UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II }
v. } Civil Action No. 3:10 CV 188
KATHLEEN SEBELIUS }

October 18, 2010

COMPLETE TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE HENRY E. HUDSON
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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UNITED STATES DISTRICT COURT

(The proceeding commenced at 9:10 a.m.)

THE COURT: Good morning.

MR. GETCHELL: Good morning.

MR. GERSHENGORN: Good morning, Your Honor.

THE COURT: I apologize for the delay. We're having some difficulty with the audio feed to our overflow courtroom. I hope it wasn't too much of an inconvenience for you.

All right, Ms. Pizzini, go ahead and call our case for today.

THE CLERK: Case Number 10 CV 188. *Commonwealth of Virginia by Kenneth T. Cuccinelli, II v. Kathleen Sebelius.*

Plaintiff is represented by Mr. Kenneth T. Cuccinelli, II, Mr. Duncan Getchell, Jr., Mr. Wesley Russell, Jr., and Mr. Stephen McCullough.

The defendant is represented by Mr. Ian Gershengorn, Mr. Joel McElvain, Ms. Sheila Lieber, and Mr. Jonathan Hambrick.

Are counsel ready to proceed?

MR. GETCHELL: The Commonwealth is ready, Your Honor. Duncan Getchell representing the Commonwealth.

THE COURT: All right.

MR. GERSHENGORN: The United States is ready, Your Honor.

THE COURT: Thank you.

The matter is before the Court this morning on motions for summary judgment filed by each side. Because there are no material facts in dispute - each side agrees to that - the hearing today will pretty much be the hearing on the merits in this case.

Because the Commonwealth filed their motion for summary judgment about 20 minutes before the United States, I'm going to allow them to go first. Each side will have an hour and a half. I'm not going to hold you to it precisely. The case is too important to cut you off. Try to keep it within an hour and a half. And you may apportion your time however you wish in the course of your argument.

Mr. Getchell on behalf of --

MR. GERSHENGORN: Your Honor, Mr. Getchell and I conferred ahead of time, and we agreed that there would be essentially four arguments. That he would go first and third, and the United States would go second and fourth.

THE COURT: That's fine. I appreciate you working it out.

Good morning, sir.

MR. GETCHELL: Good morning, Your Honor. May it please the Court. Duncan Getchell for the

Commonwealth.

As this Court stated in its prior opinion, quote, *While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate - and tax - a citizen's decision not to participate in interstate commerce.* I will begin with the regulation of commerce.

The power claimed by the Secretary under the Commerce Clause and the associated Necessary and Proper Clause is unprecedented, unlimited, and unsupportable in any serious regime of delegated enumerated powers. Unprecedented. As this Court pointed out on August the 2nd, quote, *Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far.* Or as three former Attorneys General of the United States put it, quote, *The individual insurance mandate stands alone*. As an assertion of federal power, it is without foundation in the text of those clauses, and without precedent, legislative or judicial.

The fifteen law professors who filed an *Amicus* brief with the Washington Legal Foundation affirmed that PPACA, quote, *Goes well beyond any previous exercise of federal power*.

The Congressional Budget Office of 1994 told Congress the same thing. Quote, *A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action*, unquote.

In 2009, the Congressional Research Service informed the Senate Finance Committee that, quote, *Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this Clause to require an individual to purchase a good or a service.*

The Northern District of Florida, October 14, said it was unprecedented, citing the Michigan decision filed by the Department of Justice as saying the same thing. The Secretary on the other hand in the first sentence of her memorandum in support of her motion for summary judgment contends that the mandate and the penalty are unremarkable, insisting that, quote, *As a legal matter the provision is well within the traditional bounds of Congress's Article I powers.*

That repeated the reply memorandum of the last brief filed in this matter.

Now, this is only the first of many occasions on which the Secretary deploys raw, hyper-aggressive, *ipse dixit* assertion in an attempt to run over the obvious

legal problems that beset her case. The fact that the claimed power is unprecedented is fatal to the Secretary at this level because the Commerce Clause has both affirmative and well-established affirmative and negative outer limits, and this Court is subject to the Supreme Court's rule that it has the sole prerogative of overruling its cases.

Now -- and that's *de Quijas*.

Both the affirmative and negative outer limits of the Commerce Clause are well marked. Affirmatively, Congress may regulate channels and instrumentalities of commerce -- of interstate commerce, as well as persons or things in interstate commerce. Nothing like that is even claimed to be at issue in this case.

Finally, under the Necessary and Proper Clause, Congress may regulate --

THE COURT: It seems that in the Secretary's argument, Mr. Getchell, that theoretically they're contending that if you have a compilation of inactivity or indecision as a critical mass if it affects interstate commerce, it is tantamount to activity. At some point I'd like you to comment on that because it really is what a awful lot of their argument is premised on.

MR. GETCHELL: The fact of the matter is that the

Supreme Court in the third prong of Commerce Clause jurisprudence, which is not direct regulation of commerce, it's already Necessary and Proper Clause, allows regulation of activities that substantially affect interstate commerce.

The Secretary briefs the matter as though we made up this distinction, but it's the Supreme Court of the United States at *Wickard* and *Raich*, and always, that has said it has to be activities substantially affecting interstate commerce. And there's a reason for that. It adheres in the nature of commerce. Commerce, as we point out in the historical discussion with which the Secretary never engages, is in its nature was recognized by the founders to be voluntary, spontaneous conduct, activities, economic activities, and that's why the Supreme Court has never allowed decisions or conduct that's not activities to be regulated under the Commerce Clause.

THE COURT: Isolating just that cerebral act of making a decision or not making a decision, they appear to argue that that, again collectively, constitutes activities. Is the act of making a decision not to purchase insurance, is that activity?

MR. GETCHELL: It is not, Your Honor, because the regulation is a regulation of a status. It's a

regulation of a status of being uninsured. And any decision even, never mind conduct, is either antecedent to the status, or something that will happen later and will create the status. But regulating the status is regulating pure inactivity.

And remember, the negative limit of the Commerce Clause would not allow language to be tortured and stretched to that extent because, as the Supreme Court said in the majority decision in *Morrison*, this Court always has rejected any reading of the Commerce Clause and the scope of federal power that would have the effect of creating a national police power.

THE COURT: If your argument is correct that regulating this type of inactivity exceeds the scope of the Commerce Clause, is this statute saved by the Necessary and Proper Clause?

MR. GETCHELL: No, Your Honor, because the Necessary and Proper Clause is already exhausted when it allows the regulation of activities substantially affecting interstate commerce. To go beyond that would be for this Court to depart from the established Supreme Court authorities, and at this level I don't think that's a course that's available to the Court. That was my point.

If there are both affirmative and negative outer

limits, then it seems to me that the precedent, if it doesn't constrain the Court in terms of power, certainly ought to be more than persuasive as to how far this Court should go.

THE COURT: Okay. Go right ahead.

MR. GETCHELL: Thank you, Your Honor.

Now, under the Necessary and Proper Clause, Congress may regelate activities that in the aggregate substantially affect interstate commerce. But as I just quoted from *Morrison*, there are, of course, limits that are reached if you collapse federalism and create a national police power. And *Morrison* also notes that thus far in our nation's history, the cases have upheld Commerce Clause regulation of intrastate activity under the Necessary and Proper Clause, quote, *Only where that activity is economic in nature.*

So the limits are not merely inactivity, they're an economic activity. And any confusion about what that means in *Raich*, you know, the majority in *Raich* views -- says that even the home growing of marijuana is economic activity. There was some confusion for a while as to what --

THE COURT: If I understand your argument, Mr. Getchell, you're not arguing that the mandate isn't economic in nature because the health care market is

economic in nature, you're saying it's not activity, right? It's the third prong of *U.S. v. Perez* that you're relying upon.

MR. GETCHELL: No, I'm saying you can regulate activity, and if the mandate --

THE COURT: As long as it affects interstate commerce.

MR. GETCHELL: Right. But if the mandate, for example, had said when you're active, when you go to the doctor you have to do something, then you could -- you presumably will be regulating an activity. But here when you're just regulating the status, it's neither an activity, I would contend, nor economic. Being passive is not economic.

THE COURT: Okay.

MR. GETCHELL: Now, there was for a time some confusion about what Scalia, Justice Scalia, meant in his concurrence in *Raich* because he seemed to say that you can regulate activity that was not economic. But he clarified that in *Comstock* when he joined Justice Thomas' dissent when they said no amount of noneconomic activity can be aggregated in order to regulate. So both the majority in *Raich* and the -- Scalia would say that it has to be economic activity.

Now, what -- the means that have been chosen here,

you know, do not remotely fall within the paradigm of *Wichard* and *Raich*, which merely say that when you're dealing with a commodity which in the aggregate will affect the total stock and therefore the price, you can regulate the production of that commodity even before it becomes intrastate commerce by being sold. But that's all they stand for. And those are the affirmative outer limits.

Now, the Secretary argues that Congress can order citizens to do anything if it's integral to a scheme to regulate commerce, whether economic or noneconomic, whether activity or inactivity, unless it violates an independent prohibition. Now, this formulation is something that the Secretary necessarily has to make, but it is clearly demonstrably wrong because if you look at *New York v. United States*, there there was no question that Congress was regulating commerce. It was regulating the total disposal of spent nuclear fuel in the United States of America. It was clearly regulating commerce. But it had a means that it wished to pursue, and that means required the State of New York to pass a law.

And that was found to be unconstitutional not because it was contrary to some expressed prohibition, but because it was contrary to federalism, structural

federalism.

THE COURT: But also in that case in *New York v. United States*, as well as *Perez v. United States* when they talk about the Tenth Amendment, particularly under the commandeering theory, it is based upon requiring the State to use its sovereign power to enforce a federal regulation or enact legislation. How does the Commonwealth of Virginia commandeer to do anything here under 1501?

MR. GETCHELL: We're not arguing that they're commandeered. We're just saying that *New York v. United States* shows that there doesn't have to be an expressed prohibition.

THE COURT: Okay. All right. I see.

MR. GETCHELL: Right. And -- and if we look at the language in *New York v. United States*, the Court there said, *"Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Petitioners likewise do not dispute that under the Supremacy Clause, Congress could, if it wished,*

pre-empt state radioactive waste regulation."

THE COURT: It just simply says the State couldn't be required to pass the enactment.

MR. GETCHELL: Right. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way they choose.

THE COURT: To regulate the State to pass federal mandated statutes?

MR. GETCHELL: Right. But I contend that the principle is broader than just commandeering, sir.

THE COURT: Yes, sir. Understood.

MR. GETCHELL: And, you know, structural federalism is an independent prohibition. And we know that from *Lopez* and *Morrison* because there there was no commandeering. It was simply a violation of the enumerated powers. That Congress just simply went too far in the means that they chose.

The Secretary's position violates the negative outer limit of the Commerce Clause in two ways. First, to be, quote, "*necessary*" under the Necessary and Proper Clause, Congress must be executing an enumerated power, not changing its character. And here the claimed power to order a citizen to buy a good or service from another citizen changes the nature of the Commerce Clause because that's not a regulation of

commerce, and it's not a regulation of activities substantially affecting interstate commerce.

Now, that fact also makes the mandate and penalty violate the, quote, *Proper prong of the Necessary and Proper Clause*. As the Supreme Court stated in *Printz*, and again in *Alden v. Maine*, just 11 years ago, quote, *When a 'Law for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions mentioned earlier, it is not a 'Law proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely an act of usurpation which deserves to be treated as such.*

Now, at the very next term in 2000, the Supreme Court said in *Morrison, "We always have rejected readings of the Commerce Clause in the scope of federal power that would permit Congress to exercise a police power."*

In her final reply memorandum, the Secretary notes how many times Virginia quotes this passage. And it has quoted it a lot, but it does so as a constant reminder that the Secretary has no answer for it. First she went through over 100 pages of briefs without acknowledging that that statement was made. Now in her final reply brief, she makes the dogmatic *ipse dixit*

assertion that the claimed power to order anyone who is engaged in no activity whatsoever, to do anything whatsoever, as long as it's integral to a scheme to handle the Secretary's efforts to regulate commerce, is somehow not tantamount to a national police power - but it is.

The claim that the health care market is unique here because everyone will enter it at some point provides no limiting principle, and therefore lacks constitutional significance. The same can be said of other, indeed all, essentials and major goods of life, including food, clothing, shelter, fuel, transportation. And if -- if the fact that you're going to buy something in the future creates federal power to regulate, then the federal government has an unlimited national police power. And that's -- the Supreme Court has said, no, it doesn't, and anytime it tries to exercise such a power, we have always refused it.

Now, other than the mantra, "*health care is unique*", the Secretary's actual arguments amount to a claim that there are no limits. Under the Necessary and Proper Clause, she argues that any, quote, *A provision that is rationally related to the exercise of an enumerated power must be sustained unless it*

violates an independent constitutional prohibition. We have already been through that. That's not true because it's contrary to *Morrison* and *Printz* and *New York v. United States.*

Jumping ahead for a moment in her tax argument. The Secretary says, quote, *The minimum coverage provision imposes pecuniary burdens for a public purpose, and so is an exercise of the taxing power.* This is a claim that any command or any subject that is joined with a financial exaction is within the power of Congress. And as we will see when we get to the taxing authority, that of course is not true for about seven reasons.

As the former Attorneys General point out, there is a time-tested way to find out who is right about the Necessary and Proper Clause. Simply ask the question asked by Chief Justice Marshall in *M'Culloch v. Maryland*, and by the Court in *Printz*, and that question is, is the claimed power a great and remarkable one that one would expect to be listed in the Constitution as an enumerated power rather than left to implication as a near means. The claimed power, which by the way is contrary to every instinct of the common law, which is not disposed to regulate inactivity, this -- this claimed power to order a citizen into action by buying

goods and services from another citizen for the convenience of Congress in regulating commerce is, in the words of John Marshall, quote, *A great substantive and independent power which cannot be implied as incidental to other powers.* Not only would such a great power have to have been enumerated, not implied, the claimed power violates the basic contract itself, the fundamental understanding.

Alexander Hamilton recognized that had such a power been spelled out in the Constitution, had it been enumerated, the Constitution would have failed of adoption. Now, this is a statement from an arch-federalist. A friend of national power. He said that any claim to be able to reach into every aspect of domestic life would be a power that if it was in the constitution should result in the Constitution as a rejection.

Now furthermore, there's even a presumption, or at least an inference, against a claim of power made for the first time after over 220 years of constitutional existence. As *Printz* teaches, quote, *The utter lack of statutes*, unquote, exercising such a power in the past, quote, *suggests an assumed absence of such power*. End quote.

The Secretary's supposed examples of the

regulation of inactivity in the past are more than feeble. They are just not examples at all. All of them involve the regulation of those who are already voluntarily acting. Or like the draft or jury duty or census enumeration, they are traditional duties and privileges of citizenship tethered to an enumerated power under the Commerce Clause.

The Secretary's continued insistence that eminent domain is a coerced transaction rather than a taking is extremely idiosyncratic when the Supreme Court first upheld eminent domain for the federal government. It noted that it was at least implicit in the Fifth Amendment because of the prohibition of taking without just compensation.

She suggests that *Nurad*, the Fourth Circuit case that she cites, provides the ruling decision in this case because in *Nurad* the defendant was liable, strictly liable, because of a leak from a tank on the land that the defendant had acted to purchase. *Nurad* is not even a Commerce Clause case. It is a statutory construction case which construes the word *"discharge"* in CERCLA. And not only that, but as an Eleventh Circuit case as we pointed out in the brief cited by the Secretary shows, because Congress didn't put any jurisdictional element in CERCLA, in each and every

case, the defendant, if he wishes, can raise a constitutional challenge that his conduct is not within the Commerce Clause, and the defendants in *Nurad* didn't even bother. Other than a few false examples, the Secretary steadfastly refuses to join issue on history because she cannot possibly profit from any such discussion. And also because the five part *Comstock* test is deeply historical, she looses under that as well.

It is interesting to note in regard to *Comstock* that her *ipse dixit* approach to this case runs so far as to cause her to accuse the Commonwealth of making up the five part test, although that's what Justice Thomas called it in dissent, and that's the normal way of interpreting the statement in the majority opinion that there, quote, *five considerations,* end quote, which, quote, *taken together*, end quote, produced the holding.

Now, the Secretary wishes to raise up the question of whether or not we have chosen wisely to make a facial versus an as applied challenge. And as we pointed out in the brief, all claims that Congress has exceeded its enumerated powers are necessarily facial.

In the *Hibbs* case, Scalia in a dissent said, quote, *When a litigant claims that legislation has denied him individual rights secured by the*

Constitution, the Court ordinarily asks first whether the legislation is constitutional as applied to him. When, on the other hand a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional on its face.

Now, here of course we're not just relying on a dissent because in explaining this basic distinction, Scalia, who by the way is the biggest friend of the distinction on the Court because he keeps asking the Court to apply it in *Rowe v. Wade* cases where they don't consistently do so, we're not just relying on his dissent. He cites *Lopez* and *Morrison* in a convincing way.

THE COURT: Well, Mr. Getchell, if the focus of your attack, as it appears to be, is not on the effect that legislation has to individuals but to its inception, your argument is that this basically is stillborn legislation because it should never have been produced by Congress. If it's legal and produced, doesn't it adversely affect everyone the same way?

MR. GETCHELL: Yes. Well, it affects us the same way in every possible application. Remember, we're claiming a sovereign injury. That is the injury. They're still arguing as though the standing issue has

been resolved because they're arguing as though we're making a *parens patriae* claim on behalf of citizens, and therefore some of the citizens may be affected one way and some another.

THE COURT: If you look at the few cases that deal with facial versus applied constitutional challenges, *Salerno* and the West Virginia case they rely upon, is there a difference? Is there a difference between legislation -- between the challenge that Congress exceeded its power in enacting it as opposed to the fact that what they enacted has unlawful application or unlawful effect on individuals? Is there a distinction in the case law, and where is it?

MR. GETCHELL: There is such a distinction.

THE COURT: Point it out.

MR. GETCHELL: And it is set out, I think, in the Law Review article. I think there was a Stanford Law Review article.

THE COURT: But they don't have the power of the law. Some professors think they do, but they don't.

MR. GETCHELL: They have collected more cases than I have before me now.

THE COURT: All right.

MR. GETCHELL: The distinction is between *Morrison* and *Lopez*. Remember, *Lopez* was a -- *Lopez* was a claim

that the federal government could not pass the safe school act which prohibited a gun being within a thousand feet of a school. And the Court noted in that opinion that Congress could have put a jurisdictional element in the case that said if the guns moved in interstate commerce, then it can't be within a thousand feet of a school.

And that fact didn't cause them to then do an as applied challenge even though there were people out there that could have been regulated by a different means. And that's the case here. The fact that they might have regulated actors, the fact that there might be some actors in the whole group of people regulated, just meant that Congress could have tried to do it differently. But by picking the regulation of inactivity, it picked the one means it couldn't do, and so that's the distinction.

And the nature of the sovereign injury, as I say, makes the terms facial and as applied distinctions without a difference. Because an as applied challenge would ask whether Virginia's claim succeeds under a single known set of circumstances, it's no different than calling it a facial claim. I mean, our sovereign injury is the same. Either Virginia's police power validly applies to the status of being uninsured, or

the federal government can regulate that status under the Commerce Clause. The question is binary. There's one application really to be considered, and that binary question is to be answered by comparing the laws, the federal law and the state law, to each other, and then to the Constitution aided by the usual sources of constitutional construction, including text, historical context, tradition, and precedent. I.e., a facial analysis.

Nor is it true that the Act regulates the activity of dropping insurance, or getting treatment, or paying for it. Congress chose not to regulate those activities. Instead, Congress is trying to regulate a mere status that exists after any decision to drop insurance and prior to any receipt of medical care. Nor does it matter that Congress might have validly regulated a subset of those persons that it's attempting to invalidly regulate. And we have gone through why *Lopez* establishes that principle.

And so I would turn now to the taxing power. Three former Attorneys General of the United States have said that, quote, *The government's efforts to re-characterize the penalty as a tax are frivolous*. In answer to the Secretary's claim that Congress can command any act as long as it joins that command to a

financial exaction, the Attorneys General have framed a one word response, quote, *"nonsense."*

Although the tax argument at first blush may seem to give the Secretary an escape route from what is clearly an unconstitutional assertion of authority under the Commerce Clause, upon closer examination, the tax argument collapses back into the Commerce Clause argument. That happens for a number of reasons.

THE COURT: Well, first of all, the federal government is arguing here, the Secretary, that there is no difference between a tax and a penalty, and the terms can almost be used interchangeably. That may be too strong a characterization. But they're contending that there's no legal distinction.

And that under the footnote 12 in *Bob Jones University v. Simon,* despite the fact that it's been commented on by subsequent cases, that that is still good law, and it indicates that the distinction is no longer -- has any legal significance. Is that not correct?

MR. GETCHELL: It seemed to me they're arguing something slightly different.

THE COURT: I'll let Mr. Gershengorn address it.

MR. GETCHELL: It seemed to me that they're arguing that in order to be a penalty which requires a

separate enumerated power, it has to be a criminal penalty. And that's just not grounded in the case law. If we look at *Kurth Ranch*, which they themselves cite, there's a civil penalty, and the Court --

THE COURT: But it has to be used for enforcement. Under the *Department of Revenue of Montana v. Kurth Ranch*, they indicated that it had to be incident to enforcement in order to be a penalty.

MR. GETCHELL: Right. I think the Attorneys General have done a good job of explaining the distinction. If you have a exaction for funding the government, and that's what -- and it's that class of cases that footnote 12 in *Bob Jones* talks about -

THE COURT: Yes.

MR. GETCHELL: - the Court used to worry about whether or not was a suppressive effect or a suppressive motive. And they talked about those as regulatory taxes in that sense. And what the footnote in -- or what *Bob Jones* says is that we're not going to worry about that kind of suppressive effect because all taxes have that kind of suppress effect to one extent or another.

THE COURT: But the Secretary argues here that this particular mandate is going to raise significant revenue for the federal government and that saves it.

MR. GETCHELL: Well, let's -- let's just start with the fact that in order to get to the taxing argument, they've got to first show it's a tax, okay. Because even -- even though they do try to suggest that the words chosen by Congress don't matter that much, that they do seem to concede if it really is a regulatory penalty, then it needs to have an enumerated power.

THE COURT: Does the fact that Congress used the word *"penalty"* in one portion of the division and the term *"tax"* with respect to the medical devices and I think the tanning salons, does that have significance to a court trying to define what that term means?

MR. GETCHELL: Yes, it does, Your Honor.

THE COURT: Okay.

MR. GETCHELL: And it's the District Court of Northern District of Florida who's found that on October the 14th. The Secretary argues that it doesn't matter at all. Well, it may not be dispositive, but it certainly matters.

And you start with a claim that is a penalty. Congress enacts it and calls it a penalty. The two political branches of the government argued strenuously that it was not a tax. And so you certainly start with the presumption that it's a penalty and not a tax

because Congress has said so. And what Congress has called it may in fact be dispositive because we cite the *Board of Trustees of University of Illinois* case where the Supreme Court said if Congress has claimed that it's enacting a provision pursuant to the Commerce Clause, we're not going to relabel it as a tax.

So, the first problem is that this is not a tax at all. And I can illustrate, I think quite clearly, why that's the case. Nobody contests that the penalty is in aid of the mandate. The mandate is not a tax, so this is a mandate penalty, not a tax penalty - the word that the Secretary has made up. And it is --

THE COURT: But you don't argue or you don't contest the fact that it is intended to generate revenue?

MR. GETCHELL: No, I think it's not intended to generate revenue because if it works to accomplish its purpose, then everyone buys insurance and no revenue is raised. And you will note in the Act that the Act lists itself of its revenue-raising measures, and the mandated penalty is not included in this list. So we start with -- we start with deference to Congress that it's a penalty and it's not a tax. And we know that if it's just a penalty, then it needs an enumerated power to support it. And the only possible enumerated power

is the Commerce Clause, and so we've collapsed back into the Commerce Clause and the whole tax argument has been a needless excursion.

And we need to remember too that whether something is a penalty instead of a tax is a question that's justiciable. Ultimately, it's for the Courts, as *Rosenberger* said recently at 515 U.S. citing *La Franca*. And *La Franca* says, quote, *The two words*, that is tax and penalty, quote, *are not interchangeable one for the other. No mere exercise of lexicography can alter the essential nature of an act or thing. And if an exaction be clearly a penalty, it cannot be converted into a tax by the simple expedience of calling it such.*

And this -- this principle was reaffirmed as recently as 1996 when the Supreme Court said in *Reorganized CF & I Fabricators* citing *La Franca*, quote, *A tax is an enforced contribution to provide for the support of government. A penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.*

There the Court found that what Congress had called a tax was actually a penalty. Here, of course, Congress itself agreed that this penalty is a penalty.

I think the *Fabricators*' case is extremely

important because it supports the distinction that the three former Attorneys General made in this case between a penalty and a tax. A tax is the exaction for funding the government, and under modern doctrine, we no longer worry about whether that's suppressive or not suppressive.

A penalty is an exaction that's imposed for violating a command. And that's what we have here. The mandate is the command. The penalty is the penalty.

Now, we know, as I said from the *Board of Trustees of University of Illinois* that the Supreme Court went on to relabel what Congress calls Commerce Clause power a tax, but substantively because Congress announced the desire to regulate, and then joined a command to an exaction, it's a penalty as a matter of law.

And I think at this point the case is over for the Secretary on the tax argument, and that explains why a desperately, recklessly, and in the teeth of controlling authority, the Secretary argues that only criminal penalties are penalties for the purpose of requiring an enumerated power. And that's just not -- not what unlawful means. If it's an exaction for doing something unlawful, unlawful means in *La Franca* civil penalties as well as criminal penalties. And this

Court, and in all district courts, impose civil penalties all the time. They have to be supported by an enumerated power.

We know from *Kurth Ranch* that the Court doesn't draw a distinction between civil penalties and criminal penalties because there the question was whether or not it was a tax or a civil penalty.

THE COURT: That was an interesting case though because if you tax someone for the production of marijuana 10%, it was an underlying criminal offense but yet it was a civil penalty. So it's somewhat of a hybrid under the facts of that case.

MR. GETCHELL: Well, but as they analyzed it, the criminal process was already completely over because it was a double jeopardy case.

THE COURT: Very true.

MR. GETCHELL: And I think in the other argument on the other side was that it was -- that it was part of the criminal proceeding, and the majority said -

THE COURT: For double jeopardy purposes. Right.

MR. GETCHELL: - we'll call it a civil penalty, and we do call it a civil penalty, but it's still double jeopardy.

THE COURT: Yes, sir.

MR. GETCHELL: The Black's Law Dictionary defines

unlawful, and it specifically notes that the word *"unlawful"* does not require criminality, but it is broad enough to encompass it. You know, this -- this is idiosyncratic word usage, as the Northern District of California -- I mean, Florida recognized in rejecting the very argument. That's the one thing that the district court did in Florida on substance. It ruled on a 12(b)(6) standard for the rest of the case, but on taxes it entered final judgment and dismissed the tax count.

THE COURT: Yes.

MR. GETCHELL: The argument that the penalty must be a tax because it's codified in the Internal Revenue Code is contrary to 26 U.S.C. 7806(b). And there's similar language in *CF & I Fabricators* that the placement of a provision in the Internal Revenue Code raises no presumption about what it is.

Now, even if the penalty were renamed a tax, the Secretary would still lose undermining authority. As recently as 1994, the Court wrote, quote, *Yet we have also recognized that there comes a time in the extension of the penalizing features of the so-called tax when it looses its character as such and becomes a mere penalty with the characteristics of regulation and punishment*, end quote, *"Kurth Ranch,"* quoting the *Child*

Labor Tax Case. And so we have -- we have a different use of words.

Rhetorical term I guess is equivocation when the Secretary discusses footnote 12 in *Bob Jones* because on the one hand there's something called regulatory facts that just means ordinary taxes that have a suppressive effect. That's gone.

Then there are regulatory penalties whether or not they're called a tax. At some point along the extension, the Court says, no, it becomes a regulation that has to be supported by enumerated power. The *Child Labor Tax Case* is still binding on this Court.

Butler stands for the same proposition. *Butler* has been repeatedly cited by the Secretary as being good law.

The Secretary's notion that the *Child Labor Tax Case* has somehow been implied but overruled in *Sonzinsky* is clearly wrong because *Sonzinsky* distinguishes the *Child Labor Tax Case*, thereby recognizing its continued validity. And *in Sonzinsky*, it's an interesting case, too, for another reason. The Northern District of Florida said that the language in *Sonzinsky* that said if we have something that is -- that purports to be a tax on its face, then we won't -- we won't look to motive. And the Northern District of

Florida said, you know, the negative corollary of that is that if something is called a penalty, it's a penalty.

The Secretary's three law professor *amici* recognized the *Child Labor Tax Case* and *Butler* have not been overruled, and therefore under *de Quijas* they are binding. But there's no reason to suppose that the Supreme Court would even want to overrule because they are simply manifestations of what the court said in *Morrison* that the Supreme Court has always rejected readings of the scope of federal power that would permit Congress to exercise a national police power. And that's what the *Child Labor Tax Case* says it can't do, and that's what *Butler* says it can't do. And *Child Labor Tax* was cited as recently as 1994. So there's no basis for saying the Supreme Court would even want to overrule them once we've seen that that footnote 12 in *Bob Jones* isn't even talking about the same kind of regulatory tax that the child tax -- *Child Labor Tax Case* in *Butler* are talking about.

As I say, the Attorneys General have done an excellent job in reconciling all of the tax cases. Putting aside the direct taxes capitation of land which must be apportioned, all exactions on account of conduct are taxes which will be upheld without

collateral inquiry into motive, even though there's some suppressive affect and suppressive intent because all such taxes have a suppressive affect to a certain degree.

But "commands" they point out, "commands" joined to exactions are regulatory penalties which must be tethered to an enumerated power. This is why Congress can tax things it cannot regulate, but cannot regulate through taxation things that it cannot regulate.

Now, in the end, the problem with the tax argument is the same problem as with the Commerce Clause argument. It is anti-historical and contrary to precedent indeed, because the Secretary's tax argument collapses back into a Commerce Clause argument under the tax cases is properly understood. It is the same argument, an argument that fails because Congress acted beyond the affirmative and the negative outer limits of the Commerce Clause.

So the question then becomes to what remedy is the Commonwealth entitled, and that raises the issue of severance. A finding that the mandated penalty are unconstitutional is fatal to PPACA as a whole. The standard is the one that was articulated by the U.S. Supreme Court in *Alaska Airlines*. And there are two examples that *Alaska Airlines* gives with respect to

severance.

First -- well, just as a threshold matter, statutes containing severability clauses are entitled to a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. And there is no severance clause here, and therefore we don't entertain that presumption.

The -- contrary, however, to the Secretary's briefing, Virginia has never claimed that the absence of the severability clause means the whole Act necessarily fails. It simply removes that particular presumption.

What we -- what we do argue is that *Alaska Airlines* stands for the proposition that otherwise unconstitutional parts of an enactment cannot be severed unless it is evident that Congress would have passed those provisions without the unconstitutional provisions. And the Court gave two examples in *Alaska Airlines*. And one is what I'll call the legislative bargain.

THE COURT: Of course there was an awful lot in this Bill that didn't have any relationship at all to health care. A significant portion didn't have anything to do with health care. How does it affect

that?

MR. GETCHELL: Well, that's -- the most direct way it affects it is under the legislative bargain prong. Because this -- this Act was -- was passed under almost unique parliamentary circumstances. And -- and it passed with the minimum number of votes necessary for closure in the Senate, and then it was never even intended to be the Bill that ultimately was passed.

When the election in Massachusetts destroyed the ability to invoke closure, it became apparent that the Act, if it passed at all, would have to pass unchanged. It passed through the House with the narrowest of margins of 219 congressmen of one party who voted for it. And so it seems to me that because we're dealing with not adjudicative facts but legislative and constitutional facts, this Court is entitled to conclude that this Bill would not have passed without the mandate and the penalty at all. And under the legislative bargain, everything falls. So that would be the first argument.

There's another example under *Alaska Airlines*, which is that clearly Congress would never intend to pass -- to pass provisions that don't work if you strike the unconstitutional prong. And the Secretary has conceded that if the mandated penalty falls, that

the insurance regulation falls. The prohibition on the use of preexisting conditions, ratings, cancellations - all of those fall.

But she is trying to save the Medicare and Medicaid changes. And there I would say her own argument works to her disadvantage because she has argued repeatedly that the core of PPACA was to change how health care is paid for. And so it seems to me that we must assume that Congress would not have passed any of the payment provisions without the mandated penalty because they don't work together as Congress made the scheme hoping that it would work.

THE COURT: That's quite a cluster of assumptions, I must admit.

MR. GETCHELL: I'm sorry?

THE COURT: I say that does require quite a cluster of assumptions though.

MR. GETCHELL: If we start with the proposition that -- with the concession that the -- if insurance part goes down, and so what we're fighting over under that wing, if you don't accept the legislative bargain analysis but only the workability analysis, what we're fighting over is whether or not Medicare and Medicaid changes were part of the same system as the mandated penalty because if so, then --

then the whole system can't work with the mandated penalty taken out. That's what we would ask the Court to consider.

THE COURT: All right.

MR. GETCHELL: The Secretary, as I say, has said that the ACA regulates economic decisions regarding the way in which health care services are paid for. The Act regulates payment for those services through employer sponsored health insurance and governmental programs such as Medicaid, and through insurance sold to individuals or to small groups and in exchanges. The Act also regulates the terms of health care insurance policies in industry practices, such as preexisting medical conditions.

Again, I would just argue that if the Secretary herself has described the package of financing in this way, and clearly the mandated penalty are at the heart of the financing, then the financing part should fall.

Under the legislative bargain part, everything would fall, including things like abstinence education, which the Secretary refuses as --

THE COURT: The only problem with that argument is that this Bill has more moving parts than a Swiss watch, and I just don't know whether or not -- I hear you.

MR. GETCHELL: Right. And I'm just -- I just offer for the Court's consideration that under the legislative bargaining approach, everything would fall.

And then under the workability approach, at least we ought to look at the parts that were intended to operate together in deciding what to strike.

THE COURT: All right.

MR. GETCHELL: So the final -- the final issue then becomes, as briefed by the parties, is if you do declare the mandated penalty unconstitutional, is it appropriate to issue an injunction. The Secretary suggests that an injunction is unnecessary because, quote, *A declaratory judgment provides adequate relief as against an executive officer as it will not be presumed that that officer will go before the judgment of the Court.*

However, I'm confused by the qualification she makes. She qualifies that statement by suggesting she would only be bound by this Court's decision, quote, *After appellate review is exhausted.* So if absent some clarification of that, we would suggest that we have clearly met the four factor test that the Supreme Court has imposed for the award of an injunction, and we would pray for such relief.

I'll reserve the rest of my time.

THE COURT: All right.

Mr. Gershengorn.

MR. GERSHENGORN: Thank you, Your Honor. May it please the Court. Ian Gershengorn for the United States.

THE COURT: Yes, sir. Nice to have you here this morning.

MR. GERSHENGORN: Patient Protection and Affordable Care Act regelates the markets of health insurance and health care which collectively constitute more than one-sixth of the national economy. It builds on existing federal regulation in order to stem spiraling health care costs, and to fundamentally change the way Americans pay for their health care services. It does so principally by changing the way Americans purchase health insurance, and making that health insurance more widely available and more affordable. And health insurance is a principal way that Americans pay for health care.

What the Act does is expand Medicaid eligibility bringing millions into its -- within its coverage. The Act also provides for health care exchanges making health insurance more affordable for individuals and small businesses. It directly reforms insurance companies requiring them in eliminating preexisting

condition exclusions -- putting in a preexisting condition exclusion, and making sure that individuals who have cancer, and other debilitating illnesses, are not charged exorbitant rates, or denied coverage altogether.

And in the minimum coverage provision, Congress sought to change the way Americans finance their health care services by encouraging individuals to pay for those health care services now through insurance rather than at the time of service out-of-pocket when many individuals cannot make the payments, and costs are shifted to other participants in the industry.

Virginia has alleged that the minimum coverage provision is unconstitutional, but accepting that argument would require this Court to adopt -- to resurrect doctrines and approaches to the Commerce Clause and the tax power that the Supreme Court laid to rest more than 70 years ago. Virginia is free to disagree with the policy in the Affordable Health Care Act, but it is not entitled to undue decades of settled law to get this Court to invalidate it. The government's motion for summary judgment should be granted.

Let me turn first to the Commerce Clause. Congress saw what it perceived to be markets in crisis.

The health care market involved more than $2.5 trillion in spending, and was expected to double over the next decade. Despite that, more that 45 million people were without insurance, and millions more were being denied coverage or charged exorbitant rates because of preexisting conditions. The Affordable Care Act attempts to address that economic and market failure, and it does so by the way I've outlined: Through Medicaid changes, through employer incentives, through health care exchanges, and through direct reform of insurance policies. It also does it through the minimum coverage provision.

And what Congress understood was that insurance is principally about how and when Americans will pay for health care services that they will inevitably consume. That --

THE COURT: But all that being said, what this really distills down to is whether or not you can compel someone to make a decision when they're not inclined to do so otherwise.

MR. GERSHENGORN: And, Your Honor, --

THE COURT: And that could apply, and I don't want to go back and rehash things we discussed during the prior hearing, but that could apply to one's decision to buy an automobile, to join a gym, to eat asparagus.

I mean, it's boundless under your theory.

MR. GERSHENGORN: And, Your Honor, it is absolutely not, and I would like to explain why.

There are -- the core of the Commonwealth's argument is that this is somehow passivity. And it is absolutely not passivity. It is not inactivity.

What is going on is people are active participants in the health care services market. They are consuming medical services. The appearance of inactivity is just an illusion. The consumption of medical services without paying for them, and then shifting those costs, has a devastating effect on the economy.

THE COURT: But you're assuming that first of all that everyone needs medical care, which may have some basis to it, and you're assuming that there is a significant number of people who will not pay, and that therefore everybody should pay.

MR. GERSHENGORN: Your Honor, what Congress is -- has said is because you cannot predict which one -- who in fact -- which of the uninsured are the ones who will not pay, that Congress can legislate the group. And that's exactly, Your Honor, what the Fourth Circuit held in *Gould*.

That's exactly what the sex offender registration system was based on. It was based on an assumption

that some percent of the population, and we couldn't -- Congress couldn't tell, was going to recidivate. And in fact what the Fourth Circuit says, the estimates were 10-to 15% of sex offenders would recidivate.

And what Congress has said was since we can't tell, we will make the predictive judgment that the only way to make this work is to have complete registration. And Your Honor recognizing the difference, obviously, between sex offenders and health insurance.

THE COURT: Sure.

MR. GERSHENGORN: But that principle, that regulating for the group, is necessary in that sort of predictive circumstance is exactly what Congress is entitled to do.

THE COURT: But each and every person put themself in the class to be regulated by virtue of committing a crime. Not everyone in the United States put them in the class of being someone who gets health services and fails to pay for them. Not everyone is in that class.

MR. GERSHENGORN: If everybody -- but Congress doesn't have to wait until you fail to pay. The key point is the first half of Your Honor's sentence, which is that everybody puts themselves into the active category by consuming health care. What Congress -- it

is exactly -- that is exactly why this case is very much like many of the examples that we've cited for Your Honor. It is exactly like the other insurance requirements that Congress has imposed. It is like an insurance requirement on interstate truckers or on coal users, or things that are routine. It is precisely those people --

THE COURT: But those people --

MR. GERSHENGORN: But those people aren't participating in a -- I'm anticipating what I think is Your Honor's question. But those people are in a market. But the people who consume health care services are just as much in that market. There is a health care service -- there is a health care services market, and people are in that market, and they are using those health care services.

And the notion, Your Honor, that there is some passivity exception to the Constitution is simply at odds with case after case after case. If Your Honor looks at *Gould*, what the people were arguing -- what the defendants were arguing in *Gould* expressly, they said, this is a failure to register. You're penalizing for failure to register. And the Court said too bad. In *Sage*, when the Court -- when they said that this was a failure to send child support payments, and the Court

said too bad.

And in *Nurad*, although my -- my brother at the Bar suggests that that's different. And, Your Honor, it was exactly the same thing. And in *Nurad* what the Court will say -- what the company will say was that it was a failure to stop a leak. And the Court said no. That CERCLA covers that. And under the Commonwealth's theory, that's excluded.

This is exactly what Judge Steeh was getting at when he said that the Supreme Court has rejected over and over the idea that you can withdraw yourself from interstate commerce by saying I am not involved in some interstate commerce activity. And what Judge Steeh said in upholding this, we know exactly the grounds that the government argues.

THE COURT: But in each of the examples you give, someone took an affirmative act to place themself within a class that is subject to regulation. In the case of buying property, there's a transaction you enter into, and that makes you responsible. In the case of the interstate trucker, they bought a truck and engaged in interstate travel.

Here you have someone who is totally passive in a state of equipoise, doesn't want insurance, wants the government to leave them alone, and you say, no, got to

have insurance.

MR. GERSHENGORN: Your Honor, that's the same as the interstate trucker or the coal operator who says I'm absolutely passive in the insurance market and I don't want insurance. In fact, what the Commonwealth said --

THE COURT: But they're driving a truck on the highway.

MR. GERSHENGORN: But what the Commonwealth said this morning -- right, but the other -- but the people who are subject to this regulation are consuming medical services. It's every bit as much of a market, Your Honor, as driving -- as interstate trucking. It's not the -- the market for medical services is no different from a Commerce Clause perspective than the market for coal or the market for -- or the market for interstate trucking. They are in that market.

And what the Commonwealth said this morning, Your Honor, which I think they had to do, was that Congress could have conditioned the actual point of sale treatment on getting insurance because that, I think even the Commonwealth has said this morning, would be an economic transaction of the kind that would trigger -- that would trigger under the passivity approach would allow the Commonwealth to regulate.

But that, in this market, is -- if Congress could do that, then it can surely do what it did here because Congress was able to make two -- two conclusions. First of all, it would be a crazy system to require people as a condition of treatment to have insurance when they show up at the emergency room door. What Virginia is saying is oh, yeah, Congress can do that as long as we're happy to let the uninsured die on the emergency room floor. But Congress is surely allowed to make the judgment that we're not going to do that, and the Commerce Clause does not prevent them from doing so.

The other thing, Your Honor, is that at that point, it's just a question of timing. In this unique market where Congress is able to -- where Congress can make the judgment that everyone is going to use medical services at some point in their life, that Congress could then make the judgment that we don't need to wait until they actually show up at the doctor's office in order to -- in order to impose the requirement.

And of course it has to be that way because the only way the system works to prevent the uncompensated care is to require the insurance ahead of time; otherwise, it is not insurance at all. And so what Congress has done is taken a market -- and, Your Honor,

I know that -- I recognize from our last discussion that this is a critical point, and I need to say it again, the market for medical services is the same as the market for trucking. And the people who are engaged in the market for medical services are engaged in that market just as much as the interstate trucker. And likewise, the trucker is just as passive in the insurance market. He is saying, I don't want insurance just as much as the individuals are saying I don't want insurance.

THE COURT: Well, he or she is only passive when they decide not to drive their truck.

MR. GERSHENGORN: Right, Your Honor. But it's precisely that difference that gives Congress the authority to legislate it. That's our point, is that in every other market, this is where the whole parade of horribles makes the -- is not a legitimate problem here. In every other market, of course the trucker can -- the trucker or the coal operator, or anybody else, can elect not to participate in that one market.

But no one, virtually no one except perhaps the hermit up, you know, in the Rockies somewhere, no one else can make the judgment that they are not going to participate in the health care market. You cannot opt out of the health care market. And that is precisely

why the entire parade of horribles is exactly that. It's just -- it's a figment of the Commonwealth's imagination.

It is because there is something unique. You can't opt out of the health care market the way you can the interstate trucking.

THE COURT: But it also assumes that the average person is not going to pay for their health care. It also assumes that they're not going to pay cash rather than use insurance.

MR. GERSHENGORN: No, Your Honor, I don't think it does assume that the average person does. What it does is take actual documented affects and say that collectively the group of uninsured imposes a number of costs. And it's not just cost-shifting, but it is among those cost-shifts. It is $43 billion annually, a number that the Commonwealth doesn't disputes.

It is job loss -- job lock where people are hesitant to move from one job to another, 25% more unlikely, causing $10 billion in harm to the economy. It's bankruptcy. Sixty-two percent of bankruptcies are caused by medical services providers. And it's premium spiral. These are a whole series of effects that Congress was addressing to get at a very substantial and real problem.

THE COURT: In the final analysis, isn't this the fact that there are a number of people that cannot afford health care, cannot afford medical treatment, so everybody is going to pay for it?

MR. GERSHENGORN: Your Honor, I think that there is -- there are -- in some answer to that, the answer is that collectively the -- collectively, the uninsured do impose these burdens. The problem is that --

THE COURT: So everybody else is going to pay?

MR. GERSHENGORN: But the problem when you say *"everybody else,"* Your Honor, it suggests that we can tell ahead -- the only reason why I'm sort of pushing back on Your Honor's question is because the only reason that -- I think Your Honor's question seems, or presumes, or could be read as presuming, that there is a group that we can identify that are not going to be able to pay, and so those people -- if we could just regulate those people, then we would all be fine, and the rest of us would be fine.

But of course the problem is that no one can tell whether they're going to be the one hit by the bus, whether they're going to be the one that gets cancer. And that is precisely because you can't tell ahead of time. Just like in *Gould*, you can't tell who the recidivists are. You can't tell who the uncompensated

are going to be that causes this very problem.

The notion, Your Honor, that somehow this is unprecedented and that that's somehow fatal, and sort of wrapped up in this whole idea, it's just one that I don't accept for a number of reasons. I mean, it is -- the legislation is unprecedented in the sense that Congress has adopted an approach to a unique market.

But in *Condon v. Reno*, it is unprecedented that the federal government would try to regulate, drop the sale of driver's -- of driver's license info. In *Gould*, it was unprecedented that Congress would set up a nationwide sex offender registration system. In *Heart of Atlanta Motel*, it was unprecedented that Congress would pass the Civil Rights Act. That didn't stop the Court from upholding it.

And more broadly, I think that the whole approach, Your Honor, gets the analysis of this whole focus on unprecedented, gets it exactly backwards. The legislation comes from Congress with a presumption of constitutionality, and so there has to be a basis in the case law to strike it down. And in the last 70 years, although the Commonwealth keeps trying to go back from the Commerce Clause perspective back to the 1800s, and that's fine, that's exactly what the Supreme Court was doing in the 20s and 30s, but then there was

a break point. And for the last 70 years, there have been exactly two, exactly two, decisions that struck down the -- struck down legislation on grounds like the Commonwealth is urging. And those two decisions, *Lopez* and *Morrison*, are a million miles from this case.

Neither one of those was part of a comprehensive scheme, which this legislation is. Neither one of those was directed towards reforming an economic market, as this legislation is. And each one of those required a piling of inference on inference on inference to get to the economic affect. This is Congress's effort to reform and restructure two core economic markets that together count for one-sixth of the national economy.

I also want to emphasize, Your Honor -- I should say, so there is no -- in terms of what's unprecedented, what's unprecedented is a passivity exception to the Constitution. There is no such thing. It's in the insurance reforms I talked about. In the *Gold Clause Cases*, those are people sitting at home admiring their gold bars. And Congress said you've got to turn those in. If there was anything where somebody had opted out of the economy more than there, and the Court held that that was acceptable.

THE COURT: But they took the affirmative act of

purchasing the gold.

MR. GERSHENGORN: Well, it's unclear, Your Honor, how they got the gold. They had it. I mean, they got it somewhere.

THE COURT: Well, there had to be some transaction that put it in their possession whether it be by inheritance, by purchase, or by theft.

MR. GERSHENGORN: Right.

THE COURT: Right?

MR. GERSHENGORN: Well, right. It had to get to them somehow. But all I'm saying, Your Honor, is that those people were not in a market. Those people were sitting at home.

Whether it's the *Gold Clause Cases* or the failure to register cases, those are all situations essentially -- essentially what the Commonwealth is arguing --

THE COURT: Well, if you possess gold, which is a standard medium, you are in the market by possession, just like they were in *Wichard*.

MR. GERSHENGORN: Right. And what I'm saying, Your Honor, is that by the same token, those same people are in the market for health care services.

Now, what the Commonwealth suggests is they may be in there involuntarily. But then that is not a difference that has any -- any force with respect --

with respect to the Constitution.

The question isn't -- the touchstone of the Commerce Clause is whether there is a substantial affect on interstate commerce. The touchstone is not voluntary.

Now, Your Honor, sort of this discussion I think has also sort of slighted the second half of the Commerce Clause argument, which is very much the integral -- an integral scheme, and necessary to what everybody agrees is proper interstate commerce regulation, which is of course the regulation of the insurance companies and the insurance contracts. And those are things like insurance companies can't exclude people who have preexisting conditions. They can't charge different rates for people based on their health status or the existence of a disease. They can't put lifetime caps on limits. So those are -- those are absolutely clearly an indisputable part of interstate commerce.

And so what Congress said was, in order -- and in an express finding by Congress, that in order to make those reforms work, the individual mandate was necessary. And of course that was based not just on something Congress pointed out here, but on actual testimony from an economist who said that the insurance

markets in those situations without the individual mandate would implode precisely because people would know that with -- that if they got sick they could get insurance at any time, and so of course they would opt out of the insurance market which would leave only the sickest behind which would cause the premiums to go up which could cause more people to come out of the market and then this market c literally fall apart. And that was based again not just on economic testimony, but on the experience of New York and New Jersey which was before Congress. That kind of regulation pursuant to the -- to the Commerce Clause is within the -- absolutely within the Commerce Clause power.

Now, what -- what the Commonwealth suggests is somehow that it's not permissible because it's not economic activity. Well, as we said, we think it is economic activity. But the case law is crystal-clear. And this is exactly what Justice Scalia was talking about in *Raich* when he says, *"Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."*

Now, what the Commonwealth keeps quoting, which is Justice Scalia's -- or Justice Scalia joining Justice Thomas' dissent in *Comstock*, it's talking about

something different, which is the aggregation of noneconomic activity. And Justice Scalia, based on *Lopez*, said you can't do that.

But Justice Scalia was crystal-clear in *Raich*, as was the majority in *Raich*, that the regulation of even noneconomic activity could be used when it's integral to the scheme.

THE COURT: Is that strong supporting statement that gives you -- if you accept the fact that one's decision not to buy health insurance is activity, you have to first of all establish that, and then Scalia's statement adds to the strength of your argument.

MR. GERSHENGORN: Well, Your Honor, Justice Scalia wasn't addressing that. And we don't believe there is an activity/passivity discussion.

THE COURT: I understand that.

MR. GERSHENGORN: But that is exactly what -- but it is -- it is exactly what Judge Steeh -- what Judge Steeh held when he upheld the minimum coverage provision on exactly these grounds, which was that this was integral to the scheme, and that it was indeed, although is not necessary, but that it was indeed -- it was indeed activity in the sense that it was a decision about how to finance the purchase of medical services.

Now, Your Honor, there is I know from what the

other side is arguing and from Your Honor's questions, a concern about people who -- that the minimum coverage provision is extending to people who -- who have somehow opted out and are not participating in either market. And I think -- I mean, one thing that deserves emphasis is Your Honor's observation that this is a facial challenge. And quite frankly, the Commonwealth has the law on facial challenges completely wrong. The facial challenge under *Salerno*, the statute survives as long as --

THE COURT: Of course in *City of Chicago v. Morales* they say *that Salerno* is not good law.

MR. GERSHENGORN: Well, Your Honor, the Supreme Court has continued to apply it in case after case. I don't think that --

THE COURT: Those are cases though that involve application or the effect of the law. And I can't find any application, and correct me if I'm wrong, and I would appreciate help on this, where there has been a challenge to the power of Congress to enact it.

MR. GERSHENGORN: No, Your Honor, I am not saying -- or the government is not saying -- the federal government is not saying that the State couldn't bring a facial challenge as was done in *Lopez* and as was done in *Morrison*. They clearly have the right to do that.

The distinction that we're suggesting is that the test under the facial challenge is if there are a substantial number of applications when it is constitutional, then the facial challenge fails. And that's exactly what Justice Scalia in the part that the Commonwealth for some reason they're stopping when they keep quoting *Gibbs*, but what Justice Scalia says is -- this is in *Hibbs*. He says, "*It seems, therefore, that for the purpose of defeating petitioners' challenge, it would have been enough for respondents to demonstrate that the statute was facially valid-i.e., that it could constitutionally be applied to some jurisdictions.*"

And so even if Your Honor -- even if the Commonwealth is correct that there is this exception for people who are purely passive, there is no doubt for that those who do actively participate and do engage in compensated care, that the statute is entirely constitutional. Now that may mean, as Justice Scalia went on to suggest, that there would be other people who have an as applied challenge.

But for the purpose of the facial challenge, it is absolutely the law that it has to be unconstitutional. And *Salerno* says unconstitutional in every case. But in any event, within a broad sweep.

And that's exactly what the Court did in *Sage*, the

Second Circuit decision. That's exactly the test that the D.C. Circuit applied in the *Nebraska* case. And so this is not something that's sort of new or novel for this circumstance. Indeed, it is the Commonwealth that's seeking to change the law on facial challenges.

THE COURT: But if you argue, Mr. Gershengorn, that Congress's exercise of power is to require a person to make a decision, every person would be forced to make a decision one way or the other. If requiring someone to go through that deliberative process, it exceeds the authority of Congress under the Commerce Clause, doesn't it affect everybody equally?

MR. GERSHENGORN: Your Honor, I don't think it does for this reason. There are people who are clearly -- what the statistics show is that in fact 62% of the people who are uninsured have purchased insurance within the last year. Those are people who are coming in and out on a regular basis, often month to month, in and out of the insurance market. The same statistics show -- or statistics also --

THE COURT: Yes, but your argument is based upon the status of being insured, and not the decision to buy or reject insurance.

MR. GERSHENGORN: Your Honor, I -- the -- I would say it differently. I would say the Commonwealth's

objection is that it covers people who even -- who are not in the insurance market and therefore are passive. And it covers people who are not in the health care service market and they're passive.

For the reasons that I've talked about, I think that's not the right way to look at it. But even if it were, there's no question that in fact the evidence that Congress sets forth is that many people, in fact the majority, are in and out of both markets. And when people are coming in and out of both markets like that, Congress has the authority to say we're going to regulate how you do it. Because the very fact that you are coming in and out the market, that you're buying insurance today and then dropping it the next month, and then buying it the next month, which is what the evidence shows is happening, that Congress has -- can say those purchasing decisions are having an impact on the interstate market.

And they're saying the same thing - the uninsured are going in, they are seeing the doctor, they are getting emergency room care and they are not paying. And Congress is not forced under the Commerce Clause to have billions and billions of dollars redistributed to other market participants on the grounds that they are powerless to do so.

Your Honor, I just want to -- just to try to nail down a couple of points. On the facial challenge, what the Commonwealth said was, Nor does it -- I'm trying to quote, and obviously I don't have the stenographer power, but what I wrote down was, Nor does it matter that Congress could have regulated a subset of these people.

But under the commerce -- under the facial challenge, not only does it matter, it's dispositive in our favor that once you say Congress could have regulated this subset, that's what makes the distinction between a facial challenge and an as applied challenge. They absolutely could do that. That is what *Hibbs* understood, and that's what -- and that is what *Salerno* requires.

With respect to *Comstock*, Your Honor, I do want to touch on that. We continue to assert that the Commonwealth has made up its five part test. And although they keep quoting Justice Thomas' dissent, that is his dissent, and he was ridiculing what the majority had done, but you, I think, will not find a single court that since then has applied *Comstock* as a five part test.

In fact, *United States v. Belfast* in the Eleventh Circuit recently applied *Comstock*, and applied the

regular test that has been around for 220 years. Indeed, it was quite extraordinary in a case like *Comstock*, which I think most people viewed as at the very, very edge of the Necessary and Proper Clause, that somehow the Court was -- had narrowed the test and yet still upheld the -- still upheld the provision at issue.

And so I think it is very clear that under the Necessary and Proper Clause, the integral nature justifies this regulation. Now, there has been some suggestion, particularly in one of the *Amicus* briefs, but also in the Commonwealth's brief, that -- that the Necessary and Proper Clause doesn't apply because somehow it's not direct enough. But I think for at least three reasons it's clear that this exercise of the power is -- was proper.

First of all, it actually is necessary, which of course isn't the test under necessary, ironically, but it actually is essential here. It's not just appropriate or helpful. The testimony was that the insurance reforms couldn't work without it.

There's some suggestion that it's -- second, that it's just modifying downstream affects. It's not actually affecting the insurance company's ability to comply, of course, and that's incorrect. Because the

testimony before Congress was that the insurance companies couldn't continue in the market, and in fact would go bankrupt because the market would implode. So we're not talking about downstream affects. We're talking about the very thing that enforces insurance companies to comply with the regulations.

And then the third thing that somehow this is improper and somehow too attenuated, I think it's exactly the opposite. The people who are the uninsured who are the subject of the minimum coverage provisions are the very ones who are benefiting from these insurance reforms. This is not imposing something on some third party when I say, well, in order to make this work we need you to -- we need you to pay the bill. These are the people who can, as a result of these reforms, purchase -- purchase insurance after they get sick. It's really quite an extraordinary thing that you get to purchase the fire insurance once the house is on fire. And so what Congress has said is in that situation we are going to have you go ahead.

And so, Your Honor, you know, all of the sort of -- stepping back. I know the concern that somehow this is a limitless police power. Judge Steeh addressed this in his Michigan decision, and he recognized that --

THE COURT: But his decision was only as to whether or not a preliminary injunction should issue.

MR. GERSHENGORN: No. No, Your Honor, that's not correct. Absolutely not correct. Excuse me, Your Honor. I didn't mean to offend.

THE COURT: That's okay. People tell me that all the time.

MR. GERSHENGORN: I apologize, Your Honor.

That's not correct. The parties had agreed ahead of time to convert it into a final decision.

THE COURT: I may have missed that in the opinion.

MR. GERSHENGORN: And what Judge Steeh has decided, that is a final and appealable decision on those two grounds. It is not a preliminary edict. He denied -- in fact, I believe he denied the preliminary injunction as moot in light of the fact that he had actually decided --

THE COURT: All right. I stand corrected then.

MR. GERSHENGORN: But it's very important because Judge Steeh's decision is the only decision that's reported under the Commerce Clause, and Judge Steeh upheld it. And he recognized in there precisely that the market, A, was unique; and that, B, that this was a financing decision; and that, C, there were the cost shifting.

I mean, all of the things that we're saying here today are precisely the ones that Judge Steeh found. And he recognized that this concern that somehow this allows you to regulate obesity is just unfounded. That that is not an economic matter. It's not a way to finance. The links are much more attenuate.

At that point, you really are getting into a sort of *Lopez* and *Morrison* concern. And then it's the same what the Commonwealth references over and over to a police power. This is not a police power because it is tethered quite precisely to a economic market. It is really the core in -- and stepping back, Your Honor, what -- what I think gives the government's argument its force is that unlike *Morrison*, and unlike *Lopez*, we are actually regulating one of the largest markets in the United States' economy. And to say somehow that that is not part of the Commerce Clause in the same way *that Lopez* and *Morrison* are, or that recognizing Congress's ability to regulate --

THE COURT: I don't think anyone quarrels with regulating the market isn't within the Commerce Clause. The question is, can you compel someone to enter that market.

MR. GERSHENGORN: Well, again, Your Honor, it's compelling -- it's -- it is instead forcing somebody to

pay for what they have already -- a market they have already entered. It is forcing them to pay for the health care services that they already have.

If I can turn to the tax argument.

THE COURT: Yes, sir. Please do.

MR. GERSHENGORN: So with respect to the tax argument, Your Honor, there are really -- I think the Commonwealth is really making two arguments. One, that this is not a tax. And, two, that if it is a tax, it's an improper one because you can't use the tax to regulate what you can't otherwise regulate. So let me start with the tax argument.

This is a tax. It is true that in the statute it is labeled a penalty, but it is an amendment to the Internal Revenue Code. It is something that you pay on your tax filing. If you don't pay taxes for a year -- you don't have to file for a particular year, you don't pay the penalty. It is enforced by the Secretary of the Treasury. It goes to general revenues. It is -- it is a tax.

Now, there are a couple of arguments that the --

THE COURT: Why then is 1501 prefaced by saying that it is an exercise of Commerce Clause power? Why did the members of Congress, as well as the President, deny to every person in America that it was not a tax?

Was it just tacking to the political winds at the time, or did it have substance to it?

MR. GERSHENGORN: Your Honor, I think there are a couple of things going on here. There is -- first of all, a tax -- let me start with the findings. With respect to the findings, of course Congress did not find in there that it was an exercise of the commerce power, per se. It made a series of findings that are relevant to that, but it never actually invoked the commerce power in 1501. What it says is this is --

THE COURT: But it never specifically invoked the taxation power either.

MR. GERSHENGORN: But the reason the distinction is critical, Your Honor, is because there are findings -- factual findings are relevant to the Commerce Clause power, but they're not relevant to a tax power. It is not based on a particular finding.

And so it's not surprising that when Congress is making factual findings, all of the factual findings relate to the Commerce Clause, not to the tax power, because there are no factual findings that need to be made.

Now with respect to invocation of the power, a couple of things. First of all, the Fourth Circuit has been as clear as can be that Congress does not have to

identify the power that it wants. That the *Abril* decision and what -- and the cases -- the cases cited there, and what the cases cited say is Congress, in usury, says whether Congress has the authority to adopt legislation is the question, not whether it correctly guessed the source of that power. And *Abril* said that, and the Supreme Court's ruled in the case, so that's the first point.

The second point is in *Leckie*, which I think is a critical decision here. It's quite similar. What *Leckie* was was a situation in which the -- was the Coal Act. And it involved premiums. And what Congress did was make a series of findings, all of which related to the Commerce Clause. Nevertheless, what the Fourth Circuit held in a decision that binds this Court in a way that it did not bind of course Judge Vinson, but in a decision that binds this Court, what the Fourth Circuit held was that was nonetheless an exercise of the taxing power. It was a tax even though there was no mention of the tax power.

Indeed, *Leckie* is even stronger and more helpful for us because what were the two things that *the Leckie* court pointed two saying that it was a tax? First of all, they've amended the Internal Revenue Code. And second, that the Secretary of Treasury has enforcement

powers, both of which are true in this case.

Now, one of the things that the Commonwealth says is that because of 7806, you can't look at the fact that it's in the Internal Revenue Code, but that is incorrect. What 7806 is about is placement within the Internal Revenue Code. You can't say, oh, look, it's in the miscellaneous excise tax provision, as this is, and draw something from that. And that has been the government's -- that is the correct understanding. It has never been the case that the fact that something is in the Internal Revenue Code at all is irrelevant. And indeed, *Leckie* and the Second Circuit case on which it relied, I'm blanking with the name, but it's cited in *Leckie*, both relied on the fact that it amended -- that the provision amended the Internal Revenue Code.

THE COURT: Two things that Judge Vinson relied upon that caught my eye.

MR. GERSHENGORN: Sure.

THE COURT: First of all, he also mentions the fact that in the House Bill, which was passed first, they referred to it, I believe, as a tax.

MR. GERSHENGORN: Uh-huh.

THE COURT: And the only way it could pass the Senate was for that word *"tax"* to be struck and the word *"penalty"* put in so that it would be consistent

with the representations that both the President and Congress made to the American people. Does that have any significance at all?

MR. GERSHENGORN: It doesn't, Your Honor, and let me explain why. I think it's very important, and I'm glad Your Honor brought it up. Judge Vinson, I think, was struck by a couple of things, which I want to address here. One is this history that there was a change from tax to penalty. And what Judge Vinson said was there has to be some significance to that.

The other, which is related to that, is that somehow this undermines accountability. I'd like to address each of those because I think they're both important. With respect to the change, it's important that Your Honor recall that the Supreme Court had said over and over that the labels don't matter. And so what they did was they changed from tax to penalty.

I'd like to -- to point Your Honor to the *Leckie* decision again because I think it is really -- it is really quite helpful here. The history of the *Leckie* tax, which turned out to be called a premium, was this, and it's laid out in *Barnhart v. Sigmon Coal*, 534 U.S. 438 at note 6. What happened was there was a coal -- a coal pension fund problem. Congress passed something that imposed a tax on coal producers, and was part of a

larger tax package. The President vetoed that. When it went back to Congress, Senator Rockefeller tried to put back in tax language, and Congress refused to enact it. Then what they did was they called it a premium, and put in a premium.

And yet in *Leckie*, what the Fourth Circuit held, which again is binding on this Court as was not on Judge Vinson, what the Fourth Circuit held was that was a tax. That was a situation in which the history is much clearer. That in fact they didn't want a tax. The President had vetoed it. Senator Rockefeller couldn't get it in, and yet it still came in. And again, this is all laid out in note 6 of *Sigmon Coal*. So that's the first part.

With respect to the sort of interchangeability point, which I take to be a concern, I would ask the Court to look at Section 1513 of the Act, which is a sort of an analogue to the individual -- to the minimum coverage provision for employers. And what is really remarkable, I think, in 1513 -- what 1513 does is create a new section of tax code, 26 U.S.C. 4980H. In 4980H(b)(1), it imposes an assessable payment on employers who don't have the right kind of plan. In 4980H(b)(2), it refers to the aggregate amount of the tax. So the thing that they just called an assessable

payment, Congress now calls a tax.

And then just on the next page, 4980H(c)(2) --

THE COURT: But the words "*assessable payment*" is not necessarily a term of art in tax law, whereas penalty and tax is.

MR. GERSHENGORN: If I could, Your Honor. You're exactly right, Your Honor. But if I could, 4980H(c)(2)(D) then says, "*Application of employer size to assessable penalties.*" And so within the exact same statute, within the exact same provision within paragraphs of each other, they refer to the exact same thing as an assessable payment, a tax, and an assessable penalty.

And so I think it's consistent with the idea that what Congress understood from case after case from the Supreme Court and from the Fourth Circuit was the labels are not dispositive. And, again, although the Commonwealth correctly - and if I was on their side I'd do the same - cites to *Reorganized CF & I*. What they don't say is the other decision that's cited in *Reorganized CF & I* over and over and over is *United States v. Sotelo*.

That is a case in which exactly the opposite of what happened in *Reogranized CF & I* happened, which is in *Reorganized CF & I* it's a tax. The Supreme Court

looked at it and said actually this is a penalty. In *Sotelo*, it said penalty, and the Supreme Court looked at it and said actually this is a tax. And so it's --

THE COURT: Now, in *Department of Revenue of Montana*, they do say there that you can call it a tax if you wish, but if it reaches the point where primarily it's designed to enforce, and where the payment is merely an incident of enforcement, it is a penalty. Does this cross that line?

MR. GERSHENGORN: It absolutely does not, Your Honor.

THE COURT: Well, the primary function here, as I think you would admit, is to require persons to purchase insurance. While it raises revenue, that's not the principal objective, is it?

MR. GERSHENGORN: Your Honor, I guess I would say I think that what's happened is the Commonwealth is collapsing two different items, which I'd like to parse out, if I could.

THE COURT: Okay.

MR. GERSHENGORN: The first is there is no doubt that there comes a point -- there's a difference between a tax and punishment. And if a penalty is punishment, then it's not part of the tax power. But what *Kurth Ranch*, in Your Honor's decision, and what

remains of cases like *Butler* and *Child Labor*, and cases like that, is there comes a point when something is punishment. But what goes into that question, whether something is punishment, is exactly what the Court talked about in *Kurth Ranch*, is it an exorbitant penalty? Does it have a *scienter* requirement? Does it deal with something that is elsewhere made criminal?

In *Kurth Ranch*, remember, Your Honor, it was a substantial penalty. It was on activity otherwise separately made criminal, and they tax -- the tax was imposed only after you had been arrested. In that situation, what the Court said is this punishment. It's not a situation in which anything that is sort of a quote, unquote, *enforcement*, which I take to mean a deterrent value. And that, I think, --

THE COURT: Are you arguing that there's nothing punitive about 1501?

MR. GERSHENGORN: I don't -- I absolutely am arguing that there is nothing punitive about it. That's not to say, Your Honor, that it doesn't deter. That's exactly what *Sanchez*, and all those cases are about. That's why I say there are two different strains of analysis that the Commonwealth has conflated.

The question about whether there is a regulatory

effect or a deterrent effect, that's something that Judge Vinson disposed of. And I think we couldn't have said it better than Judge Vinson said it, which is that's based on a series of distinctions with cases like the *Child Labor Case* that were repudiated in *Bob Jones University that* Judge Vinson said had a very short shelf life and couldn't really -- we couldn't have said it better than that.

That a situation in which he said, Well, doesn't this really deter? Doesn't this really more regulate than tax? That motive analysis is gone. That's what *Bob Jones* repudiated. That's what Judge Vinson repudiated or rejected.

What is left of those cases is not the -- and that's what *Sanchez* said. *"It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."* Even if the principal -- *"Even though the revenue obtained is obviously negligible,"* which of course this isn't, it's $4 billion annually, *"or the revenue purpose of the tax may be secondary."* *"Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."*

The question of, well, doesn't this really more

sort of push people to obey? That's not the test. That is what was going on prior to *Sanchez*, prior to *Sonzinsky*, prior to *Kahriger*. That is exactly the analysis, whether it's really revenue-raising or regulatory, *that Bob Jones* says doesn't exist, that Judge Vinson says doesn't exist.

What the Commonwealth here is saying, well, they're still citing *Bailey* and they're still citing *Butler*. Yeah, they're citing -- the cases they're citing *Butler* in *Kurth Ranch* to decide whether something is punishment. The analysis of whether something is punishment is very different than the analysis of is it too regulatory - too regulatory to something that the Supreme Court has said a federal judiciary shouldn't be decided and cannot decide. And because it is precisely --

THE COURT: Well, as a result of making the payment under that section for not having insurance, do you get insurance?

MR. GERSHENGORN: As a result of making the payment? No, Your Honor.

THE COURT: Well then why is it not punitive?

MR. GERSHENGORN: Because not every incentive to do something, just like not every tax on something, is punitive. The fact that it might encourage this is

exactly what *Sanchez* says. Even though it discourages or definitely deters the activity doesn't make it punishment.

What the Supreme Court found in *CF & I*, what made it punishment, was not that it imposed some dollar figure. What the Supreme Court said is -- and remember, *CF & I* was for a funding deficiency. What the Supreme Court said is first it imposes a 10% gap for the funding deficiency, then it imposes a 100% penalty for the entire amount of the deficiency. And not only that, the Pension Guarantee Board has its own claim for the entire amount. That, the Court said, that's punishment.

And in addition what the Court looked at was legislative history that said, you know what, we have too many willful violators. We have to up the penalties. So in that situation, *in CF & I*, the Court said, yeah, that's punishment. It wasn't that -- that it had a deterrent effect or that it imposed a penalty.

The same was true in *Kurth Ranch*. Again, what the Court said in *Kurth Ranch* is it was a substantial penalty. It was for the conduct otherwise made criminal, and the tax was imposed after arrest. And the Court said, yeah, in that situation, citing *Bailey* and *Halper*, that's a punishment. But that is

definitely absolutely not the same as saying there is an amount that is even a penalty that is put on your failure to have a certain level of insurance.

Your Honor, I did want to come back on the tax thing to a couple of other things because I think Your Honor has raised a very important point that Judge Vinson raised as well, and I think it's important to address, and this is this kind of accountability question. And, you know, when I -- what we have argued, and what I think the Supreme Court has said, is that the principal check is a accountability check. It's a political point.

But what I think Judge Vinson undervalued, and what we think is critical, is that the political check comes when Americans have to put on their tax forms that they filed in April, on April 15th, an actual amount of money. That is going to hit every citizen. And every citizen is going to know that whatever the Court says it is, they're going to think that's a tax because they're going to have to pay it on their tax form. And so the accountability that Judge Vinson is talking about is there.

The second point related to this is that it is actually not the case that the -- that members of Congress did not invoke the taxing power. We cite in

our brief that Senator Leahy, Senator Baucus, and Representative Slaughter, and I think Representative Miller, all expressly invoked the tax power in the debates. This is not some post hoc thing that nobody had thought of until afterwards. The tax power was expressly invoked.

And third, Your Honor, when you get to accountability, the notion that somehow this provision escaped public notice or it wasn't subject to the proper accountability check seems to me preposterous. It was the single most debated and discussed provision of the entire 2,700 pages. The idea that somehow calling it a penalty rather than a tax evaded some responsibility while still keeping it under the tax code.

THE COURT: But it went beyond that, though. Now let's characterize it correctly. They denied it was a tax. The President denied it. Was he trying to deceive the people in doing that?

MR. GERSHENGORN: He definitely was not, Your Honor. What the President said was that it was not a tax increase.

But the point is neither -- to sort of summarize, and even as Judge Vinson said, it's neither here nor there. The question is what was the congressional

intent. And basically what you had at the same time was a group of legislators were saying this of course is not a tax. You had another group of legislators who were saying it absolutely is a tax. So whatever accountability check there was is met.

The American people surely were not deceived that there was a minimum coverage provision there. That it was going to require them to put money onto their 1040 form, and that they were going to pay that on April 15th. And it was discussed, and discussed as a provision could be. And so the notion that somehow there was a lack of accountability here or that the -- or that the constitutional check in that sense didn't work seems to me just unsupportable.

The last point is just a small one. But there was the idea that all -- that somehow there's some significance to the fact that Judge Vinson found there was not a group of revenue provisions. There is no doubt that throughout the entire process everybody understood this would raise revenue. It was in every CBO projection. It was in the letter to Representative Pelosi, it was in the letters to the Senate. It was $4 billion annually.

THE COURT: And Judge Vinson found it puzzling though that the legislation did not indicate what the

money was going to be used for.

MR. GERSHENGORN: Well, it goes to the general treasury, Your Honor. But that's precisely what makes something more of a tax, not less of a tax. That it goes right into the general treasury. That's one of the hallmarks in cases like *Butler* and others find that when there's a specific designation for revenue, when you say this revenue is going to X, it makes it less like a tax. The fact that it goes to general revenue makes it more like a tax.

But the other concern that somehow it's not within the Title IX kind of group of revenue provisions is of course easily explainable. The two main provisions that aren't there are 1501 and 1513. But those were the key, you know, sort of regulatory innovations of the Act.

In fact, I think it's the case that had sort of -- Congress put them with the revenue provisions and everybody was, oh, you're trying to sneak through these major changes without anybody seeing it because you're just calling it the same as a Tanning Tax. It doesn't -- it is perfectly explicable that what Congress did was for these very important provisions that Congress took those out and gave them separate treatment, which is what they deserved. The fact that

they were not within the miscellaneous revenue provisions with the tax on tanning salons I think has little or no significance at all from the tax power perspective.

I guess if Your Honor has no further questions on tax, let me turn quickly to severability.

THE COURT: Okay.

MR. GERSHENGORN: Actually, one more point on tax.

THE COURT: Go right ahead.

MR. GERSHENGORN: There is in addition a notion that somehow this can't be a tax because it's very unusual to have a tax on a failure to do something. That somehow taxes are only on burdens. And I just think it's very important that I mention for the Court a few of -- just a few examples which show this actually is quite common.

26 U.S.C. 4980B --

THE COURT: Can you give me that number again?

MR. GERSHENGORN: I'm sorry. 26 U.S.C. 4980B says, quote, *There is hereby imposed a tax on the failure of a group health plan to meet the requirements of subsection (f),* which relate to the continuation of coverage.

26 U.S.C. 4980D similarly says, "*There is hereby imposed a tax on any failure of a group health plan to*

meet the requirements of chapter 100," which relate to preexisting conditions and affordability.

26 U.S.C. 4942 is entitled A Tax on Failure To Distribute Income. And it provides basically that if a private foundation fails to distribute income, a 15% tax is imposed.

26 U.S.C. 6720C is *a "Penalty for failure to notify health plan of cessation of eligibility for COBRA."* It's a COBRA case.

So the point there, Your Honor, is the idea that somehow a tax on a failure to do something is not a -- is unprecedented or legitimate, or any of these things, is just contradicting. In fact, the opposite is true. All of the sudden if this Court were to hold that that is some new requirement of tax, it would invalidate the number of provisions that had long been part of -- long been part of the Code.

Severability. With respect to severability, it's fair to say that we think the Commonwealth's kind of broad-brushed, almost meat axed approach, has no support in the case law. Although the Commonwealth says there's no presumption of nonseverability, the Supreme Court in -- when there is no severability -- when there is no severability provision, the Supreme Court in *Free Enterprise* actually has said just the

opposite. It has said, *"The normal rule is that partial,"* rather than facial *"invalidation is the required course."* That's a quote from *Free Enterprise*. *"That partial,"* rather than facial, *"invalidation is the required course."* That's the quote, *Normal rule*.

THE COURT: And that's from the *Free Enterprise* case?

MR. GERSHENGORN: That's from *Free Enterprise*, Your Honor.

THE COURT: Okay.

MR. GERSHENGORN: And more to put the same point another way it said, quote, *Generally speaking, when confronting a constitution -- Generally speaking, when confronting a Constitutional flaw in a statute, we try to limit the solution to the problem severing any problematic portions while leaving the remainder intact.*

The test is a -- is two-fold. One is the proposition -- one is the remaining provision is fully operative as law. I don't think anybody disputes that they weren't fully operative. And then the Court says we must sustain the remaining provisions, quote, *Unless it is evident that the legislature would not have enacted those provisions independently of that which is invalid.* So we think the test that they're applying is

wrong.

The two -- the two --

THE COURT: Which test do you recommend I apply should I reach that conclusion?

MR. GERSHENGORN: I think you should apply the one I just read, Your Honor, which is that the rest of it stands --

THE COURT: The *Free Enterprise*?

MR. GERSHENGORN: *Free Enterprise*, which actually quotes from *Alaska*, so I'm not sure that there is a huge difference, but *Free Enterprise* is Chief Justice Roberts speaking for the Court.

The two -- the two main arguments that I see is, one, is this legislative bargain which I think, with respect to the Commonwealth, is misapplied. The Supreme Court has never asked this Court to act as a majority whip and to count votes. And to say if this provision were gone that I know that X -- I mean, a provision like this, for example, minimum coverage provision, is likely to have caused a number of people to have not voted had it been dropped, but it is also likely to have caused a number of people to vote for it had it been dropped because that was a point of contention.

The question -- the notion that this Court could

figure - not this judge, but that any judge - could figure that out, is just not feasible. The idea that the Court could know, for example, whether the majority -- the majority would have votes in his or her pocket had it gone -- been closer, and asked some of the no votes to go to yes is, of course a normal part of the legislative process, which again a federal court couldn't possibly superintend.

So the idea that this Court could figure out - and again I don't mean you, Your Honor - but that any federal court could figure out exactly how the votes would go is not what the Supreme Court is saying. The Supreme Court is saying when you look at the text, and is it the kind of thing where the whole Bill, all 2,700 pages, would have gone down if this single provision were struck? And I think the answer to that is clearly no.

The second idea is that somehow because the government has noted over and over again that provisions are mutually reinforcing, or even that this is integral for the Act, is somehow a concession that the entire Act has to fall is preposterous. I mean, just think for a second about *Raich*. The government argued over and over in *Raich* that the regulation of intrastate activity was an integral -- was integral and

necessary to the regulation of interstate. But nobody suggested, and as the Supreme Court has decided otherwise with respect to intrastate activity, that the whole rest of the Controlled Substances Act, the interstate component, would have fallen. Those are two different inquiries.

So what the government has quote, unquote, conceded, is that there are a number of specific provisions that the -- particularly 2701, 2702, 2704, which are the guaranteed issues, they are the parts of the Bill that really impose the most core commerce -- reforms on insurance companies; the preexisting conditions, lifetime caps, and things of that nature. But those are the provisions really for the reasons that we've said the two are necessary, those really couldn't stand. That they would create exactly the kind of market implosion that we talked about, and we're consistent about that.

The notion that somehow the Medicaid portion couldn't also stand, I think Your Honor described it exactly right, that that has a cluster of assumptions that I just don't think that this Court can engage in, so --

THE COURT: So your position is that should I decide that portions of this statute are

unconstitutional, particularly 1501, which is the only one that's really before me, if I do decide that it's unconstitutional, you believe the other aspects of the Affordable Health Care Act could function independently of that invalidated position should I reach that conclusion?

MR. GERSHENGORN: Your Honor, the only ones that we think necessarily fall are those -- the three that I mentioned. The others, there are -- it's clear that the Medicaid one doesn't fall. I think that the others would require a further analysis that I don't think, quite frankly, either side has done in the briefing before this Court.

THE COURT: Fair answer.

MR. GERSHENGORN: And then just very, very briefly on the injunction, Your Honor. The idea that there would be an extraordinary remedy in an injunction when -- for a provision that doesn't take effect until 2014, that there would be some irreparable harm in the interim seems to us very difficult to understand, and so we think entering an injunction, if this Court were to strike down the minimum coverage provision, would be inappropriate.

So with that, Your Honor --

THE COURT: Thank you, Mr. Gershengorn.

Mr. Getchell.

MR. GETCHELL: The Secretary argues that her theory of power is not unfounded. That's a mere assertion and not logic. And there is nothing in her position that's founded. It is -- the assertion that somehow not being insured, the status of not being insured, is like going into the business of being an interstate trucker, shows just how strained and extreme this position is.

The -- the claim that a market is unique because you can't opt out is equally applicable to food. No one can opt out of the food market, or clothing, or shelter, or transportation. Can the federal government require everybody have burial insurance because nobody can opt out of dieing? The claim is way, way, way too radical.

THE COURT: Well, they're contending that because everyone needs health care, that this Bill essentially regulates the method by which you will pay for something that is inevitable that you are going to receive.

MR. GETCHELL: I know that's what they claim, but it's not factually correct. They could have passed a law that talked about how you paid for the care when you were receiving the care. We're crossing a line

that's never been crossed before here by saying you can order somebody to buy a good or service from another citizen. That is a means that's invalid.

THE COURT: But I think that Mr. Gershengorn would argue that if someone presents themselves in the emergency room and needs tens of thousands of dollars worth of emergency care, that some provision has got to be made to pay for that.

MR. GETCHELL: Well, you know, last --

THE COURT: And if they don't have the money to pay for it, then the citizens are required to do it.

MR. GETCHELL: Last term, the Supreme Court in the *Accounting Board* case --

THE COURT: Which one?

MR. GETCHELL: The *Accounting Board* case. And I think the same statement was made in *New York v. United States*. Every generation has its exigencies, and they claim that the government has to have the power to do something because it's really important that it be done. And the Supreme Court said in both of those cases if we actually yielded to that kind of argument, then we destroy the Constitution, which is much more important than whatever passing problem a generation identifies as the problem.

And I couldn't help but remark that

Mr. Gershengorn kept using the word "*collectively*." We have to do this "*collectively.*" And that crosses a line too that's never been crossed before because basically we get back to the foundational statement of Alexander Hamilton that a constitution that would allow you to reach into every aspect of domestic life was not one that this people would have adopted.

And the notion that you can collectively regulate us to buy insurance is a profoundly unprecedented and extreme claim of power. I don't care how urgent the exigency might be to do something about health care, they could have done constitutional things about health care. They chose the one thing they weren't allowed to choose.

I would -- I would say that the statement that only in the last 70 years only twice has the Court stricken commercial -- Commerce Clause regulation is not in fact correct. And it misapprehends what *Wichard* was about. *Wichard* did away with distinctions between manufacturing and commerce, and agriculture and commerce, and direct regulation as a -- of interstate commerce as opposed to direct. But it didn't do anything with respect to the actual affirmative outer limits except to say that activity, which in the aggregate, substantially affects interstate commerce

can be regulated even though no sale has yet taken place because a commodity is involved. And that's all that *Raich* stood for.

The -- the idea that we can read the word *"activity"* out of the binding Supreme Court precedents is what was wrong with the -- the decision out of Michigan. Because basically what the Court there said was, yes, I know this is unprecedented, and, yes, I know the Supreme Court's always said *"activity."* But I believe that had the Court really been presented with this issue, they would have used the better word, *"decision."* And I just don't know where that comes from. I don't think it comes from the precedents of the United States Supreme Court.

Ultimately, the assertion that was accepted there and the assertion that you're being asked to accept, and the assertion I think that is absolutely improper, if words mean anything, is that inactivity means activity. That's what the Secretary's reduced to arguing.

Now, there is an objective limit to how much you can play with words like that because *Printz* says there is at least an inference, if not a presumption, that if this power has never been exercised before and never claimed before, it doesn't exist. And so the

profoundly unprecedented nature of this claim really prohibits the Secretary from trying to make words infinitely plastic.

And if you look at the *Accounting Board* case too from last term, there's a quote from a circuit court of appeals that one of the first hints that something may be unconstitutional is it's never been done before. And so this is an actual -- this is an actual presumption.

It's not true, as the Court noted in Florida, it's not true that just because something is unprecedented it's absolutely guaranteed to be unconstitutional, but it certainly is a hint. And it's elevated in both the *Accounting Board* case and in *Printz* to a lot more than a hint. And whereas here we have the additional fact that the power we're talking about, the Commerce Clause, has established affirmative and negative outer limits, then this Court should not -- should not move those boundaries.

With respect to the unprecedented nature of this, the Secretary continues to say, well, it falls within the garden variety cases, but it doesn't, as the GAO and the Congressional Research Service noted.

With respect to some of the cases cited, *U.S. v. Gould*, the sex offender registration activities, there

is actually a jurisdictional hook in the statute itself. It's not an inactivity case. You have to -- you have to commit the crime, then you have to cross state lines.

So with respect to *Sage*, which is interstate child support enforcement, the cases clearly say that there's a jurisdictional hook there too. And they're not regulating under the substantial affects prong anyway. There the analysis of the cases uniformly recognizes that they are under the things in interstate commerce. The obligation is treated like a contract, and therefore contracts are interstate commerce, so it's child support obligations.

The gold cases, the question there -- the assertion was made that the gold cases are inactivity cases. In the first place, the gold cases aren't even ordinary Commerce Clause cases because the Court did say that the Commerce Clause was in the mix, but importantly the power to coin money, the power to regulate -

THE COURT: Regulate currency.

MR. GETCHELL: - regulate the value of money was the basis for the power there.

And in response to Your Honor's question, what were they doing? They were trading in gold bonds. I

mean, this was -- this was high grade commercial activity.

The fact of the matter is that the facial versus activity issue --

THE COURT: Facial versus applied?

MR. GETCHELL: Sir?

THE COURT: Facial versus applied.

MR. GETCHELL: Yes. I'm sorry. Facial versus applied. The Commonwealth's objection is not that there are some enactors. The Commonwealth's objection is that its law, which it believes is valid, would be displaced be the federal law if the Secretary is correct. That is a facial challenge. It doesn't matter that there may be other people who could have been regulated by other means because they're actors.

We don't look at what other means that Congress might have chosen. If the means it did choose are unconstitutional, that's the end of the inquiry. And in a binary collision between the reserved powers of the State and the enumerated powers in the -- the alleged enumerated powers of the United States, there's a binary question, not different applications, that could come out differently.

The idea under the tax argument that this penalty is not a punishment strikes me as being somewhere in

Lewis Carroll territory because obviously that's what it is. It's a civil penalty. It would be recognized as a civil penalty by English judges in the Seventeenth Century, and by every judge in every century since. It is a civil penalty.

And the idea that the penalty only requires an enumerated power to support it if it's criminal is extracted from the facts of *Kurth Ranch*, which happens to be involving marijuana production. And the Secretary is trying to make the facts into some sort of rule of law. But it's -- you know, *Kurth Ranch* cites *the Child Labor Tax Case*. And the principles of the *Child Labor Tax Case* are the same principles as *Morrison*, which is if you're trying to regulate through taxation, then you're going to have an enumerated power to do it.

And the -- the equivocation continues. The confusion between regulatory taxes in the sense of footnote 12 of *Bob Jones*, which in another -- dealing with another count, Judge Vinson recognized the distinction between regulatory and nonregulatory taxes when they're really taxes, has -- no longer exists. But he definitely didn't say that it doesn't matter that it's a regulatory penalty because he struck down the notion that this is a tax.

The same problem of equivocation appears when a resort is made in *Sanchez*. *Sanchez* is talking about the suppressive effect of ordinary taxes. It's not talking about regulation through penalties.

The idea that the placement of something in the Internal Revenue Code makes it a tax --

THE COURT: Well, certainly it's a circumstance that can be considered. And I think that's all Mr. Gershengorn is saying.

MR. GETCHELL: Yes, it certainly can be considered, but ultimately it's a judicial decision as to whether it's a penalty or tax, and this is clearly a penalty.

THE COURT: All right.

MR. GETCHELL: The fact of the matter is that the Secretary will take on a piece of the problem with the tax argument, take it on a piece at a time, but never -- never deals with what I think is the crushing weight of all the objections.

One, Congress called it a penalty. Two, the *Board of Trustees* case says that ordinarily if Congress calls something commerce, we won't call it a tax.

The negative implication of *Sonzinsky*. If we're going to defer to what Congress calls it, if he calls it a tax, so would you not defer to it if they call it

a penalty.

The fact that under *LaFranca* and *CF & I Fabricators* it operates as a penalty being a command joined to an exaction. It's not really designed to raise revenue. Not included --

THE COURT: These are all circumstances that a court can look to in deciding whether or not Congress intended it to be a tax, but none of them individually are dispositive.

MR. GETCHELL: Well, they could be. I mean, if you follow the *Board of Trustees*, absolutely. I mean, that would be dispositive on its own. But, yes, I mean, I think these are all permissible factors to consider. The problem is they all balance against the Secretary's position.

And then when you -- when you get to the last argument, then I think it is dispositive because, one, it's recognized that the regulatory penalty part of *Child Labor Tax* is -- has not been overruled, but indeed was reaffirmed as recently as 1994, then under the test it would seem that the Court would have to say regardless of whether the Supreme Court would want to revisit this - and under *Morrison* there's no reason why it would - that this Court shouldn't say that that is not binding precedent.

I think that the claim that *Leckie* binds this Court on the question of what's a tax and what is a penalty is absolutely incorrect. *Leckie* asked the question of whether or not something was -- was a tax for purposes of bankruptcy code preference and didn't involve the issue of a penalty.

The Secretary points out in her brief, for some reason, that there is a penalty in the Coal Act, but it doesn't have anything to do with *Leckie*. That wasn't litigated there. And the penalty in the Coal Act was a penalty for not paying what the Court found to be a tax.

They -- they claim that it's irrelevant -- that the statutory provision that says you don't draw a presumption from where something is in the tax code, they said it's irrelevant. They interpret it now to mean just what kind of tax it is. But if you read *CF & I Fabricators*, they speak broadly. They are not drawing an inference from it being in the tax code.

The fact that somebody called it a tax in the floor debate, let's start --

THE COURT: Called it a tax in what?

MR. GETCHELL: In the floor debate.

THE COURT: In the floor debate. Okay.

MR. GETCHELL: The fact that Leahy and Baucus may

have said this. At the time that Leahy and Baucus spoke, the Bill that passed was not on the floor. They had no idea what was in it unless they were the people who wrote it in secret, and then of course --

THE COURT: Well, am I correct that early in the debate, they were debating the House version, which used the word *"tax,"* and in the final version, I believe, stuck that and inserted *"penalty"* in instead?

MR. GETCHELL: Well, I think it's -- it is true --

THE COURT: As to the minimum essential coverage provision?

MR. GETCHELL: No. What happened was that the House Bill that had passed did seek to finance through taxation, and they called it taxation. And the penalty there was -- was supported as taxation, I think. That's my recollection.

It passed, but was never -- was never taken up in conference because when the Senate Bill which never -- which had it by implication of course rejected the tax notion because it only said *"penalty"*, and the President said what he said. And Congress overwhelmingly said it wasn't a -- it wasn't a tax. It -- it didn't go to traditional conference. The House had to repass -- had to pass the Senate bill unchanged, and then they changed a few little things in

reconciliation not having to do with anything we're arguing here today. Mostly just taking over the funding of college tuition.

So that's -- but what is clear is ordinarily if a proposal is made and then rejected, and something else is passed, the something else that's passed controls, and that's something that calls it a penalty and not a tax.

They say that we argue that there can't be a tax on inactivity. We haven't argued that. What we have said is that you can't have a penalty regulating whether you call it a tax or not without having an enumerated power. I will note, though, that in every example that's given of taxing, not distributing something, the person that's not distributing it is acting as a trust, in the case of the example, or a business.

With respect to severability, I don't think the government argues that there's a substantial difference between *Alaska Airlines*, and later applications of *Alaska Airlines*, because I think *Alaska Airlines* has become a term of art. And I think that Mr. Gershengorn said that you -- you don't strike -- there's a preference for not striking all provisions of the Act, which we concede, unless one of two things can be

shown. And I believe he said this.

One, that it couldn't be fully operative or work in the way Congress intended. And there we would say if we accept their argument that Congress intended to be changing financing generally, then it would seem that in addition it would be insurance provisions that they concealed would fall, that all changes to financing of health care should fall together because they no longer work together the way they were intended to work. But he also said that it -- it -- we should preserve that which is not unconstitutional unless it would not have been adopted. And that's -- that's the theory under which we would say the whole thing goes down because I think it's clear that it wouldn't have been adopted without the mandated penalty.

THE COURT: You have a much better grasp over the deliberation of Congress then I believe I do.

MR. GETCHELL: Well, let me address that because I know it's a very grave thing for a Court to consider the motivations of Congress and try to parse those out in the ordinary situation, but this is not the ordinary situation.

He asked rhetorically how would a court know that it wouldn't have passed without the mandated penalty. I think everybody in America knows it. And when you're

dealing with legislative and not adjudicative facts, I think this Court can know that it wouldn't have passed.

THE COURT: All right.

MR. GETCHELL: I -- nothing much -- there was sort of a throwaway on the injunction issue, but let me point out what I think is also a very grave matter.

On the -- on the irreparable harm prong, the sovereign injury is an irreparable harm. On the money damage issue, of course that doesn't even come up, so that's not a factor here. It really all defaults to harm to the government and the public interest.

And I have to say that with respect to something that is creating a great deal of uncertainty in our country, but if the Court concludes that parts of this Bill are unconstitutional, the public interest would demand that people stop having to comply with whatever parts the Court does strike down.

THE COURT: Yes. But, Mr. Getchell, as you well know, this Court is just one brief stop on the way to the Supreme Court. This case is going to be resolved by much higher courts than this one, no matter how I rule.

MR. GETCHELL: I understand, Your Honor. But we are required to make our -- make our -- preserve our case at every level.

THE COURT: I understand. I appreciate it. Thank you very much for your presentation.

MR. GETCHELL: Yes, sir. Thank you.

THE COURT: Mr. Gershengorn.

I think we're reaching the point of exhaustion on some issues, but I'm delighted to hear you.

MR. GERSHENGORN: I'm there, Your Honor. I'll be very brief. I'll just add a couple quick things.

On the tax point, just to clarify a couple of things. Although we are claiming that it is not punishment, we are not saying it has to be criminal.

In *Sanchez*, the tax was $100 an ounce. The Court said that was not -- that that was not a penalty. And although the Commonwealth cites Lewis Carroll, they didn't cite the cases. And the cases say that for something under *Kurth Ranch*, or any of the others, has to be some combination of exorbitance of these criminal activity, *scienter* requirement, or something like that.

Board of Trustees, very briefly, we think stands for something completely different than what the Commonwealth does. *Board of Trustees* was an effort to bring in a restriction that replies only to the tax power to the Commerce Clause. And what the Court said was, well, you invoked the Commerce Clause. We're not going to bring in a uniformity or other type of

restriction like a direct tax that's only applicable to the tax power. It did not say that once you invoke the Commerce Clause that you can't also invoke the tax power.

Under the date, just because there seemed to be some confusion, or at least I was unclear as to what the Commonwealth was saying, the provisions cited in our brief you were both from the House and the Senate talking about the provision that uses the word *"penalty."* There were two Senate ones in late December, and two House one that were in March of 2010. They were talking about the term *"penalty."*

And on severability, I think basically everything was said, but I just wanted to clarify one thing. The Commonwealth threw in a little phrase that's not in the language. It's not fully operative as a law as Congress intended because of course that would be silly. Congress attempted to pass the whole Bill. As to the test that the Supreme Court put forth was would it be fully operative as a law. That's not meant to be a difficult test. It's the next part where the work is done unless it's evident that the legislature wouldn't have passed.

I do want to close a little bit of a discussion briefly. I know everybody is talking about the

Commerce Clause. Just a couple of quick things. The idea that because the Commonwealth asserted standing based on their sovereignty, that that somehow is the relevant question for Commerce Clause, whether it implicates Virginia sovereignty. But to the extent there's a question about activity, inactivity, it goes to the people who are being regulated. And it continues to be the case that, although we don't agree with the Commonwealth's approach, that the people who -- there's definitely a core of people who even under the Commonwealth's approach are entirely active, and that's enough to defeat the facial challenge.

It is also the case that just on the broader points just as I think it's to almost to reiterate what I said, but perhaps a little more sharply, but the decision to get or not get insurance and thereby essentially gamble that other people will pay your way when you get sick is not inactivity. It's not passivity. That is an active decision.

The last thing I'd like to say on the Commerce Clause is, again, and the Commonwealth has I think reasserted on rebuttal what I had heard them to say, which is that Congress could have done this at the point of care. That Congress could say in order to get medical care you have to have insurance. And so what

the Commonwealth is saying is that there are two -- that basically Congress was left with a choice.

One, they're saying that the timing matters. That Congress couldn't say everybody in the world knows that people use medical care, doctors' services. Every statistics shows it. But Congress had to ignore that, and therefore leave untouched a massive problem that it saw because Congress could have said before you get care you have to have insurance, but we can't cure the actual --

THE COURT: You're not insinuating the Congress could order physicians not to perform medical service without payment; that's not what you're saying?

MR. GERSHENGORN: I think actually what -- there may be other limitations, Your Honor, but that's actually what the Commonwealth just conceded. And that's actually the same thing that Florida conceded in the Florida argument, that that's a point of sale restriction. Whatever else is true, when you make a purchase, at the time you make the purchase, Congress can surely say you have to pay for that in a certain way. That is -- there may be -- you could have a substantive problem, and there may be other restrictions, but from the Commerce Clause objective, that's exactly right.

THE COURT: All right.

MR. GERSHENGORN: So from the Commonwealth's perspective -- argument is, one, that Congress has to ignore in a market that constitutes one-sixth of the national economy, Congress has to ignore what every single person knows to be true, which is that people use medical care.

And, two, if Congress wanted to fix this problem, the only way it could do it is through a point of care restriction which requires people to let other people die on the emergency room floor because they don't have insurance. And that, to me, from my perspective, is a preposterous choice.

That once you make the concession - as I said, they did the same in Florida because it's true - that Congress could do this at a point of sale, I think the propriety of what Congress actually did flows as a matter of course.

And then one final just to close on the injunction piece, Your Honor. I didn't really talk about the public interest and the irreparable harm that the Commonwealth mentioned, and think it is worth closing, I think, on that. Of course the Supreme Court law is quite strong that the striking down of federal statute is itself irreparable harm, and that would be enough.

But I think it's also worth noting when you're talking about where does the public interest lie, that you're talking about a situation in which Congress, our elected representatives, made a judgment about what was necessary. About what was necessary to deal with people who have preexisting conditions that can't get insurance. People who are denied coverage because of lifetime caps. People who are charged exorbitant rates for those conditions. Precisely the things that -- that would be struck down in a decision such as the Commonwealth is asking for. And I think in a situation like that, the judgment of our elected representatives and the potential for harm to people like that for provisions like that, show that the public interest and the irreparable harm lies in not having a voice.

Thank you, Your Honor.

THE COURT: I want to commend both Mr. Gershengorn and Mr. Getchell for a very well briefed case. Very capably argued. I hope to be able to have a decision out by the end of the year. In fact, I'm sure I will.

These are very complicated issues. Many of these issues are ones the courts haven't confronted, and there will a lot of mining on my part, reviewing case law, and trying to piece all this together.

But once again I want to commend both sides for

doing an excellent job. One of the best I've seen in my years as a judge. Thank you, gentlemen, very much.

On that note, we'll stand in recess.

(The proceeding concluded at 11:38 p.m.)

REPORTER'S CERTIFICATE

I, Krista M. Liscio, OCR, RMR, Notary Public in and for the Commonwealth of Virginia at large, and whose commission expires March 31, 2012, Notary Registration Number 149462, do hereby certify that the pages contained herein accurately reflect the notes taken by me, to the best of my ability, in the above-styled action.

Given under my hand this 7th day of November, 2010.

_____

Krista M. Liscio, RMR
Official Court Reporter