidy program to the insurance companies, which is  
4 what the insurance companies would like, I'm sure.

5 Do you really think that that is somehow  
6 showing deference to Congress and -- and respecting the  
7 democratic process?

8 It seems to me it's a gross distortion of  
9 it.

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

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

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

1           MR. FARR: I guess to some extent I have to  
2 quarrel with the premise, Justice Scalia, because at  
3 least the -- the position that I'm advocating today,  
4 under which the Court would only take out the minimum  
5 coverage provision, I don't think would fit the  
6 description that you have given of taking out the heart  
7 of the statute.

8           Now, I do think once you take out  
9 guaranteed-issue and community rating you are getting  
10 closer to the heart of the statute. And one of the --  
11 one of the difficulties I think with the government's  
12 position is that I think it's harder to cabin that, to  
13 draw that bright line around it. It's harder than the  
14 government thinks it is.

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

22           But the other thing that's going to happen  
23 is with the subsidy program. The -- the way that the  
24 subsidy program is -- is set up, the subsidy is  
25 calculated according to essentially a benchmark plan.

1 And this -- if one -- if the Court wants to look at the  
2 provisions, they're -- they begin at page 64A of the  
3 Private Plaintiffs' brief, again in the appendix. The  
4 particular provision I'm talking about's at 68A. But  
5 there's a -- there's a question -- you -- you're looking  
6 essentially to calculate the premium by looking at a --  
7 at a standardized silver plan.

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

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

25 JUSTICE KAGAN: Mr. Farr, I understood that

1 the answer that you gave to Justice Scalia was  
2 essentially that the minimum coverage provision was not  
3 the heart of the Act. Instead, the minimum coverage  
4 provision was a tool to make the nondiscrimination  
5 provisions, community rating, guaranteed-issue, work.

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

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

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

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

1 impossible.

2 JUSTICE BREYER: But would you -- I would  
3 just like to hear before you leave your argument, if you  
4 want to, against what Justice Scalia just said. Let's  
5 assume, contrary to what you want, that the government's  
6 position is accepted by the majority of this Court. And  
7 so we now are rid, quote, of the true "heart" of the  
8 bill. Now, still there are a lot of other provisions  
9 here like the Indian Act, the black lung disease, the  
10 wellness program, that restaurants have to have a  
11 calorie count of major menus, etcetera.

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

22 MR. FARR: Well, Justice Breyer, I think  
23 what I would say is if one goes back to the, what I  
24 think is the proper severability standard and say, would  
25 Congress rather have not -- no bill as opposed to the

1 bill with whatever is severed from it, it seems to me  
2 when you are talking about provisions that don't have  
3 anything to do with the minimum coverage provision,  
4 there is no reason to answer that question as any other  
5 way than yes, Congress would have wanted these  
6 provisions.

7 JUSTICE KENNEDY: Is that the real Congress  
8 or a hypothetical Congress?

9 (Laughter.)

10 MR. FARR: An objective Congress, Your  
11 Honor. Not the specific -- not with a vote count.

12 JUSTICE SCALIA: Why put -- why put Congress  
13 to that false choice?

14 MR. FARR: Well --

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

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

23 JUSTICE BREYER: I know. So you -- I would  
24 say stay out of politics. That's for Congress; not us.

25 MR. FARR: Right.

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

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

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

20 CHIEF JUSTICE ROBERTS: Certainly.

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

1 balancing, the subsidy programs are extremely large.  
2 They -- in the year 2020, they are expected to be over  
3 \$100 billion in that 1 year alone. So if you are  
4 looking at the numbers, please consider that.

5 Thank you, Your Honors.

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

7 Mr. Clement, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

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

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



1 tool to make it work. It's a tool to pay for it, to  
2 make it affordable. And again, that's not my  
3 characterization; that's Congress's characterization in  
4 subfinding I on page 43A of the government's brief.

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

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

24 Now, the government -- Mr. Kneedler also  
25 says there is an easy dividing line between what they

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

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

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

1 guaranteed-issue, community rating and the individual  
2 mandate, there is nothing left to the heart of the Act.

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

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

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

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

25           Case No. 11-393 is submitted. We will

1 continue argument in Case Number 11-400 this afternoon.

2 (Whereupon, at 11:50 a.m., the case in the

3 above-entitled matter was submitted.)

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<b>A</b>				
<b>ability</b> 45:10	58:2 59:25 60:1	<b>adverse</b> 41:6	<b>amicus</b> 2:6 3:10	15:7 18:16
<b>able</b> 27:18 57:9	60:5 62:11,20	54:24 57:3	25:16 41:18	66:16 72:13
57:16,19,19,21	63:8 65:22,22	59:13,21,24	53:11 56:6	73:18,18 82:18
<b>ably</b> 83:23	66:25 67:11,18	60:17 62:15	<b>amount</b> 24:18,19	<b>appropriations</b>
<b>about's</b> 75:4	68:21,25 70:15	67:12,17 68:1	31:21 60:20	16:14
<b>above-entitled</b>	72:16,20,22,24	<b>advisory</b> 13:19	61:8	<b>areas</b> 23:5,23
1:21 84:3	75:14 76:3 77:9	<b>advocating</b> 70:7	<b>amounts</b> 48:18	46:25
<b>absence</b> 65:18	80:11,12,19	70:13,23 71:17	<b>analogies</b> 47:22	<b>argue</b> 28:20
<b>absolutely</b> 10:8	82:23 83:2,18	74:3	<b>analysis</b> 18:9	83:22
64:10	<b>action</b> 20:18	<b>affect</b> 36:24	33:16 69:11	<b>argued</b> 23:9
<b>abstract</b> 10:7	29:20,21,24	52:18	<b>and-a-half</b> 48:8	36:13 65:23
<b>accept</b> 25:9	70:21,23	<b>affirmative</b>	<b>Angeles</b> 34:15	<b>arguing</b> 15:15
36:17 46:18	<b>actions</b> 72:1	29:24	<b>annual</b> 60:2	67:4
69:25	<b>activity</b> 64:2	<b>afford</b> 57:9,20	<b>answer</b> 7:12 9:25	<b>argument</b> 1:22
<b>accepted</b> 77:6	65:16 66:4,6	<b>affordable</b> 4:23	10:5 20:9,9	3:2,5,8,11 4:4,8
<b>access</b> 50:3	<b>acts</b> 65:23	7:6 15:2 50:3	22:21 26:1,15	6:22 16:8 23:15
51:12 54:23	<b>actuarial</b> 54:17	51:1,2,6,12	33:7 37:24	23:19 25:21
55:12	54:21 61:19	55:12 56:24	38:20 40:11,14	28:14 41:18
<b>accurate</b> 61:22	<b>add</b> 52:7	57:2,13 65:22	43:9 71:15,15	42:21 46:18
79:9	<b>added</b> 42:10	81:2,11 82:21	76:1 78:4 79:9	47:4,5,18 56:5
<b>accurately</b> 57:15	<b>additional</b> 54:21	82:25	<b>answered</b> 20:4	77:3,14,18 80:8
<b>achieve</b> 80:17	70:2,3	<b>afternoon</b> 84:1	<b>answers</b> 37:12	84:1
<b>acknowledge</b>	<b>address</b> 12:18	<b>age</b> 61:23 62:6,9	<b>anticipated</b>	<b>arises</b> 33:16
74:16	69:17 79:13	75:19,20	69:21 75:13	<b>Article</b> 28:21
<b>act</b> 4:13,16 9:13	<b>addressed</b> 19:12	<b>ages</b> 71:9	<b>anticipation</b>	34:6,8
9:14 14:20,22	42:21	<b>agree</b> 9:5 11:5	48:11	<b>articulated</b> 49:20
15:17,25 16:10	<b>addressing</b> 10:6	46:21 64:6	<b>Anti-Injunction</b>	<b>aside</b> 79:16
16:19 17:4 23:6	31:15 35:20	68:13 69:4	30:7,25 33:13	<b>asked</b> 18:5 20:4
23:22,24 24:15	54:16	82:21	<b>anybody</b> 30:11	37:20,25 44:17
25:11,22 26:6	<b>adjudicates</b> 30:3	<b>aims</b> 64:12	<b>anymore</b> 75:22	69:20
26:16 28:1,5,23	<b>adjusted</b> 5:15	<b>airline</b> 17:17	<b>apart</b> 29:12	<b>asking</b> 9:6 17:11
29:3 30:1,7,25	71:6 75:20	<b>AL</b> 1:4,8,12,16	<b>appear</b> 54:5	24:9 51:5 69:12
31:15 33:14,22	<b>adjustments</b> 71:3	<b>Alito</b> 25:5,8,20	<b>APPEARANC...</b>	69:12
33:25 35:2 36:6	<b>admit</b> 15:12 17:2	33:20 41:17	1:24	<b>aspect</b> 44:21
36:8 38:3 40:15	<b>adopt</b> 20:11	53:5 79:14	<b>appendix</b> 6:10	<b>aspects</b> 13:23
40:23 42:23	<b>adopted</b> 50:10	<b>Alito's</b> 34:9	63:5 75:3	<b>assess</b> 44:2
43:1 44:10,11	55:3	43:10 53:21	<b>applied</b> 18:9	<b>Association</b>
44:12,13,18,21	<b>adopting</b> 51:21	<b>allied</b> 30:15 31:7	<b>applies</b> 57:15	54:13
44:23 45:2,4,9	<b>adopts</b> 70:6	<b>allow</b> 33:15	72:2	<b>assume</b> 6:25
45:23 46:1,2,5	<b>advance</b> 49:19	<b>altering</b> 73:13	<b>apply</b> 17:12 18:4	43:11,14,23
46:9 47:25 48:1	49:23 52:20	<b>altogether</b> 19:24	18:15 23:12	64:24 76:6 77:5
48:4,7 49:5,13	<b>advancing</b> 64:11	51:20	29:3,4 31:16	<b>assuming</b> 42:1
49:19,23,25	64:12	<b>Amendment</b> 38:8	34:6	68:12
54:11,12 56:1	<b>advantageous</b>	<b>Americans</b> 24:5	<b>appoint</b> 23:8	<b>assumption</b> 37:5
	55:13	<b>amici's</b> 80:10	<b>approach</b> 14:1	49:7 52:9 55:7

<p><b>assumptions</b> 52:14,15  <b>attach</b> 17:1  <b>attractive</b> 60:11  <b>augment</b> 52:7  <b>authority</b> 78:22  <b>authorized</b> 60:5  <b>authorizes</b> 60:2  <b>available</b> 8:7              80:20  <b>average</b> 60:11              60:18  <b>avoid</b> 28:9  <b>aware</b> 73:15              79:10  <b>awesome</b> 44:3  <b>a-1</b> 82:11,16  <b>a-2</b> 82:12,15  <b>a.m</b> 1:23 4:2 84:2</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>B</b> 17:16 65:5  <b>back</b> 5:6 21:7              23:9 34:20              47:17 61:13              69:9,13 77:23              80:15 82:17  <b>background</b>              54:12  <b>bad</b> 10:23 73:22              73:23  <b>balance</b> 34:21              35:17 54:5              79:18,22  <b>balanced</b> 51:4  <b>balancing</b> 53:14              79:16 80:1  <b>ballpark</b> 42:1  <b>ban</b> 22:8,9 83:8  <b>band</b> 62:9 71:11  <b>bankrupt</b> 48:12              48:16,22  <b>bankrupting</b> 73:1  <b>bar</b> 33:14  <b>BARTOW</b> 2:5</p>	<p>3:9 56:5  <b>based</b> 13:3,9              18:15 39:5 49:7              52:9 60:14              73:12 74:20  <b>basic</b> 4:22 9:7              10:25 48:3  <b>basically</b> 13:3              14:5 20:12 26:4              39:6 75:10  <b>basis</b> 11:9,13              33:16 63:11  <b>bear</b> 29:12  <b>becoming</b> 57:13  <b>beginning</b> 8:2              65:3  <b>behalf</b> 1:25 2:3              3:4,7,13 4:9              28:15 80:9  <b>believe</b> 29:1              33:11 66:14,14              70:18  <b>believed</b> 63:12  <b>believer</b> 18:13  <b>benchmark</b>              74:25 75:16,19              75:21  <b>benefits</b> 14:23              16:19  <b>best</b> 8:21 13:9,15              44:25 56:12  <b>better</b> 7:21 12:11              12:13 15:3              22:12 26:15              35:13 67:23  <b>beyond</b> 31:2              37:11 42:7  <b>big</b> 18:13 20:9              26:18,19  <b>bigger</b> 26:8  <b>bill</b> 38:17 39:4              42:9 77:8,14,19              77:19,20,25              78:1,16,17,17              82:5</p>	<p><b>billion</b> 41:20,22              41:23,24 42:4              43:12,12 48:10              53:12 80:3  <b>biosimilar</b> 23:23  <b>biosimilarity</b>              23:4  <b>Biosimilars</b>              15:17  <b>bit</b> 9:22 67:10              68:17  <b>bitter</b> 7:4  <b>black</b> 14:22              16:18 24:6              27:13 77:9  <b>Blackmun</b> 19:12  <b>blend</b> 37:17,22              37:22,23  <b>blow</b> 77:19  <b>blows</b> 77:19  <b>blunt</b> 78:20  <b>Booker</b> 13:15,22              13:24 14:13              44:25 45:1              49:21  <b>bottom</b> 7:10,12  <b>box</b> 81:14  <b>boy</b> 14:4  <b>Brady</b> 31:14  <b>bragging</b> 69:2  <b>branch</b> 20:5  <b>breast</b> 23:4,21  <b>Breyer</b> 22:19              23:18,21 27:10              31:19 46:8,23              77:2,22 78:23              79:1  <b>Breyer's</b> 26:3              33:7  <b>brief</b> 6:9 13:12              41:18 53:11              61:10 63:5 75:3              79:14,17 81:4              82:3,7,8 83:22  <b>briefed</b> 36:23</p>	<p><b>bright</b> 74:13  <b>bring</b> 32:6 33:23              70:21,23 76:21              81:5  <b>bringing</b> 29:9              32:11 59:25  <b>broad</b> 49:25 70:1  <b>broader</b> 21:13,25  <b>broadly</b> 12:19              68:23  <b>Brock</b> 14:14              19:13  <b>brokered</b> 39:17  <b>bronze</b> 13:7  <b>Buckley</b> 22:4,5              28:9 83:4  <b>budget</b> 42:9  <b>budgetary</b> 43:20              81:7  <b>bugaboo</b> 37:14  <b>built</b> 51:22  <b>burned</b> 59:6  <b>burns</b> 58:24  <b>business</b> 1:4 4:5              31:15  <b>businesses</b> 29:5              50:4,6  <b>buy</b> 52:2</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 3:1 4:1  <b>cabin</b> 74:12  <b>calculate</b> 75:6  <b>calculated</b> 74:25  <b>calculating</b> 75:13  <b>call</b> 20:17  <b>called</b> 10:14  <b>calorie</b> 77:11  <b>campaign</b> 21:17  <b>care</b> 4:23 7:6,21              27:12 29:8              32:19 40:2,3              49:4 50:3 51:1              51:2,12,14              55:12 65:22</p>	<p>82:21 83:12  <b>carefully</b> 79:23  <b>carried</b> 31:25              83:23  <b>carry</b> 51:9  <b>case</b> 4:4,5 7:14              15:13 21:13              28:19 31:12,13              31:13 32:6,11              33:12,17 34:11              40:13 41:9              44:16 45:12,20              45:21 56:10              76:10,16 79:3              79:10 83:25              84:1,2  <b>cases</b> 9:20 13:15              19:10 20:15              22:2 31:9 44:20              49:21 79:2,11              83:22  <b>cause</b> 5:1 29:19              29:20,24 41:6  <b>caused</b> 59:24  <b>CBO</b> 67:10,12              67:16  <b>center</b> 17:4  <b>centered</b> 37:12  <b>central</b> 45:2 50:9              56:22 68:21  <b>certain</b> 18:16              26:10,12,14              52:11  <b>certainly</b> 14:14              49:8 56:21 59:2              71:25 79:20  <b>challenge</b> 30:10              30:17,23 32:3              33:14 70:16  <b>challenged</b> 30:24              35:21 63:11  <b>challenges</b> 70:14  <b>challenging</b>              33:24  <b>chance</b> 22:16</p>
---	--	--	---	---

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

<p>31:11 49:8  <b>consumers</b> 67:22  <b>contemplate</b>                  29:9  <b>contemplated</b>                  52:3  <b>context</b> 63:2,7                  63:22,23 65:7  <b>contexts</b> 19:25  <b>continue</b> 4:3                  30:16 49:19,22                  51:17 84:1  <b>continues</b> 30:13  <b>continuing</b> 29:16  <b>contradicted</b>                  67:9  <b>contrary</b> 45:19                  52:22,22 77:5                  83:6  <b>contributes</b>                  60:21  <b>contribution</b>                  21:18,20,23                  22:9,15  <b>contributions</b>                  22:6 83:8  <b>control</b> 55:2,4  <b>controversial</b>                  27:1  <b>convenient</b> 16:15  <b>convert</b> 39:7  <b>core</b> 25:22 27:25                  28:5  <b>corn</b> 17:10  <b>Cornhusker</b>                  10:14,22  <b>correct</b> 38:24,25                  54:18 68:13                  69:19 76:24  <b>correctly</b> 81:6  <b>cost</b> 5:1 6:18,19                  29:12 52:10,14                  52:15 53:10,12                  77:12,16,17  <b>costs</b> 6:22 41:19</p>	<p>41:21 48:17                  53:8 55:4 61:18  <b>Counsel</b> 5:5                  66:17  <b>count</b> 39:7 77:11                  78:11  <b>counteract</b> 4:21  <b>country</b> 52:5  <b>couple</b> 5:21,22                  7:2 20:22 26:19  <b>course</b> 6:7,8 8:5                  19:14 69:17                  70:9,23  <b>court</b> 1:1,22 4:11                  8:20,24 9:3,6                  11:2,4 12:21                  14:4,8,15 18:21                  20:6 21:16,19                  21:20 22:5,8,13                  23:9 28:17,18                  28:22 29:1,5                  30:21 31:14                  32:22,23,24                  33:2,18 34:12                  35:20 36:11,22                  36:23,25 37:8                  38:3,12 39:7                  41:4 42:7 45:2                  45:4 47:9,15                  48:24 50:17                  56:8 62:23 63:3                  63:9,11,25 64:9                  66:2,3 68:19                  69:12 70:6,8,21                  70:22,24 71:1                  71:18,21,23                  72:10 73:12,14                  74:4 75:1 76:17                  77:6 78:20 79:3                  81:7 82:18 83:4                  83:9,21  <b>courts</b> 49:2  <b>Court's</b> 9:20 18:8                  32:15 34:10                  35:8 37:6,15</p>	<p>39:3,8 43:16,20                  44:11 54:2 65:9  <b>Court-appointed</b>                  2:6 3:10 56:6  <b>cover</b> 48:17,17                  58:18 60:10                  72:5  <b>coverage</b> 5:14                  8:1 28:20 33:4                  40:16,17 41:3                  43:5,7 48:5,7                  48:12,14 49:14                  50:1 52:4,17,23                  52:25 54:18                  55:6 56:14,23                  56:23 57:25                  59:7,9,19,21                  62:2,13 63:10                  64:7 65:15,25                  66:22 67:3,5,14                  69:1,6 70:9,19                  70:25 72:18                  74:5 76:2,3,7                  76:20 78:3                  79:23,24 80:12                  80:13,14,17  <b>covered</b> 49:3                  53:3 57:8 63:20  <b>covers</b> 60:16  <b>crashed</b> 59:6  <b>crashes</b> 58:23  <b>create</b> 60:14  <b>created</b> 83:4  <b>creates</b> 40:15  <b>creating</b> 63:18  <b>credit</b> 24:18 28:7                  50:4  <b>credits</b> 16:2                  24:18 30:23                  51:15,16 55:17                  67:22  <b>criminalizing</b>                  66:11  <b>critical</b> 24:17  <b>crown</b> 68:25</p>	<p>82:23  <b>crux</b> 62:17  <b>curiae</b> 2:6 3:10                  56:6  <b>current</b> 13:2  <b>currently</b> 47:3  <b>cut</b> 7:8 14:7,12                  35:2 43:13                  50:14 55:10</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 1:25 3:3,12 4:1                  4:8 80:8  <b>Daimler/Chrys...</b>                  34:17  <b>dare</b> 22:4  <b>Davis</b> 34:14  <b>day</b> 8:9 23:25  <b>days</b> 26:19  <b>deal</b> 26:19 59:24                  83:5  <b>dealing</b> 31:10                  59:20  <b>death</b> 66:21 67:9                  68:10  <b>debate</b> 5:2,3,4                  68:15  <b>decades</b> 21:7,7,7                  22:10  <b>decide</b> 15:3                  17:18 28:1                  29:24 38:17  <b>decided</b> 13:16  <b>decision</b> 35:9                  45:22 72:10                  73:15 83:23  <b>declared</b> 17:21                  25:10  <b>declaring</b> 8:3  <b>decline</b> 61:9  <b>deemed</b> 40:19  <b>defense</b> 72:7  <b>deference</b> 72:14                  73:6  <b>deferred</b> 71:22</p>	<p><b>deficit</b> 72:17  <b>definition</b> 19:6                  64:17  <b>degree</b> 34:13  <b>delighted</b> 11:19  <b>democracy</b> 20:5                  22:1  <b>democratic</b>                  22:12 73:7  <b>denies</b> 31:10  <b>Department</b> 1:15                  2:3 4:6  <b>Deputy</b> 2:2  <b>description</b> 74:6  <b>designed</b> 50:2  <b>desired</b> 50:15  <b>destroying</b> 77:18  <b>determination</b>                  49:9  <b>dictionary</b> 64:14                  64:19,22  <b>differ</b> 23:13  <b>difference</b> 39:21                  53:6 63:14                  75:17  <b>different</b> 11:2                  13:18 14:11                  15:15,21 17:24                  20:6 35:5 46:4                  46:16 55:23                  57:14 60:7                  62:14 67:18                  71:9 80:13  <b>differential</b>                  61:24  <b>differently</b> 9:22                  12:9  <b>difficulties</b> 15:22                  73:13 74:11  <b>difficulty</b> 15:24                  73:11  <b>direct</b> 33:14  <b>directed</b> 52:18                  68:23  <b>direction</b> 5:4</p>
--	--	--	--	--



<p><b>directly</b> 20:1 31:12 71:16 <b>disagree</b> 41:25 51:10 <b>disappear</b> 69:9 <b>discrete</b> 51:13 <b>discretion</b> 37:7 37:15,23 <b>discretionary</b> 71:22 <b>discriminate</b> 55:22 <b>discuss</b> 47:24 71:19 <b>discussion</b> 32:13 67:15 <b>disease</b> 24:6 77:9 <b>dish</b> 24:24 82:1 <b>dispassionately</b> 34:21 <b>disposition</b> 25:13 25:14 <b>dispositions</b> 25:12 <b>disproportionate</b> 24:25 <b>disputing</b> 61:7 <b>dissent</b> 14:1 <b>distort</b> 35:9 <b>distortion</b> 73:8 <b>district</b> 23:9 <b>dividing</b> 11:15 40:16 81:25 82:9 <b>divining</b> 11:2 <b>doctors</b> 23:5,22 <b>doing</b> 5:8 44:5 47:9 55:24,24 79:25 <b>dollars</b> 48:10 <b>doubt</b> 52:12 <b>dozen</b> 59:23 <b>dozens</b> 79:2 <b>draw</b> 74:13</p>	<p><b>drawn</b> 49:17 <b>dream</b> 47:7 <b>driving</b> 56:13 <b>drug</b> 23:23 66:4 66:4,5,11 <b>dug</b> 26:25 <b>D.C</b> 1:18,25 2:3 2:5</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 3:1 4:1,1 <b>earlier</b> 36:4 71:5 71:8 75:18 79:15 <b>easy</b> 13:5 26:17 26:24 34:5,6 39:24 40:3,3,14 64:12 81:25 82:9 <b>echoing</b> 36:4 <b>economic</b> 64:2 65:16 68:2 69:23 <b>economists</b> 5:6 5:17,17 41:18 42:10 53:11 79:14,17 <b>economy</b> 65:6 <b>EDWIN</b> 2:2 3:6 28:14 <b>effect</b> 34:24,25 42:20,22 44:19 44:24 48:7,14 49:1 50:5 68:1 72:17 <b>effective</b> 63:18 <b>effectively</b> 55:21 63:24 <b>effectiveness</b> 71:12 <b>effects</b> 55:13 65:6 <b>effectuating</b> 50:13 <b>efficient</b> 61:7</p>	<p><b>effort</b> 27:7 <b>Eighth</b> 38:8 <b>either</b> 62:4 66:11 68:10,11 <b>eliminate</b> 35:16 <b>embodied</b> 50:21 <b>employees</b> 24:22 <b>employer</b> 16:3 24:20,21,21 50:3 52:4 55:22 <b>employers</b> 51:13 51:15,22 52:1,2 52:6,8 55:15,16 <b>enables</b> 73:20 <b>enact</b> 63:13 71:14 <b>enacted</b> 10:11 31:4,6,8 54:4 <b>enacting</b> 62:10 72:22 73:2 <b>enforceable</b> 72:9 <b>enforcement</b> 72:1 <b>English</b> 64:24 <b>enhance</b> 50:2 <b>enormous</b> 38:17 <b>enormously</b> 35:5 <b>enrollment</b> 60:2 <b>entire</b> 28:23 77:19 <b>entirety</b> 65:24 <b>envisioned</b> 12:15 <b>equals</b> 43:12 <b>equitable</b> 35:19 <b>ERISA</b> 65:21 <b>especially</b> 7:19 <b>ESQ</b> 1:25 2:2,5 3:3,6,9,12 <b>essential</b> 4:17 6:11,14 11:24 38:24 40:20 41:13,15 45:9 63:17,22,24 64:1,18 65:13 65:15,20,21</p>	<p>66:5 67:2 80:25 81:12 <b>essentially</b> 57:18 59:21 67:22 74:25 75:6 76:2 76:19 78:22 <b>establishes</b> 81:12 <b>establishing</b> 61:22,23 <b>ET</b> 1:4,8,12,16 <b>etcetera</b> 23:6 77:11 <b>everybody</b> 11:1 11:5 57:15 62:5 62:6 69:2 74:19 <b>evidence</b> 66:19 66:25 <b>evident</b> 51:11 <b>exact</b> 65:17,19 <b>exactly</b> 8:16 19:15 36:21 39:18 40:6,9 62:2 81:14 <b>example</b> 12:13 13:15 21:12 22:4 29:25 45:1 45:15,16 53:10 56:12 61:25 62:8 66:1 72:1 <b>examples</b> 5:24 21:11 <b>exchange</b> 24:19 <b>exchanges</b> 6:15 6:15 11:24 12:1 12:2,6,7,12,14 12:20,25 13:1 16:1 24:16,17 24:20,22 28:7 31:23 67:20 74:16,18 82:14 <b>excised</b> 45:13 <b>excluded</b> 56:17 <b>excuse</b> 58:3 63:4 69:6</p>	<p><b>exercise</b> 27:24 34:10 36:14 37:7 43:15 44:3 <b>exercising</b> 36:7 <b>existing</b> 54:20 <b>expand</b> 51:12 <b>expanded</b> 43:5 <b>expanding</b> 56:22 <b>expansion</b> 41:23 42:11,15,17,25 <b>expect</b> 38:11,12 <b>expected</b> 80:2 <b>expects</b> 73:13 <b>expenditure</b> 30:10 <b>expenditures</b> 22:7,9,14,15 83:9 <b>expensive</b> 7:9 <b>experience</b> 51:23 54:12 59:17 <b>expertise</b> 53:19 53:21 <b>explain</b> 34:11 <b>explicitly</b> 54:8 <b>exploring</b> 46:21 <b>extent</b> 74:1 <b>extraordinary</b> 46:5,5 <b>extreme</b> 36:14 <b>extremely</b> 80:1</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>facilities</b> 6:16 <b>fact</b> 5:17 34:4 48:6 68:18 70:10 75:21 <b>fair</b> 61:2 67:6 <b>fairness</b> 20:19 <b>fall</b> 10:22 11:20 12:25 25:11 28:2,24 41:9 48:2,4 49:13 55:9 65:24</p>
--	--	---	---	--

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

<p>25:23 29:10 73:1 74:1 76:8 <b>guide</b> 37:14 <b>guidelines</b> 13:17 45:5 <b>guts</b> 50:14</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>H</b> 2:5 3:9 56:5 65:11 <b>habit</b> 5:8 <b>half</b> 12:10,11,13 12:17 22:3 31:22,23,24,25 32:2 43:13 47:21 48:23 59:23 <b>halfway</b> 83:4,11 <b>hand</b> 11:17 25:2 26:9 53:7 <b>handful</b> 21:22 26:4 <b>hands</b> 5:19 <b>happen</b> 42:3,17 70:8 74:22 <b>happened</b> 38:7 39:18 59:22 <b>happens</b> 61:4 <b>happy</b> 18:15,21 <b>hard</b> 15:19 34:7 46:7 <b>harder</b> 74:12,13 <b>head</b> 65:4 <b>headed</b> 65:6 <b>health</b> 1:8,15 7:20 13:2 27:12 49:25,25 53:10 56:19 58:12 63:18 65:21 75:22 83:12 <b>healthcare</b> 14:22 15:2 <b>healthy</b> 48:20 58:11,20 59:25 81:16</p>	<p><b>hear</b> 23:10 46:15 77:3,20 <b>heard</b> 29:20 40:11 <b>heart</b> 7:19 15:24 16:10 24:15 26:6,16 35:1 44:18 45:13,23 46:1 47:18,20 73:19 74:6,10 76:3 77:7,14,18 77:20 79:4 83:2 <b>held</b> 28:24 31:7 33:22 72:11 <b>help</b> 18:5 <b>helpful</b> 71:20 <b>helping</b> 24:4 <b>HHS</b> 4:6 <b>high</b> 53:10 56:18 57:23 58:13 <b>hip</b> 15:23 22:16 <b>history</b> 17:25 18:18,19 38:4 42:8 54:3 55:8 68:22 <b>hoc</b> 66:25 <b>hold</b> 47:4,5 <b>holding</b> 13:23 32:15 <b>hole</b> 42:4 <b>hollow</b> 16:6,9,12 <b>hollowed-out</b> 17:6 23:20 25:24 <b>honestly</b> 62:20 <b>Honor</b> 73:10 78:11 <b>Honors</b> 80:5 <b>hospital</b> 60:3 <b>hospitals</b> 24:24 24:25 <b>house</b> 50:19 83:4 83:11 <b>huge</b> 46:2 <b>HUMAN</b> 1:8,16</p>	<p><b>hurt</b> 30:11 <b>husker</b> 17:10 <b>hypothesis</b> 52:11 52:12 70:9 <b>hypothetical</b> 17:10 34:9 78:8</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 9:6 29:7 67:7,8 68:24 <b>identified</b> 36:22 80:25 <b>identify</b> 15:11 81:12 <b>ignore</b> 9:14 <b>ignoring</b> 66:18 <b>II</b> 22:24 25:17 <b>III</b> 2:5 3:9 34:6,8 56:5 <b>illnesses</b> 63:19 <b>imaginative</b> 64:18 <b>imagine</b> 31:21 <b>imagining</b> 47:3 <b>immediately</b> 8:11 <b>implications</b> 43:21 81:8 <b>important</b> 28:4 36:23 47:25 57:13 60:8,17 62:21 79:17 <b>impose</b> 5:25 6:1 36:9 41:19 43:16 55:16 80:11 <b>imposed</b> 24:21 59:18 <b>impossible</b> 6:3 77:1 <b>impression</b> 24:8 45:21 <b>Improvement</b> 14:22 <b>incentives</b> 76:19</p>	<p>76:21 <b>inclination</b> 78:21 <b>inclined</b> 18:17 <b>include</b> 28:7 <b>included</b> 59:23 <b>includes</b> 10:6 <b>income</b> 60:14,15 60:22 75:15 <b>inconsistent</b> 21:2 21:5 <b>increase</b> 53:8 55:12 60:19 61:6 80:14 <b>increases</b> 36:5 72:14 73:25 <b>increasing</b> 5:11 <b>independent</b> 1:3 4:5 14:18 <b>independently</b> 12:23 17:22 79:7 <b>Indian</b> 14:22 24:4-27:12 77:9 <b>indicate</b> 63:9,11 <b>indication</b> 49:12 49:16 52:14 <b>indications</b> 48:1 <b>indispensable</b> 66:7,9 <b>individual</b> 4:12 4:16,17,24 6:1 6:4,11 8:8 11:23 24:12,14 41:22 42:2,16 43:13 52:16,16 53:3 58:12 61:6 70:20 75:23 81:9 82:25 83:1 83:17 <b>individualized</b> 13:3,4 75:11 <b>individuals</b> 81:16 <b>industry</b> 41:20 42:3 <b>inertia</b> 8:15,21</p>	<p><b>inextricably</b> 32:4 <b>infected</b> 32:14 32:19 <b>infinite</b> 57:18 61:1 <b>information</b> 6:15 7:1 67:7 71:2 <b>initial</b> 29:1 <b>initially</b> 35:6 <b>inject</b> 73:21 <b>inquiry</b> 9:7 18:21 18:22 19:16 51:8 53:19 82:17 <b>inseverable</b> 33:3 72:9 <b>insignificant</b> 68:1 <b>instance</b> 5:12 46:12 <b>instituting</b> 62:4 <b>institution</b> 32:16 <b>instruction</b> 23:8 <b>insurance</b> 12:5 13:3 24:22 36:10 41:6,19 41:20 42:3,11 42:12 48:9,9,13 48:21,24 49:4 51:19 52:6,8 53:8,15,15 54:13,23 55:15 56:16 57:5,17 57:17,22 58:17 60:15 61:24 63:18 67:20,23 68:2 70:18 71:10 72:3,3,6 72:7 73:1,3,4 75:23 <b>insured</b> 60:21 <b>insurer</b> 13:8 <b>insurers</b> 6:16 29:10 <b>intended</b> 4:21 12:24 17:23</p>
--	--	--	--	--

<p>19:4 22:23 36:10 43:17 48:4 74:18 <b>intent</b> 9:8,11,25 11:1,3 17:14 19:24 21:4 49:11,12 50:13 50:21 51:3,4 81:20 83:6 <b>interconnected</b> 16:1 17:4 <b>interpret</b> 19:11 <b>interpretation</b> 38:1 39:3 40:7 40:10 <b>interrupted</b> 33:9 <b>interstate</b> 63:7 65:5,7 66:5,10 <b>intrastate</b> 66:4,9 <b>intrusive</b> 18:1 <b>invalidation</b> 70:11 <b>invited</b> 83:21 <b>invoking</b> 55:14 <b>involve</b> 20:6 44:21 <b>involved</b> 42:12 <b>involves</b> 21:14 <b>issuance</b> 66:20 <b>issue</b> 5:1,7,25 6:3,12 10:7 11:10,16 12:1 25:15 28:6 30:1 31:4 37:2,6,12 40:18 53:1,6 63:19 67:4 68:24 69:18 71:19 72:4 <b>issues</b> 28:19 <b>item</b> 38:17,17 <b>i.e</b> 53:20 80:13</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>J</b> 11:22 <b>jewel</b> 68:25</p>	<p><b>jewels</b> 82:23 <b>job</b> 15:7 <b>join</b> 60:12 <b>joined</b> 22:16 <b>judge</b> 45:10 <b>judges</b> 14:7 <b>judgment</b> 14:11 20:7 27:24,25 34:11 <b>judicial</b> 20:18 35:19,23 36:3,5 36:8,14 44:3 <b>judiciary</b> 36:5 <b>juries</b> 14:6 <b>jurisdictional</b> 34:6,9 <b>jurisprudence</b> 18:12 <b>Justice</b> 2:3 4:3 4:10 5:5,22 6:13,21,25 7:10 7:23 8:6,14,17 8:19,23 9:1,9 9:20,23 10:2,10 10:18,24 11:7 11:18 12:7,16 13:11,21 14:19 15:9 16:11,21 17:7,8,10 18:5 18:7,10,14,23 18:25 19:5,9,12 19:19,23 20:8 20:13,17,20,23 21:5,11 22:18 22:19,21 23:18 23:21 25:5,8,20 26:3,7,11,12 27:3,5,10,21 28:11,16 29:6 29:19 30:8,21 31:3,18,19,20 32:10,13 33:6,7 33:20 34:8,9,16 34:18 35:23,25 36:2,2,3,16,17</p>	<p>36:19 37:1,5,11 37:18,20 38:7 38:11,15,19,23 39:9,12,15,24 40:2,8,12,14 40:21,25 41:8 41:16,17 42:14 42:24 43:3,8,10 43:22 44:1,5,15 45:7,16,20 46:8 46:23 47:11,17 47:20 48:11,19 49:6 50:7,12,23 51:25 52:9 53:5 53:18,21,24 54:7 56:2,7 57:1,10 58:3,6 58:14 59:1,3,16 60:24 61:3 64:14,16,17,21 64:23 66:17 67:24 68:6,9 69:14,15,20 70:7,16 71:16 72:12 73:17 74:2 75:25 76:1 76:8 77:2,4,22 78:7,12,15,23 79:1,14,20 80:6 80:10,21,22 83:19 <b>justices</b> 18:16 37:25 <b>justiciability</b> 33:1 37:17</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>Kagan</b> 11:7,18 12:7,16 13:11 13:21 21:5,11 22:18 39:9,12 39:15 40:14 58:14 59:1,3,16 75:25 <b>KATHLEEN</b> 1:7</p>	<p><b>keep</b> 17:6 28:3 57:13 76:22 82:1 <b>Kennedy</b> 17:8 18:7,10,14,25 22:21 34:8 35:23 36:2,3,17 36:19 43:8,22 44:1,5 51:25 52:9 53:18,24 67:24 68:6 69:14 78:7 <b>key</b> 24:18,20 <b>kickback</b> 10:15 10:23 <b>kind</b> 43:16,18 82:13 <b>kinds</b> 15:10 23:2 <b>Kneedler</b> 2:2 3:6 28:13,14,16 29:15,22 30:8 30:20 31:12 32:8,10,24 33:7 33:11 34:4,12 34:16,17 35:18 35:25 36:16,19 37:1,4,10,16 37:19,22 38:7 38:18,21,25 39:9,11,14 40:1 40:5,13,24 41:2 41:12 42:6,19 43:2,4,19,25 44:4,8,15,25 45:15,18,25 47:8,14,19,23 48:15,23 49:10 50:11,17 51:10 52:4,13 53:13 53:23 54:1,10 56:3 57:2 69:20 81:6,24 <b>know</b> 5:10 9:12 13:8 14:8,25 17:11,22 18:3</p>	<p>19:14 23:1,13 24:7 26:2,4,15 37:13 40:21 44:20 45:21 50:12 54:22 59:4 64:23 65:1 65:5,7 68:21 71:8 76:9 78:23 81:22 82:2 <b>knowing</b> 63:9 <b>knows</b> 50:15,15</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>lack</b> 44:1 <b>laid</b> 54:20 <b>large</b> 55:22 58:1 80:1 <b>largely</b> 22:11 <b>larger</b> 64:1 65:16 <b>laugh</b> 26:23 <b>Laughter</b> 10:17 26:21 38:10,14 39:25 40:4 46:22 47:13 68:7 78:9 <b>law</b> 19:20 21:17 29:13 30:19 32:11 35:3,7,15 38:13 39:12 50:18,20,21 54:4,6 63:13 66:11 69:22 72:24 <b>laws</b> 55:20 <b>lawsuit</b> 33:24 <b>leave</b> 25:24 26:9 32:23,25 34:19 35:10 44:18,19 45:24 52:25 58:22,23 77:3 <b>leaving</b> 5:19 79:15 <b>led</b> 67:8 <b>left</b> 10:9 22:9,10 23:20 25:24</p>
--	--	---	--	---

44:23 54:19 76:18 83:2 <b>legislation</b> 10:14 21:8 27:6 39:17 70:2 73:14 <b>legislative</b> 5:8 8:15,20 11:3 14:18 16:24 17:25 18:17,18 19:24 20:7 38:4 39:4 42:7 49:11 49:12 50:21 54:3 55:8 66:23 68:22 <b>legislator</b> 21:22 <b>legitimately</b> 31:4 31:6,8 <b>let's</b> 8:2 11:7 22:22 26:16 37:11 71:22 72:12,12 77:4 <b>level</b> 21:1 24:2 <b>light</b> 8:22 <b>limit</b> 22:14 35:20 <b>limits</b> 21:20 22:6 35:19 <b>limp</b> 12:22 <b>line</b> 7:11,13 11:15 16:25 29:14 40:11,16 40:22 41:1 49:17 60:10 61:17 74:13 81:25 82:9 <b>link</b> 81:12 <b>links</b> 11:25 19:17 <b>list</b> 46:23 <b>litigation</b> 29:9,14 29:17 70:3 <b>little</b> 9:21 44:21 67:9 68:17 72:13 <b>loads</b> 77:13 <b>loaf</b> 12:11,11,11 12:13,13,17	22:3 47:21 <b>long</b> 51:24 55:15 <b>longer</b> 70:14 <b>look</b> 7:5,25 9:10 9:11,20 11:15 11:21 15:25 18:18 20:12 22:14,22 23:1 24:23 38:3,23 39:4,16,22,23 43:20 44:12 49:22 51:1,4 54:2 59:5 63:3 66:13 74:20 75:1 81:7 82:15 82:19,19,20 <b>looked</b> 6:5 22:5 40:22 59:6 73:15 <b>looking</b> 6:14 9:17 14:14 16:24 38:2 44:10,11 62:11 67:1 75:5 75:6 80:4 <b>looks</b> 9:7 59:5 65:10 68:22 79:16 <b>Lopez</b> 63:25 65:17,19 <b>Los</b> 34:14 <b>lost</b> 42:2 68:15 68:17,20 <b>lot</b> 13:12 16:13 27:9 34:24 46:18 62:14 76:21 77:8 <b>lower</b> 56:18 57:24 58:7,8 81:19 <b>lowered</b> 52:10 <b>lung</b> 14:22 16:18 24:6 27:14 77:9 <b>Lyons</b> 34:15	<b>magnitude</b> 5:3 <b>main</b> 44:23 <b>major</b> 77:11 <b>majority</b> 13:25 29:3 45:8 50:18 77:6 <b>making</b> 20:7 33:1 <b>mandate</b> 4:12,16 4:17,25 6:1,4 6:11 7:15 8:8 11:11,23 12:9 22:23,24 24:12 24:14,20,21 25:3,10 28:6 29:11 41:22 42:2,16 43:13 49:7 61:4 70:20 81:9 82:25 83:2 83:17 <b>mandated</b> 52:2 70:19 <b>mandates</b> 16:3 71:14 <b>mandatory</b> 5:14 8:1 13:20 24:12 45:1,4 72:18 <b>manner</b> 4:20 12:24 13:13,18 14:9 19:3,15 <b>March</b> 1:19 <b>market</b> 4:25 12:4 46:3 51:19 52:16 53:4,16 54:17,25 55:3 55:24 58:22,23 76:22,23 81:19 <b>markets</b> 56:16 63:18 <b>market-based</b> 55:2 <b>Massachusetts</b> 5:13 62:8 71:13 <b>master</b> 23:8 <b>materials</b> 66:23 <b>mathematical</b>	79:25 <b>matter</b> 1:21 7:13 8:6 10:7 17:12 18:2 29:1 35:18 38:1 39:2 72:22 84:3 <b>matters</b> 37:16 53:2 <b>mean</b> 6:14,17 7:3 8:17 10:13 13:21 14:23 16:8,13,17,18 17:2 20:10 21:6 22:1 23:7,11 26:2,9,22 27:6 27:21 29:8 31:1 32:7 38:5 39:15 42:6 44:14 46:8 46:23 49:13 50:12 61:2 64:9 68:16,21 69:6 70:11 74:15 76:25 81:14 <b>meaning</b> 63:23 67:2 <b>means</b> 10:20 40:10 63:24 64:5,10 <b>meant</b> 69:3 <b>Medicaid</b> 16:5 28:8 41:23 42:11,15,17,25 43:5 51:18 53:16 <b>Medicare</b> 24:24 28:7 29:25 30:2 30:3 49:1,3,3 <b>member</b> 11:4 <b>mentioned</b> 15:18 67:19 <b>menus</b> 77:11 <b>merits</b> 37:23 <b>middle</b> 16:16 <b>milk</b> 17:18 <b>million</b> 42:2 48:8	48:23 49:4 52:5 <b>millions</b> 29:4 47:10 49:2 56:16,17 <b>mind</b> 57:14 76:16 <b>minimum</b> 7:9 28:20 33:4 40:16,17 41:3 43:7 48:5,7,12 48:14 49:14 50:1 52:17,23 52:25 54:18 55:6 56:13 57:25 59:7,9,19 59:20 62:13 63:10 64:7 65:15,25 66:22 67:3,5,14 69:1 69:6 70:9,25 74:4 76:2,3,6 76:20 78:3 79:22,24 80:12 80:17 <b>minutes</b> 80:7 <b>miscellaneous</b> 27:9 <b>misconceptions</b> 59:15 <b>mix</b> 60:18 <b>model</b> 6:2,5 8:2 <b>modern</b> 79:10 <b>moment</b> 46:1 59:11 <b>monetary</b> 44:9 <b>money</b> 7:8 30:11 31:25 32:2 72:19 77:12,16 77:17 79:8 <b>months</b> 67:11 <b>morning</b> 4:4 <b>move</b> 35:16 36:20 37:1,11 37:21 62:19,19 <b>moving</b> 17:2 <b>must-hire</b> 14:17
	<hr/> <b>M</b> <hr/>			

<p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 3:1,1 4:1  <b>narrow</b> 71:11  <b>national</b> 1:3 4:4              54:13 65:6,21  <b>Native</b> 24:5  <b>necessary</b> 10:21              33:17 64:8,8,10  <b>necessity</b> 78:20  <b>need</b> 17:11 48:21              71:3 82:19  <b>needed</b> 80:14  <b>needy</b> 25:1  <b>never</b> 29:20              34:25 35:11              36:10 39:15              46:12  <b>new</b> 20:11,13              36:11 41:22              72:22 76:17  <b>nice</b> 57:7  <b>nondiscriminat...</b>              59:9 76:4  <b>non-severability</b>              33:21  <b>note</b> 79:17  <b>notes</b> 61:9  <b>notion</b> 48:3  <b>notwithstanding</b>              13:17  <b>November</b> 67:10  <b>number</b> 4:4              17:16,16 58:1              81:22 84:1  <b>numbers</b> 41:25              80:4  <b>numerous</b> 64:10  <b>nurses</b> 23:5</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 3:1 4:1  <b>objective</b> 18:1,2              18:14,15,20,22              18:25 19:22              23:12 78:10</p>	<p><b>objectively</b> 22:22  <b>objectives</b> 64:11  <b>obligations</b> 36:25  <b>obvious</b> 29:10  <b>obviously</b> 57:17              75:8  <b>occasion</b> 28:18  <b>occasions</b> 64:10  <b>offer</b> 51:14  <b>offering</b> 51:15,16  <b>offset</b> 41:21  <b>offsets</b> 16:4  <b>off-the-cuff</b> 24:8              26:3  <b>oh</b> 82:3  <b>okay</b> 10:12,15              10:16 13:6              14:20 19:23              22:23,25 24:1,6              24:24  <b>old</b> 56:19 58:19              69:9,13  <b>older</b> 58:16  <b>once</b> 19:6 27:25              50:14 58:17              66:13 74:8 81:9  <b>ones</b> 29:10 36:24              50:16 67:18              72:5  <b>open</b> 56:15  <b>opening</b> 82:8  <b>operate</b> 4:20              12:23,24 13:18              13:19 14:10              17:21 19:3,15              42:9 43:1 46:3  <b>operated</b> 13:14              14:17  <b>operating</b> 49:15  <b>operation</b> 4:18              6:11 11:24 15:6              67:20  <b>opinion</b> 14:15,16              19:13 21:21              67:25</p>	<p><b>opinions</b> 18:8              21:3 46:24  <b>opposed</b> 67:1              77:25  <b>opposite</b> 36:7  <b>opt</b> 61:11  <b>options</b> 8:7,13              73:24  <b>oral</b> 1:21 3:2,5,8              4:8 28:14 56:5  <b>order</b> 5:2 81:18  <b>ordinarily</b> 47:15  <b>original</b> 80:16  <b>ought</b> 30:15              56:12  <b>outset</b> 56:9  <b>out-of-pocket</b>              61:18  <b>overall</b> 61:8  <b>overturn</b> 35:4</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 4:1  <b>package</b> 34:1              40:17,19 49:18              52:21 55:9 59:8              69:3  <b>page</b> 3:2 11:22              63:4 75:2 81:4              82:7  <b>pages</b> 16:17              27:13 38:9  <b>pale</b> 74:17  <b>parallel</b> 31:13  <b>parliamentary</b>              39:19  <b>part</b> 13:24 14:16              25:1 50:9 61:15              62:21 64:1              65:15,21 66:15              66:23 68:21              69:3 70:14              81:10,15  <b>participants</b>              53:16</p>	<p><b>participate</b> 58:21  <b>particular</b> 14:12              29:16 49:18              63:16 75:4  <b>particularly</b>              30:23 73:12  <b>parties</b> 29:18              47:10,10  <b>parts</b> 16:12              17:13 78:17  <b>party</b> 17:15,16              32:14 33:18,19  <b>pass</b> 17:23  <b>passage</b> 27:6  <b>passed</b> 5:14 7:1              10:19 13:19              16:9,12 17:20              19:7 27:2,8              39:5 50:18,20              50:22 67:11  <b>passes</b> 46:9  <b>path</b> 8:4 9:2  <b>patient</b> 4:22 7:6              50:25 51:5              82:21,24  <b>patients</b> 49:4  <b>PAUL</b> 1:25 3:3              3:12 4:8 80:8  <b>pay</b> 31:22 75:17              75:17,24 81:1              81:13  <b>peek</b> 18:17  <b>penalty</b> 51:13              55:16  <b>people</b> 4:25 5:19              12:4 13:5 31:17              36:24,25 39:23              41:5 48:8,23              50:7,8 52:5              53:2,3 55:23              56:16,18,23              57:4,8,14,16              57:21 58:1,10              58:15,18,19,20              58:20,23 59:25</p>	<p>60:2,9,18 61:10              61:11,16 64:24              68:14 69:22              75:22 76:22              80:13,14 81:18  <b>percent</b> 5:7 60:9              60:10 61:16  <b>percentage</b>              60:21  <b>perfect</b> 12:12  <b>perfectly</b> 12:8              18:14  <b>period</b> 51:24  <b>periods</b> 60:2  <b>peripheral</b> 46:24              47:1,2  <b>periphery</b> 15:12              15:16 27:22              28:2,3 46:17  <b>person</b> 60:15,20  <b>Petitioners</b> 1:5              1:13 2:1 3:4,13              4:9 28:23 29:4              80:9  <b>pick</b> 13:8 62:18  <b>picks</b> 60:19              61:17  <b>picture</b> 20:10  <b>piece</b> 19:6 21:8              27:6  <b>pieces</b> 19:16  <b>pipe</b> 47:7  <b>place</b> 11:21 22:9              29:22 30:2              32:12 33:13              35:11 43:20              45:24 76:19  <b>plain</b> 67:2  <b>plaintiff</b> 35:22  <b>plaintiffs</b> 62:18              65:23 75:3  <b>plan</b> 74:25 75:7,9              75:16,19,21  <b>plans</b> 53:11              55:22 75:10</p>
---	--	---	--	---

<p><b>play</b> 70:4  <b>played</b> 69:24  <b>pleas</b> 71:17  <b>please</b> 4:11              28:17 36:1              37:18 56:8 80:4  <b>plus</b> 43:12 67:19  <b>point</b> 7:14 13:22              13:25 16:7              20:20 21:13,25              26:3,10,13,14              26:23 27:4              29:23 30:21              32:25 34:5              43:23 46:1,19              47:2,4 48:8,10              50:20 52:19,21              61:3,7,14 64:20              65:12 69:5              76:15 79:15              80:10,16 81:5              83:3  <b>pointed</b> 11:12              23:3 40:15 71:5  <b>points</b> 57:1 67:17              80:22  <b>policies</b> 6:17              52:10  <b>policy</b> 13:6,7,7              24:19 37:13              62:1 72:3,4  <b>political</b> 39:6  <b>politics</b> 78:24  <b>pool</b> 58:10,15              81:17  <b>poor</b> 56:19 75:22  <b>portion</b> 8:4  <b>position</b> 25:9              34:3 42:17,25              53:25 56:10              62:18 69:16,25              70:7,13 71:16              72:16 74:3,12              77:6  <b>positively</b> 10:8</p>	<p><b>possibility</b> 43:14              73:11  <b>possible</b> 46:20              57:7 59:19              72:14  <b>possibly</b> 16:8              30:19 31:25              65:22  <b>post</b> 66:25  <b>postpone</b> 59:12  <b>Potemkin</b> 82:13  <b>poverty</b> 60:10              61:17  <b>power</b> 7:25 8:24              9:3 34:10 35:19              36:5,8,14 37:9              37:12 44:3              63:12  <b>powers</b> 22:2,13  <b>practical</b> 22:20              26:1  <b>practice</b> 21:6  <b>preceding</b> 65:11  <b>precisely</b> 56:21              61:22  <b>preexisting</b>              55:20 63:19  <b>preferred</b> 45:3  <b>premise</b> 36:4,18              74:2  <b>premium</b> 57:9              60:11,20 62:6,7              75:6  <b>premiums</b> 5:2 7:9              57:6,12 60:18              81:19  <b>present</b> 54:17,21  <b>presumably</b>              27:16  <b>presume</b> 19:20              20:14  <b>presumption</b>              19:20 20:14,21  <b>pretty</b> 23:10  <b>preventive</b> 49:4</p>	<p><b>previous</b> 16:15  <b>pre-existing</b>              22:25  <b>price</b> 13:3 24:19              27:11 55:13              57:2,18,19,20  <b>prices</b> 5:11,18              56:18,24  <b>principal</b> 80:24  <b>Printz</b> 31:13              36:21  <b>prior</b> 44:16 51:23              56:17 58:9  <b>private</b> 51:19              75:3  <b>probability</b> 43:12  <b>probably</b> 79:11  <b>problem</b> 8:12              22:17 34:9              50:24 54:15,25              57:3 58:14              62:13 63:1              66:17 75:11              81:8 82:2 83:16  <b>problems</b> 20:3              34:6 41:7  <b>procedural</b> 17:19  <b>procedure</b> 30:5              69:21  <b>proceed</b> 32:9  <b>process</b> 16:6              35:10,11 39:4              69:21 73:7,22  <b>products</b> 74:19              74:20  <b>program</b> 73:3              74:23,24 77:10  <b>programs</b> 62:4              71:13 79:24              80:1  <b>promise</b> 23:3  <b>promote</b> 51:8  <b>promoted</b> 19:25  <b>promotes</b> 51:2,5  <b>promoting</b> 23:5</p>	<p><b>proper</b> 32:9,14              43:15 64:8              69:10 77:24  <b>properly</b> 33:2  <b>proposal</b> 17:16              17:16 29:7 69:8  <b>propose</b> 23:14              23:17  <b>proposed</b> 25:12              25:12  <b>proposition</b> 9:16              10:11,25 25:9              28:23  <b>proscription</b>              10:16  <b>prosecutors</b> 14:7  <b>protection</b> 4:22              7:6 50:25 51:5              82:21,24  <b>protections</b>              55:20  <b>prove</b> 5:17,18  <b>proven</b> 6:17  <b>proves</b> 21:12              30:20  <b>provide</b> 12:4              13:4 36:12 61:9              82:24  <b>provides</b> 13:8              61:5  <b>providing</b> 4:22              7:5  <b>provision</b> 5:14              7:19,24 8:1              10:12 14:17              15:16 22:16              24:24 25:11              27:12,14 28:20              28:24 29:16,18              30:10 33:4,12              33:21,22,25              34:22,22 35:20              36:8 40:16,18              41:3,5,9 43:7              45:4 48:5,8,14</p>	<p>49:14 50:1,4              51:4 52:8,17,23              54:19 55:8              56:14 57:25              59:7,9,19,21              62:13 63:10              64:4,7 65:15,25              67:14 69:1 70:9              70:12,25 72:8,8              72:10,18 74:5              75:4,12,12,14              75:20 76:2,4,18              76:20 78:3              79:23,24 82:4  <b>provisions</b> 4:15              5:15 9:12,13,15              10:8 11:11              13:10,16 14:12              15:11,17,22,23              16:23 19:17              21:16,18,22              25:15 26:5 27:9              27:15,23 28:1,5              29:3 30:9 31:3              31:5,14,16              32:15,18 33:3              34:24 35:3 36:6              41:11,14,15              44:13 45:2 46:2              46:6 48:6 49:15              49:18,19,22              50:2,9 51:21              52:11 53:7,7              54:19 55:11              56:11,14 59:10              59:24 67:18              75:2 76:5,7,10              76:11 77:8,16              78:2,6 79:5              82:15  <b>public</b> 49:24,25  <b>punishment</b>              45:11  <b>purchase</b> 52:8  <b>purchasers</b></p>
--	--	--	---	--

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



<p>11:9 20:16 21:6 21:10 23:17 27:20 37:4,10 40:6,9 47:23 50:23 60:4,25 68:5 78:25 <b>rights</b> 36:24 <b>rise</b> 55:9 60:19 <b>rising</b> 6:23 <b>risk</b> 36:9 43:16 43:18 44:2 68:1 68:14 69:14 81:17 <b>risks</b> 54:17,21 71:2 72:5 <b>ROBERTS</b> 4:3 16:11 18:23 26:7,12 27:3,5 28:11 29:6,19 33:6 36:2 40:8 40:21,25 41:8 41:16 42:14,24 43:3 49:6 50:23 56:2 69:15,20 70:16 79:20 80:6 83:19 <b>roles</b> 48:24 <b>roughly</b> 41:20 <b>rule</b> 20:11,13 <b>rules</b> 17:19 <b>ruling</b> 73:14 <b>run</b> 52:22 <b>runs</b> 59:22</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:2 3:1,6 4:1 28:14 <b>salvage</b> 15:7,8 <b>save</b> 7:7 <b>saver</b> 6:18,19 <b>saying</b> 6:2 11:10 22:21 29:9 46:12,16 48:20 49:10 52:1 53:18 66:7</p>	<p>67:25 73:22 76:24 <b>says</b> 9:12 19:14 19:20,23 20:12 25:16,16 31:21 44:18 59:6 63:17,25,25 65:3,13 66:14 72:4 75:20 79:10 80:11 81:6,25 <b>scale</b> 20:22 <b>Scalia</b> 8:14,17,19 9:9,20,23 10:2 10:10,18,24 17:10 18:5 19:23 30:8,21 31:3,20 34:16 34:18 38:7,11 38:15 40:2 44:15 45:7,16 45:20 47:11 48:11 50:7,12 58:3,6 60:24 61:3 64:14,16 64:17,21,23 72:12 73:17 74:2 76:1 77:4 78:12,15 <b>Scalia's</b> 39:24 40:12 76:8 <b>scheme</b> 64:1,3 66:15 <b>scratch</b> 14:25 <b>Sebelius</b> 1:7 4:5 <b>second</b> 31:24 33:2 59:13 61:14 65:13 66:1 69:16 75:11 79:13 <b>SECRETARY</b> 1:7 <b>section</b> 63:25 66:3 <b>see</b> 13:6 32:3</p>	<p>39:4 64:12 <b>seek</b> 70:24 <b>seeking</b> 52:7 <b>seeks</b> 35:22 <b>seen</b> 59:16 71:7 <b>segue</b> 21:13 <b>selection</b> 41:7 54:24 57:3 59:13,21,24 60:17 62:15 67:12,17,21 <b>selections</b> 67:23 <b>selling</b> 61:25 <b>Senate</b> 10:21 72:21 <b>sending</b> 34:20 <b>sense</b> 22:1 64:22 <b>sentence</b> 63:17 65:13 <b>sentencing</b> 13:17 14:5 45:1,5 <b>separate</b> 17:12 33:24 <b>separated</b> 34:2 <b>separately</b> 16:17 79:7 <b>separation</b> 22:2 22:13 <b>serve</b> 23:5,22 24:25 56:22 <b>service</b> 13:9 65:21 <b>SERVICES</b> 1:8 1:16 <b>set</b> 48:17 58:11 74:24 <b>sever</b> 13:16 19:21 20:2 21:9 22:2 81:23 <b>severability</b> 9:7 9:21 10:6 15:20 19:11 21:3 28:19 29:20 31:16 32:9 33:16,16 36:22</p>	<p>37:24 38:1,5 39:12 44:20 46:18 63:5 69:11 71:24 73:15 77:24 78:20 79:3 82:8 83:23 <b>severable</b> 9:13 20:2 43:24 68:3 <b>severed</b> 20:12 76:11 78:1 <b>severing</b> 15:13 72:13 <b>SG</b> 23:11 67:3 <b>share</b> 24:25 <b>sharp</b> 11:15 40:15,25 <b>sheet</b> 54:5 <b>shelf</b> 47:21 <b>shell</b> 16:7,9,12 17:6 23:20 25:24 <b>shenanigans</b> 39:19 <b>shifting</b> 54:16,20 <b>show</b> 60:3,3 71:2 <b>showing</b> 72:15 73:6 <b>shown</b> 55:7 <b>sick</b> 54:23 58:18 58:21 <b>side</b> 21:23 32:21 44:17 68:18 79:18 <b>sign</b> 60:4 <b>significance</b> 68:14 <b>significant</b> 43:14 <b>silver</b> 13:6 75:7 <b>simple</b> 38:19 79:15 <b>simplest</b> 19:22 <b>simply</b> 9:5 30:10 59:18 62:11 66:6 71:17</p>	<p>80:23 83:4,15 <b>single</b> 14:3 25:11 33:23,24 <b>sit</b> 32:1 <b>situation</b> 7:21 13:2 36:21 39:6 83:6 <b>situations</b> 12:17 71:21,25 <b>skyrocket</b> 5:2 <b>slate</b> 26:17 83:16 <b>slightly</b> 11:2 <b>small</b> 50:4,5 51:15 <b>smaller</b> 21:1 <b>Solicitor</b> 2:2 25:13 63:5 <b>solution</b> 55:2 <b>solutions</b> 5:12 <b>solve</b> 62:13 <b>somebody</b> 32:5 47:5 72:2 <b>somebody's</b> 17:1 <b>somewhat</b> 64:6 <b>Sorrell</b> 21:16 <b>sorry</b> 26:10 64:16 <b>sort</b> 9:3 16:6 21:12 25:21 26:1 37:13 62:22 67:21 68:22 82:13 <b>Sotomayor</b> 5:5 5:22 6:13,21,25 7:10,23 8:6,23 9:1 17:7 19:5,9 19:19 20:8,13 20:17,20,23 31:18 32:13 35:25 37:1,5,11 37:18,20 38:19 38:23 47:17,20 48:19 66:17 68:9 80:10 <b>Sotomayor's</b></p>
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80:23 <b>sought</b> 34:14 <b>sound</b> 68:5 <b>speak</b> 64:24 <b>speaking</b> 64:24 <b>special</b> 23:8 30:4 <b>specific</b> 20:9,10 78:11 <b>specifically</b> 6:5 6:10 63:7 <b>spend</b> 23:15 27:21 <b>spiral</b> 5:18 66:21 68:10 <b>spirals</b> 67:9 <b>spoke</b> 57:3 <b>square</b> 9:16 <b>stand</b> 4:13,16,20 24:3 32:19 62:23 79:6 <b>standard</b> 17:11 77:24 <b>standardized</b> 74:19 75:7 <b>standing</b> 25:25 30:9,12,22,25 32:16,17 34:13 37:2 <b>standpoint</b> 22:13 <b>start</b> 8:2 11:5,7 14:25 60:18 80:22 <b>started</b> 32:13 <b>starting</b> 26:3 <b>state</b> 6:15 21:14 54:12 59:7 <b>statement</b> 21:2 <b>statements</b> 65:10 <b>states</b> 1:1,22 5:10,24 6:18 48:13 59:5,17 61:21,23 62:3,7 62:11 66:8 71:6 71:10 76:17	80:15 <b>statute</b> 7:18 8:11 10:22 14:2 15:12,16 19:2,5 19:7 21:14,14 22:5,11 31:10 40:11 45:3,13 50:10 66:2 67:14 72:9 73:19 74:7,10 78:22 81:10 82:20 83:14,14 <b>statute's</b> 73:19 <b>statutory</b> 30:4 38:1 39:2 40:7 40:9 <b>stay</b> 78:24 82:12 <b>staying</b> 32:12 <b>stick</b> 12:19 <b>stop</b> 24:23 49:8 <b>straight</b> 9:6 50:24 <b>strains</b> 18:9 <b>strange</b> 33:15 <b>street</b> 39:20 <b>stricken</b> 36:9 43:14 45:10 <b>strike</b> 7:14,24 8:8,10 10:8,18 15:18 21:19,23 22:6 25:14,16 25:17 26:9 28:9 35:10 36:14 44:17 46:5 79:5 80:18,19 82:25 <b>strikes</b> 36:5 <b>striking</b> 6:19 36:15 47:20 <b>strong</b> 16:7 <b>strongest</b> 15:13 <b>struck</b> 10:13 14:3 21:16 22:8 23:11 26:16 29:13 30:15 31:14 33:13,15	42:18 43:1 44:22 45:4,12 46:13 55:25 56:12 71:1 76:17 83:15 <b>structure</b> 38:2,5 44:12 47:25 48:1 54:3 60:13 66:25 <b>structured</b> 20:5 <b>stuck</b> 83:8 <b>stuff</b> 23:2,24 24:5 55:17 <b>subfinding</b> 81:4 <b>submit</b> 39:3 <b>submitted</b> 83:25 84:3 <b>subsidies</b> 60:6,8 60:13 61:5,8,12 61:14 62:9 <b>subsidized</b> 51:24 55:15 <b>subsidizes</b> 61:18 <b>subsidy</b> 60:10 73:3 74:23,24 74:24 75:13,24 79:24 80:1 <b>substantial</b> 43:11 68:1 81:15 <b>substantially</b> 53:8 <b>substantive</b> 44:13 <b>subtitle</b> 82:5 <b>sue</b> 72:6 <b>sufficient</b> 66:16 <b>suggest</b> 11:3,8 16:18 18:11 23:7 25:18,20 36:6 65:1 82:10 <b>suggested</b> 39:16 49:17 <b>suggesting</b> 8:23 67:15 <b>suggestion</b> 68:19	68:20 <b>suggests</b> 24:13 45:19 53:21 <b>suit</b> 33:14 <b>suitable</b> 51:14 <b>support</b> 60:25 83:22 <b>supports</b> 13:22 13:25 <b>suppose</b> 17:15 33:20,21 <b>supposed</b> 12:3,4 12:22 18:4 23:12 41:21 48:2 <b>Supreme</b> 1:1,22 <b>sure</b> 9:10,23 17:8 18:7 21:8 24:3 25:7 52:12 73:4 <b>surely</b> 16:23 <b>suspect</b> 26:24,24 27:9 31:20 <b>sweeping</b> 28:23 <b>sweet</b> 7:4 <b>system</b> 56:17,19 56:20 57:24 58:9,23 59:6 61:11 64:6 69:9 69:13 73:2 <b>systems</b> 71:6	<b>talk</b> 21:3 57:12 59:12,13 <b>talked</b> 42:15 75:18 <b>talking</b> 16:20 23:25 27:10 32:12 44:9 65:5 65:8,14 69:14 71:8 75:4 78:2 79:18,21,22 82:6 <b>talks</b> 9:24 46:17 67:12,17 <b>task</b> 7:16,18,20 39:3 83:13,15 <b>tautological</b> 19:12 <b>tax</b> 16:2 24:18,18 28:7 30:23 31:21,21 33:12 33:12,15 51:15 51:16,23 53:10 55:14,16,16 <b>taxes</b> 30:23 <b>taxpayer</b> 30:12 30:12 <b>tell</b> 6:16 16:22 41:10 82:8 <b>telling</b> 10:21 44:6 <b>tells</b> 20:1 81:7 <b>tended</b> 71:10 <b>term</b> 66:8 <b>terms</b> 47:24 <b>test</b> 9:21 17:9,24 18:3,11,25 19:22 23:12 49:20 <b>testimony</b> 54:13 <b>tests</b> 18:14 <b>text</b> 11:5,8,15,19 12:3 38:3,4 39:22,23 42:7 44:12 47:24 54:3,11 55:7 <b>textual</b> 11:9,13
<b>T</b>				
<b>T</b> 3:1,1				
<b>take</b> 7:4,7 8:24 9:2,6 11:19 18:17 22:20 29:8 32:14,19 45:23 52:25 55:5 61:4 69:13 71:24 73:18 74:4,8 75:16 79:13 81:16 <b>taken</b> 7:19 <b>takes</b> 83:3 <b>take-title</b> 76:18				

<p>18:20,22 62:21  <b>textually</b> 15:25                  18:15  <b>Thank</b> 28:11,16                  56:2 80:5,6                  83:19  <b>theory</b> 21:19  <b>thing</b> 8:9,14 14:8                  20:22,25 21:24                  22:3 23:23 24:4                  29:11 30:6                  32:23 46:11                  48:2 55:19                  58:17 60:23                  61:16 74:22                  75:21 79:4,16  <b>things</b> 7:2,7,8                  11:20 14:20                  15:1 16:20 20:6                  30:1 35:15                  46:17,24 52:20                  52:21 53:14,17                  54:8 55:9 57:11                  57:22 60:7 61:3                  62:14 71:7                  76:15  <b>think</b> 5:23 7:2,3                  7:7,21 8:19 9:4                  10:24 11:8 12:2                  12:16,21,25                  13:8,14,22,24                  14:13,21 15:3                  15:10,14,18,19                  16:7,8 18:8,16                  18:18 20:19                  21:10,11,12,15                  21:21 22:1,12                  25:19 26:2,15                  27:15,23,23                  28:4,8 29:15                  30:20 31:20                  32:8,24 33:3,9                  34:18 35:18                  36:16,19 37:16                  37:25 40:1,1,5</p>	<p>40:5,13 41:12                  41:12 42:10,19                  42:21 43:19                  44:8,25 45:7,8                  45:12 46:4,8,20                  47:8,21 48:15                  51:11 52:13,16                  53:14 54:2 55:9                  56:10 59:3,15                  62:17 63:1                  64:12,20,25                  66:13,16,21                  67:6 68:15,17                  68:23 69:10                  70:7 71:15,20                  72:5 73:5 74:5                  74:8,11,12,16                  76:13,15 77:22                  77:24 78:19                  79:9,11,17 82:3                  82:18 83:16  <b>thinking</b> 31:19                  31:20 62:11  <b>thinks</b> 47:1,1                  74:14  <b>third</b> 60:23  <b>thought</b> 9:11                  14:9 38:19 39:1                  48:19  <b>thoughts</b> 70:4  <b>three</b> 37:20                  48:10 52:21                  54:8 60:7 61:24  <b>throw</b> 16:16  <b>throwing</b> 15:8  <b>thrown</b> 48:24  <b>ticks</b> 20:22  <b>tied</b> 11:11 15:23                  24:12  <b>time</b> 27:22 28:10                  39:6 51:24 60:4                  60:5 67:13 72:2                  83:6  <b>times</b> 18:9 37:21                  43:6</p>	<p><b>title</b> 25:1,16,17                  25:17 26:4                  50:24 66:3                  82:20  <b>titles</b> 22:24 46:10                  46:10,11  <b>today</b> 48:21                  70:17 74:3  <b>told</b> 62:25 83:9  <b>tool</b> 76:4,7,9,12                  78:20 80:15,18                  80:24,24,25                  81:1,1  <b>tools</b> 76:14 80:16                  80:19  <b>top</b> 54:20  <b>total</b> 24:8  <b>totally</b> 38:15  <b>toto</b> 35:14  <b>touched</b> 21:18  <b>traditional</b> 55:14                  55:17  <b>traffic</b> 66:4,10,11                  66:12  <b>tried</b> 5:24 6:18                  16:22 22:5,10  <b>true</b> 5:6 10:2                  30:6 53:5 61:4                  64:22 77:7  <b>try</b> 8:11 20:8                  39:18 42:8 47:5                  47:5 62:14 83:5                  83:7  <b>trying</b> 55:1,10                  62:22 81:16                  82:19,23  <b>tumbling</b> 73:2  <b>turn</b> 24:17 37:23                  47:2 62:16  <b>turns</b> 21:15  <b>two</b> 9:19 13:23                  15:9 19:17                  32:25 37:7                  47:22 48:8,10                  48:23 50:24</p>	<p>54:19 56:14                  57:11 62:9 67:5                  68:11 76:18                  78:15  <b>tying</b> 54:8  <b>type</b> 70:20  <b>typically</b> 62:3</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>unable</b> 11:14                  56:23,24  <b>uncommon</b> 46:9  <b>unconstitutional</b>                  4:13 5:13 15:18                  17:21 25:10                  28:25 31:7,24                  33:22 35:21                  70:10,11 72:11                  83:18  <b>undercut</b> 64:3,6                  65:18  <b>underserved</b>                  23:5,22 24:5  <b>understand</b> 11:4                  18:23 37:19                  43:9 51:25 52:3                  53:24  <b>understood</b>                  75:25  <b>underwriting</b>                  13:4 75:23  <b>unhealthier</b>                  58:16  <b>unhealthy</b> 57:21  <b>uninsured</b> 54:22  <b>United</b> 1:1,22                  66:8 76:17  <b>unobjectionable</b>                  27:16  <b>unquestionably</b>                  14:20 49:24  <b>unrealistic</b> 34:19                  38:16 50:14  <b>unrelated</b> 17:17                  46:3 50:1 51:19</p>	<p><b>unresponsive</b>                  25:21  <b>unsuccessfully</b>                  22:11  <b>unsustainable</b>                  58:24 60:25  <b>unwind</b> 49:2  <b>upward</b> 5:4  <b>usage</b> 66:1  <b>use</b> 26:3 29:25                  55:14 67:2  <b>useful</b> 63:24                  64:11 66:15                  76:25  <b>uses</b> 65:12 66:8  <b>usual</b> 73:21  <b>Utah</b> 12:8</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:6,14 4:5,6                  34:15 76:17  <b>validity</b> 29:16                  30:3 77:15  <b>value</b> 61:19  <b>variance</b> 62:7  <b>variety</b> 51:17  <b>various</b> 5:11 6:16                  18:8 21:16  <b>vary</b> 5:7  <b>vast</b> 29:2  <b>vehicle</b> 16:24  <b>venality</b> 10:16  <b>Vermont</b> 21:17                  21:21  <b>veto</b> 14:18  <b>view</b> 11:19 31:13                  69:24  <b>violate</b> 10:15  <b>virtually</b> 21:2  <b>vision</b> 13:1  <b>visits</b> 49:4  <b>volume</b> 26:8,18  <b>vote</b> 10:21 27:11                  27:13 78:11  <b>voted</b> 17:20 35:1</p>
---	---	---	--	--

<p>50:9 <b>votes</b> 27:8,18 35:4,6 72:21,23</p> <hr/> <p><b>W</b></p> <p><b>wait</b> 41:5 60:4 <b>want</b> 7:17,17,20 9:4 10:9 12:10 12:18 17:25 18:11 19:21 25:20 26:1,23 27:21 28:3,8 32:18 38:8 39:1 47:21 53:19 66:10 67:13,24 68:3,9,11,11 77:4,5,17 79:15 82:1,1 <b>wanted</b> 8:10 9:9 9:18 21:22 34:25 35:1 54:18 56:21 63:9,11 78:5 <b>wanting</b> 20:20 <b>wants</b> 15:4 17:15 17:16 63:3 73:20 75:1 <b>Washington</b> 1:18 1:25 2:3,5 <b>wasn't</b> 69:1 <b>way</b> 11:2 12:2 14:13 21:21 22:6 32:9 35:8 35:12 47:4 50:5 58:17 59:19 65:17 66:8 68:5 70:19 74:23 78:5 82:13 <b>ways</b> 46:4 51:13 51:17 <b>Wednesday</b> 1:19 <b>wellness</b> 77:10 <b>went</b> 31:15 80:12 <b>weren't</b> 50:16 <b>we're</b> 5:8 7:5,23</p>	<p>7:24 8:3,10 9:5 9:16 29:12 32:12,22 38:16 39:16,17 44:5,6 50:13 65:14 70:17 71:23,23 72:4,5,14 <b>we've</b> 20:12,14 23:25 26:16 42:15 <b>whatnot</b> 51:22 <b>whimsical</b> 68:16 <b>whip</b> 39:7 <b>willing</b> 72:5 <b>wise</b> 37:8 <b>woodenly</b> 19:11 <b>word</b> 14:3 23:3 37:14 63:21 64:8 65:13 66:21 79:23 <b>work</b> 8:2 9:14,15 12:3 19:18 24:16 25:2 29:7 46:19 55:4,6 56:21 59:8 71:7 71:7 76:5,7,10 76:15 81:1 82:16 <b>worked</b> 22:12 71:12 83:10 <b>works</b> 7:7 58:17 <b>world</b> 30:17 <b>worse</b> 12:18 22:3 53:2 54:25 67:21 <b>wouldn't</b> 7:1 15:19 19:21 27:17 39:13 73:17 <b>wreck</b> 32:22 <b>wrecking</b> 15:6 <b>write</b> 67:24 <b>wrong</b> 5:18 19:19 20:23,25 42:1 42:11</p>	<hr/> <p><b>X</b></p> <p><b>x</b> 1:2,9,11,17 31:22,22,24</p> <hr/> <p><b>Y</b></p> <p><b>Y</b> 31:21 <b>year</b> 23:15 60:5 80:2,3 <b>years</b> 16:15 42:5 53:12 67:20 83:5,10 <b>year-old</b> 61:25 <b>yesterday</b> 23:25 48:21 <b>York</b> 76:17 <b>young</b> 58:19 <b>younger</b> 76:22</p> <hr/> <p><b>\$</b></p> <p><b>\$100</b> 80:3 <b>\$12,000</b> 62:1 <b>\$217</b> 53:12 <b>\$350</b> 42:4 <b>\$4,000</b> 62:1 <b>\$700</b> 41:20</p> <hr/> <p><b>1</b></p> <p><b>1</b> 17:16 62:8 80:3 <b>1.5</b> 62:8 <b>10</b> 5:7 16:15 42:4 53:12 <b>10-year</b> 41:19 <b>10:19</b> 1:23 4:2 <b>11-393</b> 1:5 4:4 83:25 <b>11-400</b> 1:13 4:6 84:1 <b>11:50</b> 84:2 <b>150</b> 52:4</p> <hr/> <p><b>2</b></p> <p><b>2</b> 17:16 48:8 <b>2,700</b> 38:9 <b>20s</b> 79:11 <b>200</b> 60:9</p>	<p><b>2009</b> 67:10 <b>2012</b> 1:19 72:11 <b>2014</b> 72:2 <b>2020</b> 80:2 <b>21</b> 66:3 <b>25</b> 61:25 <b>250</b> 61:16 <b>26</b> 48:9 <b>26-year-olds</b> 48:20 <b>2700</b> 16:17 27:13 <b>28</b> 1:19 3:7</p> <hr/> <p><b>3</b></p> <p><b>3</b> 67:19 <b>30</b> 5:8 <b>30s</b> 79:11 <b>300ga-1</b> 82:10 <b>300ga-2</b> 82:10 <b>32</b> 49:3 <b>350</b> 41:21,23,24 42:2 43:12,12</p> <hr/> <p><b>4</b></p> <p><b>4</b> 3:4 22:10 67:11 80:7 <b>40</b> 83:5,10 <b>42</b> 63:4 65:12 <b>43</b> 65:12 <b>43a</b> 6:9 11:22 63:4 81:4</p> <hr/> <p><b>5</b></p> <p><b>5</b> 16:15 <b>56</b> 3:10</p> <hr/> <p><b>6</b></p> <p><b>6</b> 82:7 <b>60</b> 72:21,23 <b>60-year-old</b> 62:1 <b>64A</b> 75:2 <b>68A</b> 75:4,12</p> <hr/> <p><b>7</b></p> <p><b>7</b> 19:13 43:13</p>	<hr/> <p><b>8</b></p> <p><b>80</b> 3:13 60:10 <b>801</b> 66:3</p> <hr/> <p><b>9</b></p> <p><b>90s</b> 59:17 62:3 <b>922(q)</b> 63:25</p>
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