

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT
3

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5 SUSAN SEVEN-SKY, also known as
6 SUSAN SEVENSKY, et al.,

7 Appellants,

No. 11-5047

8 v.

9 ERIC H. HOLDER, JR., et al.,

10 Appellees.
11 -----

12 Friday, September 23, 2011
13 Washington, D.C.

14 The above-entitled matter came on for oral
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT JUDGE KAVANAUGH AND
18 SENIOR CIRCUIT COURT JUDGES EDWARDS AND SILBERMAN

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

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C O N T E N T S

ORAL ARGUMENT OF:

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3; 94

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On Behalf of the Appellees

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1 In the 222 years since the ratification of our
2 Constitution, Congress has never imposed a mandate on American
3 citizens to buy a product from a private company. Any
4 mandates that have been imposed by Congress have always been
5 between the citizen and the Government. You have to fill out
6 a census, you have to show up for jury duty, you can be
7 drafted. Never has it uses this power. And why that is
8 significant is as the Supreme Court noted in the Printz
9 decision, the fact that Congress did not use this attractive
10 power is strong evidence that Congress knows it doesn't have
11 that power.

12 Congress has always used incentives and what's
13 interesting is that during all the crises in our country's
14 history, Congress has used incentives. During World War II,
15 you were not required to buy war bonds, you were encouraged.
16 They put up posters. Do your part, buy war bonds. You were
17 not provided to buy them. You were not required to work in
18 factories. Even as recently as right about the same time as
19 the healthcare law was passed, we had a crisis in the
20 automobile industry. Congress did not require American
21 citizens to buy a car. Congress did not pass a law saying if
22 you go and you're over a certain income level, to buy a car,
23 there's no restrictions on you, they have to sell you the car,
24 they have to give you financing. What Congress did was give
25 us incentives, the Cash for Clunker program.

1 JUDGE KAVANAUGH: What about the idea that in the
2 Supreme Court's case law, it is said that Congress can
3 regulate conduct when it's part of, an essential part of a
4 larger regulatory scheme? Here, the larger regulatory scheme
5 looked at, at least narrowly, includes the guaranteed issue in
6 community rating provisions, and the guaranteed issue is not
7 going to work without a mandate. So Congress has the power to
8 impose the guaranteed issue requirement, clearly. You agree
9 with that.

10 MR. WHITE: Run that by me again.

11 JUDGE KAVANAUGH: Congress has the power to impose a
12 guaranteed issue requirement on insurance companies.

13 MR. WHITE: Yes.

14 JUDGE KAVANAUGH: You agree with that. And then it
15 won't work without an individual mandate attached to it. We
16 know that from the states that have tried it that way. It
17 didn't work. Massachusetts tried it with the mandate and it's
18 worked extremely well, at least in terms of the goal of
19 coverage. So why doesn't that doctrine fit this situation?

20 MR. WHITE: Okay. That doctrine is fairly recent
21 vintage. I think it was first talked about in 1995 in the
22 Lopez case. It's only been applied in the Raich case and
23 what's significant about that is in Raich, it was an as
24 applied challenge where all the parties agreed that Congress
25 had the power in the first instance for the Controlled

1 Substance Act, and Congress had created a closed regulatory
2 system that could not have any holes.

3 Here, Congress has not created a closed regulatory
4 system by its own language in the individual mandate. By
5 giving so many exemptions to people who do not have to comply
6 with the mandate, Congress has shown that it truly isn't
7 totally essential because they've exempted out various groups.
8 So what you have to always start with before you get to
9 Congress' power to regulate, okay, is does Congress have the
10 power in the first instance. As the 11th Circuit recently
11 held, as last week, the Middle District of Pennsylvania held,
12 is Congress doesn't have the power to make you buy a product.

13 JUDGE KAVANAUGH: The power in the first instance
14 that I was supposing is the power to impose on insurance
15 companies the guaranteed issue requirement. I think everyone
16 agrees that's perfectly constitutional. It's in the commerce
17 power. And then the question is whether this provision, which
18 is linked necessarily to that, is permissible and just as
19 Raich says, the relevant question is whether the means chosen
20 are reasonably adapted to the attainment of a legitimate end
21 and that Congress may regulate even non-economic local
22 activity if that regulation is a necessary part of a more
23 general regulation of interstate commerce. So again, the
24 commerce regulation is the guaranteed issue. The link is the
25 individual mandate. That's the question that the case law

1 poses for me.

2 MR. WHITE: Right. And again, as the Raich majority
3 said, what was pivotal in this decision was that it was an as-
4 applied challenge, not a facial challenge, okay. So they
5 started from the premise that Congress had this power. What
6 Justice Scalia is looking at there, and again, that's just a
7 concurring decision, is that he wanted to make sure because he
8 assumed that Congress could close the door on illegal drug use
9 across the board and as a result of that, Congress is
10 prohibiting activity. It's prohibiting you from your personal
11 use, medicinal use based on California Law.

12 That's completely different than Congress requiring
13 you, as an American citizen, to force you into economic
14 activity here. That Congress has created its own problem by
15 having the guaranteed issue, and I don't mean that is a
16 problem that has people it's guaranteed to have insurance, but
17 as far as the financing cause of that, is what Congress is
18 doing is saying we're going to create a situation and now that
19 we said we've created the situation, we are now going to
20 compel people against their will to participate in that
21 situation.

22 So for example, with one of our clients, Edward Lee,
23 faith, believes in faith healing, has not had insurance, has
24 not gone to the doctor for over 20-some odd years, truly
25 believes. He has instructions to his family, if I have a

1 heart attack, I get hit by a car, doesn't matter, you pray for
2 me. If God wants me to live, I will. I don't go to the
3 doctor.

4 JUDGE SILBERMAN: But, Counsel, you're raising a
5 facial challenge, not an as-applied challenge.

6 MR. WHITE: Correct. And I'll point --

7 JUDGE SILBERMAN: So my question to you is -- well,
8 let me take a couple questions first. Looking at the language
9 of the Constitution itself, do you see any principle that
10 supports your position? The word is "regulate", right?

11 MR. WHITE: Correct.

12 JUDGE SILBERMAN: Regulate can be a requirement as
13 well as a prohibition, can't it?

14 MR. WHITE: Yes.

15 JUDGE SILBERMAN: So the language of the
16 Constitution doesn't support you, does it?

17 MR. WHITE: No. I think it does because it also
18 uses the word "commerce". Commerce is intercourse.

19 JUDGE SILBERMAN: Well, it could be --

20 MR. WHITE: It is regulating activity.

21 JUDGE SILBERMAN: Why can't it be a requirement to
22 engage in interstate commerce?

23 MR. WHITE: Because the line has been drawn by the
24 Supreme Court --

25 JUDGE SILBERMAN: Oh, no. I'm talking about the

1 language of the Constitution itself.

2 MR. WHITE: Okay.

3 JUDGE SILBERMAN: And I don't see anything in the
4 Constitution itself that supports you. Now we can go to the
5 case law.

6 MR. WHITE: If --

7 JUDGE SILBERMAN: But the language of the
8 Constitution doesn't specifically support you one way or, it
9 doesn't address this one way or another because it tells you
10 Congress can pass laws regulating interstate commerce, and
11 regulation could be a requirement to engage in commerce.

12 MR. WHITE: But you have to get to the part of
13 commerce is what -- what is being regulated there are people
14 are, excuse me, voluntarily engaged in the stream of commerce.
15 Congress, what it's doing here, is unlike all these other
16 Supreme Court cases we're looking at, or even cases from this
17 circuit where we know there's been economic activity, okay,
18 and that's what's being regulated. Here, they are regulating
19 the status of being uninsured. These people --

20 JUDGE SILBERMAN: I understand. I understand your
21 argument.

22 MR. WHITE: Okay.

23 JUDGE SILBERMAN: I was just looking at whether the
24 language of the Constitution itself supported you. Now, what
25 about the facial challenge point? You know, Judge Sutton on

1 the 6th Circuit went through that in great length. You would
2 concede, would you not, that there are many people to which
3 the mandate could apply constitutionally even under your
4 theory?

5 MR. WHITE: No. I don't concede.

6 JUDGE SILBERMAN: Nobody?

7 MR. WHITE: I don't --

8 JUDGE SILBERMAN: This can't apply to anyone
9 legally?

10 MR. WHITE: No because under the, the way the law is
11 written now, you have a requirement where you have to have
12 insurance for the rest of your life. You cannot opt out. In
13 all of the, in all of our history, people could come in and
14 out so, for example --

15 JUDGE SILBERMAN: Well, but now, wait a minute. If
16 Congress had passed a law simply requiring anybody who went to
17 a hospital or an emergency room, to at that point, buy
18 insurance, health insurance, would you say that would be
19 unconstitutional?

20 MR. WHITE: Yes. And here's why. I think what they
21 would be able to do at that point is impose a tax, some form
22 of a tax penalty because the whole basis of our jurisprudence
23 with regard to the Commerce Clause is people can come in and
24 out. It's one thing if you say you show up to the doctor,
25 you're treated, right, because they have to under EMTALA, and

1 we're going to have you sign up for insurance, or I can walk
2 out the door and say I'm not having insurance anymore. I have
3 that option. What Congress is saying here is once you're in,
4 you're in so it's, you know, you can never get out. You can
5 never check out of the hotel, all right? You can check out
6 but you can never leave.

7 JUDGE SILBERMAN: But then nonetheless, it satisfies
8 your activity/inactivity dichotomy because --

9 MR. WHITE: It --

10 JUDGE SILBERMAN: -- there is an activity, you're
11 going to the hospital for emergency care, and the Government
12 requires you to buy insurance at that point.

13 MR. WHITE: Right. But what my activity would be
14 there is what Congress would be regulating, is Congress is,
15 under the individual mandate, is regulating the health
16 insurance market because under the individual mandate, there's
17 no requirement that I go to the doctor, there's no requirement
18 that I even use the healthcare. Me going into the healthcare
19 market, and then Congress is now imposing a lifetime burden
20 upon me, I do not think Congress has that power and that's
21 held up by the recent 11th Circuit decision.

22 And for example, you know, Judge Sutton went through
23 and he gave some examples but his examples always require a
24 lifetime purchase of the product. So if you look at the
25 Constitution, that's why we're saying an ultra vires law, the

1 Constitution says you're eligible to be president if you're a
2 natural born citizen, you're 35 and over. If Congress,
3 tomorrow, passes a law that says anyone 18 and over could
4 become president and we bring a facial challenge, under Judge
5 Sutton's view is because there are still people 35 and over
6 who are naturally born, the law applies to them.

7 JUDGE KAVANAUGH: Well, he didn't, he mentioned that
8 doctrine but he didn't rely on it because he went on for 25
9 other pages without analyzing that and facial challenge wasn't
10 part of the analysis in Lopez and Morrison.

11 MR. WHITE: Correct.

12 JUDGE KAVANAUGH: Picking up on Judge Silberman's
13 question about the text of the Constitution and then my
14 earlier questions about the precedent. Suppose the text and
15 the original understanding just doesn't tell us anything one
16 way or another on this new kind of power and suppose the
17 precedent, I've read Filburn and Lopez and Raich and Morrison
18 and Printz repeatedly and suppose after that effort, I come
19 with no answer. Both sides pick out snippets that point in
20 their direction but the overall thrust, the case just really
21 doesn't address this because it's a novel exercise of
22 congressional power. How then should a court go about
23 deciding the case?

24 MR. WHITE: Okay. Yes. I think you can rely on
25 those four main decisions. The outer edge, which everyone

1 will admit, of the Commerce Clause power is Raich and Wickard
2 because it goes to intrastate local activity.

3 JUDGE KAVANAUGH: So you're saying look at where the
4 cases have gone and go no further.

5 MR. WHITE: Yes.

6 JUDGE KAVANAUGH: Another way to look at it would be
7 court's shouldn't get, should exercise restraint or be careful
8 before infringing on new exercises of congressional power and
9 let experimentation occur at the congressional level.

10 MR. WHITE: Correct,

11 JUDGE KAVANAUGH: Why do you choose that as the
12 baseline versus, say, the restraint baseline?

13 MR. WHITE: Well, that was my second part was the
14 restraint.

15 JUDGE KAVANAUGH: Yes.

16 MR. WHITE: Because I think as the Middle District
17 of Pennsylvania noted just last week, the judge was bound by
18 Stare Decisis, is it's not just the outer reaches where you're
19 looking at Wickard and Raich, which are basically the same
20 case even though it's a different substance, but you look at
21 Lopez and Morrison --

22 JUDGE SILBERMAN: That's not true. They're not
23 really the same case. I think Wickard goes, forgive me for
24 stopping you, but I think Wickard goes further. Wickard, if
25 you read it carefully, applied in the following situation.

1 You have a small farmer who wishes to grow wheat for the
2 purpose of baking bread for his own family and only for his
3 own family and nevertheless, he can be barred from doing so.

4 Now, in a sense, that is a greater exercise of
5 Governmental power than this case because as Justice Jackson
6 pointed out, the purpose of the statute was to force that
7 farmer to buy wheat in the interstate market. He couldn't
8 grow it himself, even to feed his own family.

9 MR. WHITE: I will address that after I address this
10 first point, okay? Where when you look at Lopez, when I say
11 they're basically the same case, I think the Supreme Court in
12 Raich said they're very similar, similar circumstances, okay,
13 and I understand there are nuances to everything, is that when
14 you look at Lopez and Morrison, the Court said, you know, the
15 line is drawn between economic and non-economic activity.
16 Here, we have really the absence of commerce activity. And
17 said you also have to consider the limits of federalism
18 because that's very hard because we, we are a country with a
19 free market economy. We're not, you know the Soviet Union
20 with a centralized, controlled command economy where the
21 Federal Government tells us everything, what to do. And
22 especially when we go back to when you talk about
23 Massachusetts, the states, and that's where people
24 (indiscernible) liberty to, the states are supposed to be
25 laboratories of experimentation and if the situation in

1 Massachusetts really seems to work over the course of time,
2 other states can adopt that and can move on.

3 Now, going to Wickard, Wickard is more of a
4 limitation. When we talked about Congress says, you were
5 talking earlier about Congress can regulate and prohibit as
6 they did, Wickard is a limitation in the sense that Filburn
7 was still able to grow a percentage of his acreage of wheat.

8 JUDGE SILBERMAN: That's only because there was an
9 exemption for small farmers. But the logic of Jackson's
10 opinion, it seems to me, made it quite clear he could have
11 been barred from growing any wheat whatsoever.

12 MR. WHITE: Well, if --

13 JUDGE SILBERMAN: And even to feed his own family.

14 MR. WHITE: Well --

15 JUDGE SILBERMAN: Force him to buy in the
16 interstate, in the open market.

17 MR. WHITE: Well, I do not think --

18 JUDGE SILBERMAN: Which is sort of a mandate, isn't
19 it?

20 MR. WHITE: Well, not really. If anything, it's a
21 limitation or a prohibition. I Congress said we're, in
22 effect, going to outlaw wheat growing --

23 JUDGE SILBERMAN: Sort of reminds me of let them eat
24 cake.

25 MR. WHITE: And unfortunately, that might be where

1 we're going if this, you know, if Congress has this unlimited
2 power. They are letting eat cake.

3 JUDGE EDWARDS: Wait. I'm not really understanding
4 your answer to Judge Silberman. Justice Jackson is absolutely
5 clear in saying that one of the things that was being asserted
6 there is that this may force some farmers into the market to
7 buy what they could provide for themselves. Precisely this
8 case. Had an alternative of a penalty. Precisely this case.
9 I don't know how you, I mean, it was interesting to me that
10 during your first 20 minutes, you steered clear of Filburn.
11 For good reason I guess, because I don't know how you
12 distinguish it.

13 MR. WHITE: Well, the way I distinguish it is a
14 couple of things. In keeping with all of these Supreme Court
15 cases, Mr. Filburn had the option to be a farmer and to grow
16 wheat rather than soybean, and he then fell within this law
17 that limited him with the amount of wheat he was supposed to
18 be able to buy. There was nothing that I, my reading of the
19 case saying he would never be able to --

20 JUDGE EDWARDS: No, no, no. Limiting the amount of
21 wheat he could grow.

22 MR. WHITE: I mean not to buy, sorry, to grow, okay.
23 But he was still able to do that and he would have to make
24 some choices just as the people in Raich had to. Even though
25 their State law allowed them to have medicinal marijuana at

1 the time, they had to make their own choices in that regard,
2 whether to comply with whichever law.

3 JUDGE EDWARDS: But you understand why I see Wickard
4 as further, as extending further than Raich because in
5 Wickard, the farmer is forced to buy in the interstate market.

6 MR. WHITE: I think he's only forced to buy if,
7 under the circumstances --

8 JUDGE EDWARDS: If he wants to eat.

9 MR. WHITE: Well, no but --

10 JUDGE EDWARDS: If he wants to eat.

11 JUDGE KAVANAUGH: He's growing.

12 MR. WHITE: But he's growing, he's growing 11 acres
13 of what.

14 JUDGE EDWARDS: I know, but the logic of the opinion
15 could have said he couldn't grow anything.

16 MR. WHITE: Right. And then that would be a blanket
17 prohibition just as you have --

18 JUDGE EDWARDS: And that would be perfectly okay.

19 MR. WHITE: But if Congress wanted to make the
20 determination that wheat was the equivalent of marijuana and
21 say we're going to outlaw the growing of wheat, okay?

22 JUDGE EDWARDS: No, but it was for the purpose of
23 forcing him to buy in the interstate market, or the market
24 effecting interstate market.

25 MR. WHITE: So Congress would then be outlawing the

1 growing of wheat and he would have to be forced to buy that.

2 It has outlawed, has put a prohibition, outlawed that.

3 JUDGE EDWARDS: Isn't that quite extraordinary?

4 MR. WHITE: That is very extraordinary.

5 JUDGE EDWARDS: Well, that's what, and that's what
6 Jackson said was perfectly legal.

7 MR. WHITE: Right. But that is not in keeping
8 with --

9 JUDGE EDWARDS: You mean Wickard was wrongly
10 decided.

11 MR. WHITE: Well --

12 JUDGE EDWARDS: You may be right about that.

13 MR. WHITE: Wickard would be the outer reaches.

14 JUDGE EDWARDS: You may be right about that.

15 MR. WHITE: Wickard would be --

16 JUDGE KAVANAUGH: (Indiscernible) says that.

17 JUDGE SILBERMAN: Well, Raich reads, endorses it.

18 MR. WHITE: Right. I'm not saying it was wrongly
19 decided but what I'm saying is that when you look at what
20 Congress had done there, what they actually did was they did
21 place limitations on the amount of wheat. He was a farmer.
22 He voluntarily decided to be a farmer. He was involved in
23 that. There was some controls over him but it was not to the
24 point, from my reading of the case, where he would never be
25 able to grow any wheat and therefore, would not be able to

1 provide for himself.

2 JUDGE KAVANAUGH: He had a business, right?

3 MR. WHITE: I think that might have been the
4 arguments.

5 JUDGE KAVANAUGH: He had a business.

6 MR. WHITE: He did have a business. It's just like
7 the man who ran the hotels and the barbecue places in the deep
8 south. They fell within the controls of Congress and they
9 either could get out of the business or they had to comply
10 with, you know, serving all people.

11 JUDGE SILBERMAN: Let me go back to the question.

12 MR. WHITE: Sure.

13 JUDGE SILBERMAN: The presiding judge asked if
14 there, you started out your argument, I thought, interesting
15 by pointing out that there's no direct precedent for this
16 situation, and Judge Kavanaugh asked you well, even assuming
17 there's no case on this and the Constitution doesn't give us
18 guidance, aren't we bound to give a presumption to
19 constitutionality to legislation of this kind?

20 MR. WHITE: There is a presumption of
21 constitutionality but that presumption is undercut by the
22 presumption of 222 years of history of Congress never using
23 the power and the indication there that Congress doesn't have
24 that power. So we're making a plain showing here based upon
25 the principles as adopted by several courts that Congress

1 cannot force people into private commerce and to buy a product
2 from a private company for the rest of their lives. All of
3 our precedent -- and if you go back even to, the Government
4 relied on this at the District Court, the Militia Act of 1792,
5 Congress just said you had to provide these, you know, show up
6 with a gun and a bullet, you could have bought it, you could
7 have stolen it, you could have made it yourself, even so, even
8 two, three years after the Constitution, Congress is not
9 telling people to buy products. And that also was under
10 enumerated power.

11 JUDGE KAVANAUGH: I think Judge Silberman's question
12 focuses on, and your answers have focused on, two factors that
13 I think point in different directions here that really are,
14 for me, very important factors, more than trying to get a
15 snippet from a case here or there, which is on the one hand,
16 the history, the lack of precedent for this, and thus, as
17 Justice Kennedy said in Lopez, his concurrence to potentially
18 a major alteration of the Federal/State balance. On the other
19 hand, the notion that we all feel powerful. You know, we're
20 courts on judicial restraint. It's a delicate act to declare
21 an Act of Congress unconstitutional.

22 And in that latter regard, it seems to me we could
23 be potentially in a situation where there's a shift going on
24 in how the social safety net is provided in this country. A
25 shift from before the 1930s, it was states and communities and

1 families, the 1930s Tax and Spend Government programs further
2 into the 1960s. And now a different form potentially. This
3 could be the blueprint for a privatized social safety net with
4 mandates on people to participate so the Government is not
5 spending as much, the Government is not taxing as much but the
6 Government is forcing people to participate in private
7 markets.

8 Fifteen, twenty years from now, there could be a lot
9 of that going on, depending on the constitutionality and the
10 policy judgments, but why should a court get in the middle of
11 that and risk being another 1935 situation where you're in the
12 middle of a change going on in how commerce is thought of in
13 terms of the Government?

14 MR. WHITE: The role of the Court is determine
15 constitutionality of statutes and here, as the 11th Circuit
16 noticed, is that there is no judicially administered limiting
17 principles here. The Government can just point to uniqueness
18 of a market but that's more of a circumstance than a
19 judicially --

20 JUDGE EDWARDS: But taking my colleagues' two
21 questions, I think what they're, not subtly, directly asking
22 you is the standard of review that we're looking at. Now
23 Raich, both the majority and Justice Scalia's concurrence,
24 reading majority, we do not need to determine whether
25 respondent's activities taken in the aggregate substantially

1 effect interstate commerce in fact but only whether a rational
2 basis exists for concluding so. I mean, that's what we're
3 looking at here as Federal judges. I don't know whether this
4 is precisely a rational basis standard of review but if it is,
5 you're on a very difficult path.

6 Justice Scalia said essentially the same thing in
7 his concurring opinion and if that's what our responsibility
8 is, then it seems to me you've got a hard way to go when
9 you're looking at Raich and you're looking at Wickard and
10 rational basis or some form of rational basis review is what
11 constrains us.

12 MR. WHITE: With regard to the rational basis here,
13 and I'll go back to what I said before because I think it's
14 critical and the Supreme Court said it was pivotal, is that
15 since Raich was an as-applied challenge, they were working
16 under the assumption that Congress had the power in the first
17 instance and that's when you get to rational basis because
18 you've already said Congress can do this, now we're looking to
19 see whether the means are rational here. But if you're -- and
20 it's kind of a blend in the Necessary and Proper Clause there
21 as well even though it's an independent provision.

22 But even if you go to most recently, just I guess it
23 was about a year ago, the Comstock case, where it talks about
24 the factors to consider when you're looking at necessary and
25 proper, you have to look to the history of the Federal

1 involvement, the scope of the Necessary and Proper Clause, the
2 combination of state interest. Here, we've talked about
3 before this wipes out the state interest because there can no
4 longer be experimentation, the narrowness of scope. This is a
5 radical change. This is not a modest addition to a Federal
6 statute.

7 JUDGE SILBERMAN: You read the statute as preempting
8 state statutes that would experiment in this area?

9 MR. WHITE: I think it's going to override that
10 because there's no real incentive for the states because now
11 states have more requirements --

12 JUDGE SILBERMAN: Now in other -- you're making a
13 practical argument, not a legal argument.

14 MR. WHITE: Well, even with a legal argument, there
15 would be, legally, there's be no real purpose for a state to
16 experiment anymore because --

17 JUDGE SILBERMAN: That's still a practical argument.
18 You're not arguing that the states are preempted by the
19 statute, are you?

20 MR. WHITE: I don't know if they are preempted but
21 they're, they're overwritten to the point of that there would
22 not be any (indiscernible) for that.

23 JUDGE KAVANAUGH: Well, some statutes will be
24 preempted.

25 MR. WHITE: Some statutes will be preempted.

1 JUDGE KAVANAUGH: If the state statute says that you
2 do not have --

3 JUDGE SILBERMAN: Yes.

4 JUDGE KAVANAUGH: -- cannot be forced to purchase --

5 MR. WHITE: Well, for example --

6 JUDGE KAVANAUGH: -- health insurance.

7 MR. WHITE: And thank you for that. And that --

8 JUDGE SILBERMAN: That's true. That's --

9 MR. WHITE: It is Idaho, Utah, Oklahoma, Virginia
10 have statutes.

11 JUDGE SILBERMAN: No. I was just, I thought you
12 were making an occupy the field argument and therefore, states
13 couldn't operate at all in this area. You're not making that
14 argument.

15 MR. WHITE: No. It would override the interest of
16 these particular states as I've --

17 JUDGE SILBERMAN: Right.

18 MR. WHITE: -- laid out. Again, when we get --

19 JUDGE KAVANAUGH: Now, on the bigger picture
20 question I asked you about, the change in the social safety
21 net.

22 MR. WHITE: Sure.

23 JUDGE KAVANAUGH: Something you said earlier and
24 maybe want to elaborate on seems potentially responsive, which
25 is that Congress can get at this same objective pretty well,

1 if not exactly as well, through the tax code and incentives to
2 purchase health insurance rather than mandates to purchase
3 health insurance, right?

4 MR. WHITE: Most definitely.

5 JUDGE KAVANAUGH: But it's not going to be as,
6 during the process that led up to this bill, the public record
7 reveals the health insurance companies were not satisfied with
8 incentives because incentives don't work as well as a clear
9 statutory mandate, a law. This is helpful for you on your tax
10 argument.

11 MR. WHITE: Yes.

12 JUDGE KAVANAUGH: As you know.

13 MR. WHITE: Right. And I will turn to the tax
14 argument, and Congress can use its tax power. So for example,
15 Congress, if decided politically that, you know, they'd raise
16 everyone's taxes a certain amount of money and if you bought
17 insurance, you got a tax credit. They do that all the time,
18 you know, if you buy an electric car --

19 JUDGE KAVANAUGH: Well, let me just think about this
20 statute. Suppose, just for the sake of a question, that it's
21 \$1500, just for simplicity here.

22 MR. WHITE: Yes.

23 JUDGE KAVANAUGH: You would say a statute that says
24 pay \$1500 to the IRS if you don't have health insurance,
25 perfectly constitutional. Perfectly constitutional under the

1 tax power. But if it says pay \$1500, or you shall maintain
2 health insurance and pay \$1500 to the IRS or purchase health
3 insurance if you don't want to pay the \$1500, that's
4 unconstitutional. What's different about those two things?

5 MR. WHITE: The difference --

6 JUDGE KAVANAUGH: In other words, in the second one,
7 you have an option, pay to the IRS or buy health insurance.
8 In the first one, it's just pay to the IRS and they're going
9 to provide a Government-provided medical benefit.

10 MR. WHITE: Well, I think because it's under the
11 taxing power and it's between you and the Government, you're
12 paying taxes just like you would on many things and some
13 people object to that but you still pay it, that's a different
14 premise than establishing the principle that Congress can
15 require you, as an American citizen, and when you're just at
16 home, you're not involved in commerce, to buy a product from a
17 private company for the rest of your life whether you need it
18 or not because --

19 JUDGE KAVANAUGH: Well, let's talk about a separate
20 hypothetical.

21 MR. WHITE: Yes.

22 JUDGE KAVANAUGH: You say this statute, which in
23 effect says you shall have health insurance, if not, pay a
24 penalty, again we'll say \$1500, you say that's
25 unconstitutional. A statute that says simply in the IRS code

1 if you don't have health insurance, you pay an assessment of
2 \$1500. In your theory, the latter is perfectly constitutional
3 and the former is not, and they seem extremely similar in
4 terms of their actual effects on citizen behavior. Why should
5 we draw, have so much turn on such a minute difference in
6 phrasing?

7 MR. WHITE: I don't think it's minute just because
8 of which power, which enumerated power we're talking about.

9 JUDGE KAVANAUGH: We're talking about the tax power
10 now.

11 MR. WHITE: Correct. Right.

12 JUDGE KAVANAUGH: Okay. So the tax power. If you
13 don't have health insurance, you pay \$1500. Just like if you
14 contribute to charity, you get a break. If you have a
15 mortgage interest, you get a break.

16 MR. WHITE: Right.

17 JUDGE KAVANAUGH: If you don't have health
18 insurance, you pay a \$1500 assessment. That was what the
19 house bill was. Everyone agrees that's perfectly
20 constitutional. Perfectly constitutional. You say it doesn't
21 pass muster under the tax power if it says you shall maintain
22 health insurance and if you don't have it, you shall pay a
23 penalty of 1500. You know, it's very close.

24 MR. WHITE: Right.

25 JUDGE KAVANAUGH: As the amicus brief, I think some

1 of the professors pointed out that that is very close.

2 MR. WHITE: It may be close but again, you're
3 talking about a relationship between you and the Government
4 versus a relationship citizen to citizen. And if I'm paying
5 my taxes to the Government and if somehow, it's going to
6 result in health insurance, I think that's a different
7 situation than --

8 JUDGE KAVANAUGH: So --

9 MR. WHITE: -- than putting me into the market to
10 buy a product from a private company. I think that's a
11 critical decision because just look at how Congress has always
12 used the taxing power.

13 JUDGE KAVANAUGH: Do you think the average citizen
14 would feel more coerced to buy health insurance by the first
15 rather than the second? The first, again, was you shall have
16 health insurance. If you don't, you pay a penalty of \$1500.
17 The second was if you don't have health insurance, you pay an
18 assessment of 1500. So one citizen looks at the first and
19 says I have to get health insurance, and the other looks --

20 MR. WHITE: Well, I understood your --

21 JUDGE KAVANAUGH: I don't know that there's a
22 difference.

23 MR. WHITE: No. I understood your --

24 JUDGE KAVANAUGH: The coercion comes from the money.

25 MR. WHITE: Right. But I also --

1 JUDGE KAVANAUGH: You raise 3,000 more.

2 MR. WHITE: But I understood your example was, in
3 the second example of buying the insurance, the insurance --
4 who am I buying the insurance from?

5 JUDGE KAVANAUGH: On the second example, it's just a
6 tax code provision that says if you have health insurance, if
7 you don't have health insurance, you pay an assessment of
8 \$1500 on line 6 of your tax return.

9 MR. WHITE: Yes. Right.

10 JUDGE KAVANAUGH: Right. That is 100 percent
11 constitutional.

12 MR. WHITE: Okay.

13 JUDGE KAVANAUGH: That was the House bill.

14 MR. WHITE: Yes.

15 JUDGE KAVANAUGH: The only difference in the final
16 bill, and it's slight but maybe it makes a difference, maybe
17 it's more coercive, is you shall have health insurance. If
18 you do not, you shall pay a penalty of \$1500. And my question
19 is is there really a difference in the coercive power of the
20 Government over the individual between those two examples?

21 MR. WHITE: I think there is and again, it may be a
22 subtle difference but I think it's significant in that regard,
23 is that when Congress is using its taxing power in this
24 regard, okay, there is, again, the political accountability.
25 People don't like taxes so politicians are more attuned to how

1 they're going to pass a law and there is a backlash in that
2 regard for taxes. When you're dealing with the Commerce
3 Clause, because the Commerce Clause has been expanded from its
4 original thinking, it's if Congress has now used its Commerce
5 Clause to have people buy products, then that power is more
6 unlimited because all Congress has to do is set up factual
7 finding.

8 So even in that most decision from the Middle
9 District of Pennsylvania, the judge notes there, he asked the
10 Government Attorney if Congress accepted the principle an
11 apple a day, you know, keeps the doctor away and had findings
12 for that, can Congress require you to buy an apple every day.
13 And the answer, there was no refusal of that.

14 JUDGE KAVANAUGH: Well, what do you mean by that?
15 We're on the Tax Clause now and the "require" word is the key
16 word.

17 MR. WHITE: Right. Yes.

18 JUDGE KAVANAUGH: And the question is if it's
19 required by a \$1500 payment to the IRS, is that different
20 from saying if you don't have an apple a day, you pay a tax of
21 \$1500?

22 JUDGE EDWARDS: Congress have to make findings to
23 support that tax code provision?

24 MR. WHITE: I couldn't hear you.

25 JUDGE EDWARDS: Does the Congress have to make

1 findings to support that tax code provision?

2 MR. WHITE: When it comes to the findings for the
3 tax code provision, I'm not sure.

4 JUDGE EDWARDS: Yes. Well, then it seems to me
5 it's easier. I'm not --

6 MR. WHITE: All right.

7 JUDGE EDWARDS: Your argument is not making sense.
8 You're saying all they have to do on the commerce side is make
9 findings and they're home free. On the tax side, they don't
10 have to make findings.

11 MR. WHITE: Oh, no, no, no. No. What I'm saying is
12 when we're talking about the limitations on this, we were
13 mentioning, we were talking about under the Commerce Clause
14 power of them, Congress could, because they had been making
15 findings, could make findings of anything and could make you
16 buy anything you want from a private company. What would
17 happen under the taxing power, the taxing power, if they do
18 not need the findings, that's a whole different provision and
19 it may result in the same end but there's different
20 implications there regarding political accountability.

21 JUDGE EDWARDS: But that's what I'm trying to
22 understand.

23 MR. WHITE: Right.

24 JUDGE EDWARDS: Your answer to Judge Kavanaugh, and
25 it may be it's hard to find an answer but I don't understand

1 the difference. You're saying well, the political
2 accountability is different. How so?

3 MR. WHITE: Political accountability is different.
4 Just why, for example, why this healthcare law right now is
5 not a tax, why Congress went out of its way to call it a
6 penalty is because there's going to be, they know there's
7 going to be more of a backlash from citizens because no one
8 likes their taxes raised. So they tried to accomplish what
9 they could have done in the taxing power, especially since the
10 President said he was not going to raise anyone's taxes over
11 250,000.

12 JUDGE KAVANAUGH: You don't have to call it a tax.
13 The license tax cases make clear there is a paid fee for a
14 license, and the Supreme Court upheld it under the taxing
15 power even though the Court assumed that Congress did not have
16 the power to regulate that under the Commerce Clause and even
17 though it wasn't called a tax. So the label -- what I'm
18 trying to do is tease out what factors really matter.

19 MR. WHITE: Right.

20 JUDGE KAVANAUGH: And it seems to me the mandate
21 versus encouragement is one line you've drawn that has some
22 force I admit. And then another line you've drawn is the
23 label one. I'm trying to tease out whether the label really
24 matters.

25 MR. WHITE: Right.

1 JUDGE KAVANAUGH: Suppose, for example, that this
2 law enacted had a penalty of \$50 if you didn't have health
3 insurance, called it a penalty of \$50. And then the next law
4 called it a tax and it was \$2,000. Under your theory, the \$50
5 is unconstitutional, the \$2,000 one is perfectly
6 constitutional, and I'm trying to figure out what sense that
7 makes in terms of the label.

8 MR. WHITE: Okay. With regard to these hypothetical
9 statutes you're talking about, okay, whether they can do it
10 under the tax power, we have to go back to what they actually
11 did. And what they did was they passed a law under its
12 commerce laws power and Congress --

13 JUDGE KAVANAUGH: But they didn't, they did not
14 disclaim the Tax Clause power and they never said we're
15 proceeding only under the Commerce Clause power. That's been
16 repeated often but it's not quite accurate.

17 MR. WHITE: When you look at the findings Congress
18 is only talking about its regulation of commerce, its ability
19 to regulate commerce. Congress, when you look at the labels
20 Congress used here, it's not just the labels of saying this is
21 a tax, this is a penalty. It's what Congress did beyond that.
22 Congress, in this statute --

23 JUDGE KAVANAUGH: But it's in the tax code. It's
24 paid on your IRS form. It's assessed and collected in the
25 same manner of subchapter B of chapter 68 which is the

1 internal revenue code. It's a big tax-related provision.

2 Now, you still may have a good argument on the fact that it's

3 a mandate verus encouragement. I think that's a fair point.

4 MR. WHITE: All right. If I may address the tax --

5 JUDGE KAVANAUGH: Yes.

6 MR. WHITE: Thank you.

7 JUDGE KAVANAUGH: Sorry to interrupt.

8 MR. WHITE: That's your job. All right. When you
9 look at the statute, okay, you have to look at the entire
10 statute. If everyone complies with the mandate and buys
11 health insurance, the Government doesn't receive a penny
12 because all your money is going to a private insurance
13 company. When you look at what Congress did in the statute,
14 Congress was very particular. Congress not only called it a
15 penalty. Congress, in other areas of the statute, designated
16 things taxes so you had the 10 percent tax on tanning, you had
17 the medical device tax. Congress also listed in the
18 healthcare law 17 generating, tax-generating provisions. It
19 did not list the individual mandate in them.

20 JUDGE KAVANAUGH: So something labeled a penalty can
21 never be justified under the taxing power?

22 MR. WHITE: I don't think -- no, no. I don't think
23 -- the label is not dispositive but we're not just saying --

24 JUDGE KAVANAUGH: Right. That's what I'm getting
25 at.

1 MR. WHITE: Right. It's not --

2 JUDGE KAVANAUGH: I'm trying to distinguish a
3 nonpunitive civil penalty, mouthful, from a tax under, that's
4 justified under the taxing power. How do I tell the
5 difference between those two things?

6 MR. WHITE: You have to look at the structure of the
7 statute. You have to look at the language Congress uses. In
8 this case --

9 JUDGE KAVANAUGH: Well, you just said the language
10 is not dispositive so how -- okay.

11 MR. WHITE: Okay. You have to look at the purpose.
12 Is it a tax revenue statute? This statute, when you look at
13 the --

14 JUDGE KAVANAUGH: Well, the Supreme Court's long
15 said as long as it's revenue raising. We don't get into that
16 issue anymore. Whether it's Sanchez or Sonzinsky or Bob
17 Jones. There are a lot of cases.

18 MR. WHITE: Right. But the Supreme Court also says
19 that there is a difference between a tax and a penalty, and a
20 tax is to raise revenue, a penalty is to compel behavior. The
21 penalty here, if you find the individual mandate --

22 JUDGE KAVANAUGH: Compel, yes.

23 MR. WHITE: Okay. In the La Franca case. If you
24 find the individual mandate unconstitutional, you never get to
25 the penalty because the penalty is not stand-alone. The

1 penalty is only triggered if people do not buy the health
2 insurance. Depending on -- and then Congress, when you talked
3 about the subchapter 68(b), okay, Congress specifically put
4 the healthcare law here under chapter 48. It also removed,
5 not 68 but 48, and even though it says it's assessed and
6 collected as the same penalty, that doesn't mean that it is
7 the same as a penalty under chapter 68. And also, Congress,
8 unlike all the other tax penalties, Congress removed the teeth
9 here. You have a lion without claws, without any teeth
10 because they've no levies, there's no criminal penalties. All
11 the Government can do to assess this is to withhold some money
12 if you have a refund or come after you in a civil lawsuit.

13 JUDGE SILBERMAN: In your view, 68, chapter 68 deals
14 with penalties for nonpayment of taxes. That's the classic
15 penalties that chapter 68 deals with.

16 MR. WHITE: Correct.

17 JUDGE KAVANAUGH: It's not only those though.

18 MR. WHITE: No. But those penalties are part of the
19 taxing scheme so to speak.

20 JUDGE SILBERMAN: Right.

21 MR. WHITE: Here, this is something separate. And
22 when Congress again, when you look to see what Congress did
23 here, Congress said we're going to put the individual mandate
24 in chapter 48, there might be a cross-reference to 68 but at
25 the same time, Congress is saying in chapter 48, we're not

1 going to put any traditional enforcement penalties on this
2 thing and that --

3 JUDGE KAVANAUGH: That makes it less like a penalty,
4 less like a criminal punishment. I don't see how that helps
5 at all.

6 MR. WHITE: We don't think this is a criminal
7 punishment.

8 JUDGE KAVANAUGH: Okay. Makes it less like a
9 penalty. It's basically unenforceable except by withholding
10 or other mechanism by the IRS.

11 MR. WHITE: Yes. And that also --

12 JUDGE KAVANAUGH: Right?

13 MR. WHITE: Yes. All --

14 JUDGE KAVANAUGH: Not even the penalties that the
15 IRS can usually impose on you are available here so it's a
16 lesser form of an IRS enforcement.

17 MR. WHITE: Right. Which means to me it's less of a
18 tax because if Congress wanted its money, okay, the last
19 people you want to deal with, I'm a former Federal prosecutor,
20 the last people you want to deal with is the IRS when it comes
21 to them getting your money from you, okay? So all you have to
22 do here is, all they can do here is file a civil lawsuit and
23 it's going to get to the point we're going to have a make a
24 judgment call. Is it going to cost us more money to get the
25 \$95 or not. But when you're talking -- and my time is almost

1 up.

2 JUDGE KAVANAUGH: We're going to keep going.

3 MR. WHITE: Okay. But when you tie in --

4 JUDGE KAVANAUGH: You'll get appropriate time for
5 rebuttal regardless.

6 MR. WHITE: Okay. Thank you. When you tie in the
7 tax and the penalty aspect of it, again, you have to look at
8 what they did here. You have to look and see the different,
9 the different categories they put, different terms they use.
10 So for example, the fact that they put the individual mandate
11 in chapter 48, which is the miscellaneous excise tax, there's
12 a specific IRS provision code that says just because something
13 is in the miscellaneous tax, it doesn't mean it's a tax, okay?

14 JUDGE KAVANAUGH: Well, here's the problem, and I'm
15 going to now blend into the Anti-Injunction Act argument if
16 that's okay.

17 MR. WHITE: Sure. Yes.

18 JUDGE KAVANAUGH: Which is the AIA -- you said you
19 don't want the IRS coming after you for your money. Congress
20 has said we don't want citizens interfering with the IRS in
21 their collection efforts, in their pay and then bring refunds.
22 So the Anti-Injunction Act bars pre-enforcement suits to
23 restrain the assessment of collection of any tax, okay? Then
24 in subchapter B of chapter 68 where the penalties are all
25 listed, it says that those penalties are accessible and

1 collectible in the same, and collected in the same manner as
2 taxes. And it goes on to say that the word "tax" in the title
3 includes the penalties in that subchapter. So far, you're
4 okay on the Anti-Injunction Act.

5 MR. WHITE: Yes.

6 JUDGE KAVANAUGH: But the AIA applies to those
7 chapter 68 penalties, okay? Then we turn to this law. And
8 you're right, it's in a different chapter but it also says
9 that the minimum essential coverage penalties shall be
10 assessed and collected, assessed and collected in the same
11 manner as an accessible penalty under subchapter B of chapter
12 68.

13 MR. WHITE: Yes.

14 JUDGE KAVANAUGH: Assessed and collected in the same
15 manner as an accessible penalty under subchapter B of chapter
16 68. Well, the penalties under subchapter B of chapter 68 can
17 be collected immediately. They're insulated from pre-
18 enforcement suits. The penalties in this Affordable Care Act
19 will be unable to be assessed and collected in the same way as
20 penalties under subchapter B of chapter 68 if they're not
21 similarly insulated from pre-enforcement suits. So despite
22 all this discussion about constitutional issues, I have a
23 major concern that the Anti-Injunction Act prevents us from
24 hearing this until 2015.

25 MR. WHITE: Okay. With regard to the Anti-

1 Injunction Act, okay, as I said earlier, just because the
2 penalty, which is in chapter 48, says it will be assessed,
3 excuse me, assessed and collected as chapter 68, Congress
4 specifically took away all of the, all of the powers in that
5 regard.

6 JUDGE KAVANAUGH: I'm going to --

7 MR. WHITE: I'm getting -- okay.

8 JUDGE KAVANAUGH: Okay. You go ahead. I'm
9 interrupting too much. Go ahead.

10 MR. WHITE: And so we get to the point of the Anti-
11 Injunction Act. The Anti-Injunction Act, by its plain
12 language, deals with the assessment and collection of a tax,
13 okay. In your typical Anti-Injunction Act case, you have a
14 law that's in effect, Congress, or excuse me, the IRS has
15 already issued you a notice of deficiency or has begun
16 collection, investigation, withholding and then you refuse to
17 pay and then you decide I'm going to go to court now. Like
18 the Bailey v. George case from 100, almost 100 years ago.

19 JUDGE KAVANAUGH: Yes.

20 MR. WHITE: The timing here in our particular
21 circumstance is you don't have a law that's in effect with
22 regard to the individual mandate, there's been no assessment,
23 no collection, no refusal on behalf of anyone to pay for this.

24 JUDGE KAVANAUGH: Your clients don't actually have
25 to do anything until April 2015.

1 MR. WHITE: Correct. Right. So it's only up until
2 April --

3 JUDGE KAVANAUGH: Nothing. They can --

4 MR. WHITE: Only until April 15th, 2015. If they
5 don't pay it then, and they've already said in all of our
6 papers they're going to pay the penalty, okay, so the
7 Government does not -- the purpose of the Anti-Injunction Act,
8 going back to whenever it was in the 1800s or whenever it came
9 in there, the purpose was because Congress wanted the
10 Government to get its money and then we sort out the details
11 later, right, we don't want to thwart the Government of its
12 money to function. Here, we don't have those concerns and
13 again, as Bob Jones talks about, is that the Anti-Injunction
14 Act deals with truly revenue-raising tax statutes.

15 JUDGE KAVANAUGH: This raises 4 billion a year.
16 That's real money.

17 MR. WHITE: Well, only if everyone does not comply
18 with the mandate.

19 JUDGE KAVANAUGH: The estimate.

20 MR. WHITE: The estimate.

21 JUDGE KAVANAUGH: The estimate from CVO is 4 million
22 a year.

23 MR. WHITE: Right.

24 JUDGE KAVANAUGH: Now, can you answer my question on
25 if a chapter 68, subchapter B penalty is insulated from pre-

1 enforcement review, how is it that this Affordable Care Act
2 penalty can be assessed and collected in the same manner as
3 that penalty if it's not similarly insulated from pre-
4 enforcement review?

5 MR. WHITE: Well --

6 JUDGE KAVANAUGH: Because it won't be collected at
7 the same time so it's not in the same manner. How and when
8 it's collected will be quite a bit different, and yet the
9 statute says it has to be assessed and collected in the same
10 manner as the chapter 68 penalty.

11 MR. WHITE: But penalties in chapter 68 have these,
12 have liens and levies and these enforcement mechanisms there.
13 Just because --

14 JUDGE SILBERMAN: Counsel, wouldn't this case be the
15 same case if there were no penalty at all, if Congress had
16 simply mandated it without a penalty? People --

17 MR. WHITE: Mandated the purchase of insurance?

18 JUDGE SILBERMAN: Yes. And said it would be against
19 the law not to purchase the insurance without a penalty.

20 MR. WHITE: We would not be dealing with the Anti-
21 Injunction Act.

22 JUDGE SILBERMAN: No. That's right because you'd
23 still be in court, wouldn't you?

24 MR. WHITE: Yes.

25 JUDGE KAVANAUGH: Would you have an --

1 JUDGE SILBERMAN: You'd still be arguing that the
2 mandate is illegal.

3 MR. WHITE: Yes.

4 JUDGE KAVANAUGH: Would you have an injury?

5 MR. WHITE: The injury would be --

6 JUDGE SILBERMAN: Yes. You would have an injury
7 because your client would be judged to be in violation of law.

8 MR. WHITE: Right.

9 JUDGE SILBERMAN: And that would be an injury and we
10 so held even if there's no penalty.

11 MR. WHITE: Right. And again, when you look at the
12 individual mandate --

13 JUDGE KAVANAUGH: No. I --

14 MR. WHITE: -- and the penalty --

15 JUDGE KAVANAUGH: Keep going.

16 MR. WHITE: Okay. It's not -- and I think it was
17 either in the Government or maybe in one of these amicus
18 briefs or something, talks about it's kind of a choice, right?
19 You know, you can either get the insurance or not. It's not
20 phrased that way. It's just the same if I'm driving down the
21 highway, it says maximum speed 70 miles an hour. It doesn't
22 say or you just pay 300 bucks, okay? So it's working under
23 the assumption that everyone is going to buy the insurance.

24 JUDGE KAVANAUGH: Right.

25 MR. WHITE: If people do buy the insurance, the
26 penalty does not generate any income for the Government and --

1 JUDGE KAVANAUGH: I think that's a good argument,
2 again, on your taxing power argument. I think that may be the
3 factor we've teased out that's the strongest.

4 MR. WHITE: But if you look at the Anti-Injunction
5 Act, I know this became something important just, well, it's
6 always been because the subject matter jurisdiction.

7 JUDGE KAVANAUGH: It's gotten under-analyzed because
8 neither side has been raising it.

9 MR. WHITE: Right. The Government abandoned it a
10 long time ago but every court that, other than the 4th
11 Circuit, okay, every court that has looked at it, and if you
12 look at --

13 JUDGE SILBERMAN: Is there any case in which a court
14 has held that a penalty that is not related to nonpayment of
15 taxes is covered by the Anti-Injunction Act?

16 MR. WHITE: Not that I'm aware of. I think --

17 JUDGE SILBERMAN: I'm not aware of it either.

18 MR. WHITE: I think any case that's dealing with a
19 penalty where they say it falls under here is that the penalty
20 is deemed part of the taxing scheme.

21 JUDGE SILBERMAN: Right.

22 MR. WHITE: So, you know, I don't pay my income
23 taxes --

24 JUDGE KAVANAUGH: There are penalties in chapter 68
25 that are not that way. I've looked at them are and there's

1 several that are not just for nonpayment of taxes.

2 JUDGE SILBERMAN: But there's no case. There's no
3 case.

4 MR. WHITE: There's no case that I'm aware of.

5 JUDGE KAVANAUGH: But those penalties, by
6 definition, are covered by the AIA.

7 MR. WHITE: And when --

8 JUDGE KAVANAUGH: By statutory definition.

9 MR. WHITE: Okay. Again, when we say the courts
10 have not thoroughly looked at this issue, I don't think that's
11 wholly accurate. I think some courts have looked at it. For
12 example, the Eastern District of Michigan just said well,
13 because there's no collection yet, it's not an issue. But if
14 you look at Judge Vince's decision in the Northern District of
15 Florida, he spent the greater part of his decision, I don't
16 remember how many pages but it never ended it seemed, going
17 through the distinctions of, and I don't mean that
18 pejoratively but it was very, it was very --

19 JUDGE KAVANAUGH: We take that as a compliment
20 around here.

21 MR. WHITE: As a former law clerk, you know, I can
22 appreciate how much time his staff and he put into it. He
23 goes through and he goes through a very detailed analysis
24 there. And even when you get to the question of whether it's
25 a penalty or a tax there, he'll even sit there going to the

1 timing situation because the overall purpose of the Anti-
2 Injunction Act is not being thwarted because Congress, I keep
3 saying Congress, but the IRS is not being denied any money up
4 until another three-and-a-half years or so.

5 JUDGE KAVANAUGH: What makes the Anti-Injunction Act
6 particularly a focus for me as well is that Congress, in the
7 Anti-Injunction Act, and related to it a lot of other statues,
8 they've created exceptions to the Anti-Injunction Act.
9 Indeed, after Bob Jones, when the court held, the Supreme
10 Court held the Anti-Injunction Act barred that suit, Congress
11 quickly responded with an exemption to the Anti-Injunction
12 Act. They created numerous other exemptions and for laws like
13 this that are high-profile, Congress has also, in the past,
14 crated special judicial review provisions to ensure that the
15 case is heard immediately, the Line Item Veto Act and Campaign
16 Finance Law. It didn't do that here either.

17 MR. WHITE: No. But that's addressed by, if I
18 recall correctly, the dissenting judge in the 4th Circuit
19 saying that just based upon, as I laid out, you know, how
20 Congress set up the statute, it's a penalty, that Congress
21 purposely put it outside the Anti-Injunction Act and that may
22 --.

23 JUDGE KAVANAUGH: If it just called it a penalty and
24 it was in chapter 48, I'm with you, but the cross-reference
25 assessed and collected in the same manner as penalties in

1 subchapter B of chapter 68 I think poses a problem because
2 those penalties are collected immediately, not insulated from
3 pre-enforcement, or are insulated from pre-enforcement
4 judicial review.

5 MR. WHITE: But two statutes and then, I just want
6 to talk about, is Title 26, 6671 and then 6665 which the
7 dissenting judge talks about in the 4th Circuit. 6671 says
8 taxes imposed in this title shall be deemed to refer to
9 penalties in the subchapter. Okay. The Anti-Injunction Act
10 applies to such things in which, and they're dealing there
11 with chapter 68.

12 JUDGE KAVANAUGH: Right. So you, I think we both
13 agree.

14 MR. WHITE: Right.

15 JUDGE KAVANAUGH: All chapter 68, subchapter B
16 penalties are barred or covered by the Anti-Injunction Act.

17 MR. WHITE: But we are a chapter -- again, it's
18 important that Congress put it in chapter 48 and that Congress
19 removed all of these things and as Judge Silberman says, there
20 are no cases that hold that just because it's a penalty,
21 anything that dealt with a penalty was truly dealing with the
22 tax scheme.

23 JUDGE KAVANAUGH: They put it in chapter 48 but they
24 cross-referenced chapter 68 which specifically refers to
25 taxes, so it's kind of a A equals B, B equals C. Congress

1 didn't want to say that this equaled a tax so what they said
2 is this equals a chapter 68 penalty. And when you go to
3 chapter 68, it says the chapter 68 penalty is a tax for
4 purposes of the Anti-Injunction Act. And if you put those
5 things together, if it's A equals B and B equals C, well, A
6 equals C and this is barred by the Anti-Injunction Act.

7 JUDGE SILBERMAN: In their last sentence which
8 refers only to matters within this subchapter in 68.

9 MR. WHITE: I don't have it in front of me but I
10 would think that it is critical, it is critical where Congress
11 placed it and if we go back to, you know, the basic principles
12 of statutory construction is Congress knows, we have to
13 assume, again, the presumption, we have to assume Congress
14 knows what it's using, which words it's using. And as a
15 result, that they went out of their way to put this in a
16 particular chapter, okay, and even though there was a cross-
17 reference, the cross-reference does not mean what's a penalty
18 in 48 is the equivalent of a tax in 68.

19 JUDGE KAVANAUGH: It's not, it may not be the
20 equivalent for all purposes but it has to be assessed and
21 collected in the same manner.

22 MR. WHITE: Well, the only --

23 JUDGE KAVANAUGH: In 68, it's collected without the
24 interference of a pre-enforcement suit.

25 JUDGE SILBERMAN: Counsel, why aren't you focused on

1 sort of a separate question there. Let's assume arguendo that
2 Judge Kavanaugh's proposition may be correct, that the
3 assessment itself could not be collected, the penalty could
4 not be collected in a, or could not be challenged in a pre-
5 enforcement. Isn't your argument that the mandate is separate
6 and it could be, that it is challenged separately?

7 MR. WHITE: Right because what I argued earlier is
8 before you even get to the penalty, you have to address the
9 mandate. Our challenge is to the mandate.

10 JUDGE KAVANAUGH: That exact argument was rejected
11 in Bob Jones, right? The school wanted to challenge the tax
12 exempt status. They said we don't, we're not challenging the
13 denied deduction, we're challenging our status. And the
14 Supreme Court said you couldn't sever it out that way in that
15 kind of suite, right?

16 MR. WHITE: But when you put Bob Jones into the
17 equation, as with these other cases, you're still dealing with
18 something where you have an enforceable statute, there's been
19 an assessment, collection, investigation, withholding is
20 already taking place and then there's a refusal to pay and you
21 go into court. Just based on the timing, we don't have that.
22 Plus, you have to --

23 JUDGE SILBERMAN: You have no separate mandate in
24 Bob Jones.

25 MR. WHITE: No. We have no separate mandate

1 because --

2 JUDGE KAVANAUGH: So the AIA does apply in 2014 but
3 if you can get your suit in before then, it doesn't apply?

4 MR. WHITE: No. It won't apply because this, this
5 penalty is not based upon the taxing scheme and the plain
6 language, the literal language as Bob Jones says --

7 JUDGE KAVANAUGH: I'm really under the plain
8 language of this, yes.

9 MR. WHITE: Right. It says --

10 JUDGE KAVANAUGH: Assessed and collected in the same
11 manner.

12 MR. WHITE: Right. But the plain language of the
13 Anti-Injunction Act says assessment, collection of taxes. And
14 this is not a tax based upon just by Congress putting it off
15 the way it did.

16 JUDGE KAVANAUGH: Right.

17 MR. WHITE: And it's not the same as a, in 68 where
18 they mean the same thing because those, those deal with the
19 taxing scheme. It's a separate, a separate issue.

20 JUDGE KAVANAUGH: Not all of them.

21 MR. WHITE: But --

22 JUDGE KAVANAUGH: If you look through the entire
23 subchapter B of chapter 68, you'll see a wide variety of taxes
24 that are imposed that aren't related just to nonpayment of
25 taxes.

1 MR. WHITE: But those --

2 JUDGE KAVANAUGH: Or, excuse me, tax penalties.

3 MR. WHITE: But those have been, this one has been
4 set aside and the ones that, again, I don't have the statute
5 in front of me, I would imagine those have something to do
6 with your failure to pay a tax in the first instance, and the
7 penalties, again, are applying to a tax where here, if
8 everyone complies with the mandate, all the money goes to
9 private insurance companies. It doesn't go to the Government.
10 Do you have any questions on --

11 JUDGE EDWARDS: Can I, Mr. White, as much as I love
12 the tax code, can I take you back for just a minute? I want
13 to make sure I understand something that you said in our
14 assessment of the Commerce Clause issue. Is Lopez, in your
15 mind, a facial challenge?

16 MR. WHITE: Lopez was a facial challenge. Yes, Your
17 Honor.

18 JUDGE EDWARDS: You recall that the Court applied,
19 stated the rational basis tests there that Raich stated, and
20 it goes back to Wickard. They're following the same line.
21 Raich states that as the basis for a review, cites Lopez,
22 Lopez cites Wickard. Wickard was certainly as-applied. But
23 that standard has been repeatedly stated by the Court right up
24 to today.

25 MR. WHITE: Okay.

1 JUDGE EDWARDS: Rational basis is what we're looking
2 for.

3 MR. WHITE: Right. But even, even when you look at
4 Lopez and Morrison, okay, when you, especially Morrison
5 because it had the mountain of findings that the harm to women
6 cause all these problems that effect the economy, okay, they
7 never get to the question of does Congress have a rational
8 basis in that regard because --

9 JUDGE EDWARDS: No but they're stating the standard.

10 MR. WHITE: Oh.

11 JUDGE EDWARDS: The first thing I want to do as a
12 Federal Judge is understand what my constraints are.

13 MR. WHITE: Yes. And --

14 JUDGE EDWARDS: And in these three Seminole cases,
15 that's the way they stated it. Now, this is quite apart from
16 Salerno (phonetic sp.) which, you agree Salerno is applicable,
17 that test, right?

18 MR. WHITE: The --

19 JUDGE EDWARDS: On a facial challenge, you have to
20 show no set of circumstances exist which the act could be
21 valid.

22 MR. WHITE: And I think in our case, there is no
23 circumstance that applies, yes.

24 JUDGE EDWARDS: You're not running from that.

25 MR. WHITE: No, no, no. Because just like in

1 Morrison and Lopez, they said the law does not apply.

2 Therefore, okay --

3 JUDGE EDWARDS: Yes. I mean, Morrison and Lopez
4 also make it very clear there's no economic activity.

5 MR. WHITE: Right.

6 JUDGE EDWARDS: So and that's what the later cases
7 say about them.

8 MR. WHITE: Right.

9 JUDGE EDWARDS: Okay.

10 MR. WHITE: As you're concerned with the approach to
11 it, you have to look at, you know, originally, what is
12 Congress regulating, is it economic activity here, okay, and
13 then you then go to these next steps of the rational basis
14 where even if you look at the findings, the first finding of,
15 in the healthcare law, it says that the individual mandate,
16 you know, directly effects the economy. Well, that's the
17 regulation, okay? So we get to these rational basis
18 considerations but only after we get through the first hurdle
19 does it have the power to impose this mandate on people.

20 JUDGE EDWARDS: But what the Court has said
21 consistently, and this is where I am not entirely
22 understanding. I'm not asking for you to repeat again.

23 MR. WHITE: Okay.

24 JUDGE EDWARDS: But, I mean, just so you understand
25 the concern, the Court has said consistently where necessary

1 to make a regulation of interstate commerce effective, and
2 there's no doubt that the industry is in interstate commerce,
3 Congress may regulate even those intrastate activities do not
4 themselves substantially effect interstate commerce and even
5 if they're trivial.

6 MR. WHITE: Right. But those --

7 JUDGE EDWARDS: They use the word "trivial" several
8 times in that case.

9 MR. WHITE: And that's talking about the aggregate
10 where if you have Roscoe Filburn, he's growing just a small
11 amount of wheat, you add up all the Roscoe Filburns, it's
12 going to have an impact there. But you're still going to have
13 the economic activity and you also have to look to see is, for
14 example, in Raich, would that be a barrier, would that be an
15 obstruction to the regulation? But in our circumstance, the
16 failure to have insurance, the decision to have insurance is
17 not obstructing Congress' regulating the healthcare market,
18 it's not obstructing Congress' regulation of health insurance
19 market.

20 JUDGE EDWARDS: Well, that's your disagreement with
21 their findings on the impact.

22 MR. WHITE: I'm sorry?

23 JUDGE EDWARDS: That is your disagreeing with their
24 findings on the impact of having a set of people who want to
25 self-insure.

1 MR. WHITE: Right. Well, when you look at their
2 findings, this court, this court doesn't just stick with --

3 JUDGE EDWARDS: That's where rational basis comes
4 into view.

5 MR. WHITE: Correct. But it's for the Court to
6 decide whether it has a substantial impact on the economy
7 based on these findings but also, you have to consider too
8 that Congress went out of its way to exempt a lot of people
9 and so that the individual mandate, you know, has exempted out
10 various people. And really what it comes down to is when
11 they're focusing on cost shifters, a lot of the cost shifters
12 have already been exempted out and really what it comes down
13 to is the individual mandate is focused on young, healthy
14 people for the most part to bring them into the system to
15 compensate for these other requirements imposed by Congress.

16 I reserve the rest of my time. Thank you. Unless
17 there are any questions on the RFRA claim, I'll sit down now.

18 JUDGE KAVANAUGH: Thank you. We'll give you time
19 for rebuttal. Ms. Brinkmann.

20 ORAL ARGUMENT OF BETH S. BRINKMANN, ESQ.

21 ON BEHALF OF THE APPELLEES

22 MS. BRINKMANN: May it please the Court, Beth
23 Brinkmann on behalf of the Government. I'll turn back now to
24 the Commerce Clause and go through in the same order. The
25 minimum coverage provision regulates the way participants in

1 the healthcare market finance healthcare services. The
2 provision regulates economic activity. It also forms part of
3 the act's broader regulation of interstate commerce.

4 JUDGE SILBERMAN: Counsel, let's go right to what is
5 your more, most difficult problem. What limiting principle do
6 you articulate?

7 MS. BRINKMANN: Certainly, here, Your Honor, this is
8 a regulation of economic activity, it's the means by which
9 people finance their healthcare services and it is using
10 insurance which is the customary means --

11 JUDGE SILBERMAN: Counsel, you're telling me what
12 this case, the facts of this case but you know the difficult
13 question for you is what kind of mandate could the Government,
14 could Congress come up with under the Commerce Clause which
15 would be unconstitutional? What kind of requirement that
16 persons buy services or products would be unconstitutional?

17 MS. BRINKMANN: Well, certainly it would depend on
18 the empirical --

19 JUDGE SILBERMAN: Just give me an example. Give me
20 an example of --

21 MS. BRINKMANN: I think if we talk about the
22 broccoli hypothetical, it would go to your question. I'm
23 not --

24 JUDGE SILBERMAN: You mean if Congress passed a law
25 requiring people above a certain income to buy broccoli, well,

1 that would be unconstitutional?

2 MS. BRINKMANN: No. It depends, Your Honor. Let me
3 just -- if it were, for example, if there were a --

4 JUDGE SILBERMAN: Let me give you a General Motors
5 example because that's what came up in the brief. Suppose
6 Congress provided, because General Motors, let's suppose
7 General Motors was close to bankruptcy again, please, God,
8 that doesn't happen, but suppose it was close to bankruptcy
9 and Congress passed a law requiring everybody with an income
10 over \$500,000 to buy a General Motor product, let's say,
11 annually or every three years. They would get a tax, somebody
12 buying that would get a tax credit and could sell it in the
13 market so they could end up economically uninjured. Would
14 that be constitutional?

15 MS. BRINKMANN: The right analogy would be if --

16 JUDGE SILBERMAN: Counsel, answer my question.
17 Would that be constitutional?

18 MS. BRINKMANN: I would have to know much more about
19 the empirical findings because what the --

20 JUDGE SILBERMAN: The findings is General Motors is
21 about to go bankrupt and we have to increase demand.

22 MS. BRINKMANN: And normally, in a market, a
23 different type of market like that, there's a regulation on a
24 transaction that has to do with the seller, for example. The
25 problem in this market which makes it look different --

1 JUDGE SILBERMAN: Counsel, what about my
2 hypothetical? Is it you're unwilling to give me any example
3 of a mandate that would be unconstitutional and that, that
4 does, then feeds into your opponent who says you have no
5 limiting principle.

6 MS. BRINKMANN: Far from it, Your Honor. Not at
7 all. I think it's difficult --

8 JUDGE SILBERMAN: Give me an example of something
9 that would be unconstitutional.

10 JUDGE KAVANAUGH: How about mandatory retirement
11 accounts replacing social security? President Bush proposed
12 voluntary accounts to replace a portion of social security.
13 If this law is upheld as constitutional 5, 10, 20 years from
14 now, you can easily see mandatory retirement accounts
15 replacing social security. Constitutional?

16 MS. BRINKMANN: It would depend, Your Honor. In
17 that situation, the question would arise about what the
18 empirical evidence is about the substantial effects on
19 interstate commerce. For example, we learned from the Lopez
20 and Morrison case that sets for the limits on --

21 JUDGE KAVANAUGH: The effects of interstate commerce
22 are that people who are elderly, the Government doesn't have
23 enough to provide for their subsistence and so to get people
24 into the market earlier, force them to buy retirement accounts
25 starting at age 25 is the rationale. And it seems to me that

1 follows directly from this case which goes into my question of
2 Mr. White, that I think the Government's theory would usher in
3 authorization for major privatization of the social safety net
4 with forced mandates replacing, retirement accounts replacing
5 social security. You could see the same thing with Medicare.
6 I don't see how you distinguish those things. Now, maybe
7 you'd say Congress won't do that. That's not obviously
8 something that we can rely on.

9 MS. BRINKMANN: Those are fundamentally different.
10 There is a limit. This is not a case about there being no
11 ability to mandate to buy a car or to have mandatory
12 retirement accounts under our position. If we just --

13 JUDGE KAVANAUGH: Why?

14 MS. BRINKMANN: Because what it --

15 JUDGE KAVANAUGH: I don't get the difference.

16 MS. BRINKMANN: Because what is being regulated here
17 is the customary means for financing healthcare services.

18 JUDGE SILBERMAN: Are you saying that the
19 hypotheticals we gave you would be unconstitutional under your
20 theory of the Commerce Clause?

21 MS. BRINKMANN: Without knowing more, I would tend
22 to think they would present very difficult issues, just a bold
23 mandate like to buy a product.

24 JUDGE SILBERMAN: Unconstitutional? You said they
25 would be unconstitutional?

1 JUDGE KAVANAUGH: She didn't say that.

2 MS. BRINKMANN: I can say that they certainly would
3 be, I guess it would depend if there were some other crisis.
4 For example, if there was a --

5 JUDGE KAVANAUGH: There is a crisis in social
6 security.

7 MS. BRINKMANN: Okay.

8 JUDGE KAVANAUGH: There's a crisis in Medicare. Can
9 the Government replace those two programs with a system of
10 forced mandates of insurance starting in your 20s so that the
11 Government isn't in the business anymore of essentially
12 running out of money to fund those programs?

13 MS. BRINKMANN: Our position here does not require
14 that to be valid.

15 JUDGE KAVANAUGH: But the problem is if your
16 position is upheld 10 years from now, we're going to be here
17 and the attorney for the Government is going to be saying
18 look, you upheld the mandate in that case and that's no
19 different from this. I can --

20 MS. BRINKMANN: But this is, this is --

21 JUDGE KAVANAUGH: -- see it coming.

22 MS. BRINKMANN: This is where we have market
23 participants being regulated because of two primary reasons
24 here. There is a substantial effect on interstate commerce
25 from their financing from their economic activity shifting

1 tens of billions of dollars into the market. Insurance is the
2 customary way to do that. People who do not use that means
3 fail collectively.

4 JUDGE KAVANAUGH: The people who do not save
5 sufficiently for retirement are imposing a huge cost as well.

6 MS. BRINKMANN: But here, we don't have a kind of
7 diffused general claim about generic effects on national
8 productivity, for example, which was really the issue, the
9 problem in Lopez and Morrison. Here, we are targeted on an
10 interstate market. And I should also emphasize, as Your Honor
11 pointed out in initial questioning, that this is also
12 essential to Congress' regulation, broader regulatory
13 framework here with the guarantee issue and the community
14 rating. And under the Necessary and Proper Clause, certainly
15 this is a valid regulation as part and parcel of that.

16 JUDGE KAVANAUGH: So one concern Judge Silberman
17 identified about the limiting principle, and I think I share
18 that concern. Another major concern I have identified to Mr.
19 White which is in 220 years, with a whole lot of laws and a
20 lot of crises, Congress has never once mandated a purchase.

21 MS. BRINKMANN: This is not mandating a purchase as
22 a, purchasing a product for its own sake. This is mandating a
23 type of financing, quintessential economic behavior, and it is
24 in a unique market. Congress, and I think that the
25 conversations earlier about the standard here, this is an

1 incredibly deferential standard to Congress. Whether Congress
2 had a rational basis to --

3 JUDGE KAVANAUGH: Well, that was an argument the
4 Government made in Morrison and Lopez of course, and --

5 MS. BRINKMANN: But this is different from --

6 JUDGE KAVANAUGH: -- Justice Kennedy's concurrence
7 goes through that and talks about the great restraint that
8 courts needs to show but also, that when the Federal
9 Government seeks to alter the Federal/State balance with
10 something that is not linked to commerce, that the courts need
11 to step in. And then you have Printz which relies on the lack
12 of history. I just think --

13 MS. BRINKMANN: Your Honor, if we could step back
14 for a moment and look at this regulatory scheme. It's evident
15 it's quintessential economic regulation and it's common ground
16 that Congress could require insurance or penalize consumers at
17 the point of purchase. What plaintiffs are attempting to
18 do --

19 JUDGE SILBERMAN: No, no. Counsel -- I thought
20 there was common ground on that too but Counsel had said no,
21 that's not so because they could not require the purchase of
22 insurance under circumstances where the purchaser had to keep
23 the insurance for a lifetime.

24 MS. BRINKMANN: There certainly is common ground
25 amongst the courts, including the 11th Circuit's analysis.

1 JUDGE SILBERMAN: But there's not common ground with

2 --

3 MS. BRINKMANN: Yes, Your Honor.

4 JUDGE SILBERMAN: -- your opponent.

5 MS. BRINKMANN: But what they're attempting to do --

6 JUDGE SILBERMAN: When you say it's common ground,
7 you usually, you're referring to your, the parties in the
8 case.

9 MS. BRINKMANN: Correct, Your Honor. But the --

10 JUDGE SILBERMAN: I mean, you can say there's common
11 ground with law professors too, and that and 10 cents will get
12 you on a trolley car.

13 MS. BRINKMANN: But the theory here is that there
14 could be regulation down the road but the, it isn't how
15 insurance works. You can't buy insurance on the way to the
16 hospital. And here, where you have market participants, you
17 have virtually universal participation and in this particular
18 market, you have businesses that have to provide care even to
19 those who cannot afford it.

20 JUDGE KAVANAUGH: Can Congress impose prison time
21 for those who do not purchase health insurance under the
22 Commerce Clause?

23 MS. BRINKMANN: I think there would be other
24 constitutional problems with that. I'm not sure it would --

25 JUDGE KAVANAUGH: Such as?

1 MS. BRINKMANN: -- be a Commerce Clause problem.

2 JUDGE KAVANAUGH: It's not a Commerce Clause problem
3 for Congress to authorize imprisonment for failure to purchase
4 health insurance. I think that's got to be your answer and
5 your Commerce Clause theory. But that alone shows the change
6 that your position ushers in because for 220 years when
7 Congresses wanted to encourage or discourage behavior, it's
8 used the tax code. It's done through incentives that get you
9 very close to a mandate but not quite a mandate. Your
10 Commerce Clause position means that it can be a mandate and
11 that criminal penalties can be imposed, including prison time,
12 for failure to do the purchase and that strikes me as a seat
13 change in congressional power.

14 MS. BRINKMANN: I don't think it necessarily means
15 they can be imposed, it means that it's not the Commerce
16 Clause issue. But, Your Honor, part, a significant aspect of
17 what Congress was doing was including this as part of a
18 broader regulatory scheme and it looked at the experience of
19 the states and it was clear that a minimum coverage provision
20 is essential to the Guarantee Issue and Community Ratings
21 Provision. That puts this well within Congress' authority to
22 enact it as part of that broader regulatory scheme and that
23 scheme includes several aspects. It has various tax measures
24 for employers and employees, it's expanded Medicaid, it set up
25 state exchanges.

1 JUDGE KAVANAUGH: Well, the only part, as I explored
2 with Mr. White, that it's really directly linked to as I see
3 it is the guaranteed issue provision. But the problem I have
4 with that theory, I suppose, problem, question about, I'm not
5 sure I have a problem, the question about that theory, can
6 Congress impose a huge requirement on an industry, a very
7 burdensome requirement and then, so that the industry doesn't
8 crater, impose a mandate to force more people to purchase
9 goods or services from people in that industry? And the
10 health insurance companies here said guaranteed issue without
11 a mandate, we'll be bankrupt. Use some of the states as
12 examples of the problems.

13 MS. BRINKMANN: Well, Congress certainly look at a,
14 just wealth of information about the prices in the healthcare
15 market and the cost shifting that comes about by those who
16 attempt to insure and I think that's evident, Your Honor.

17 JUDGE KAVANAUGH: On cost shifting now, on cost
18 shifting alone, that's the exact argument that Lopez and
19 Morrison rejected.

20 MS. BRINKMANN: Oh, no, Your Honor. That was a much
21 more attenuated argument.

22 JUDGE KAVANAUGH: The idea there was that violent
23 criminal conduct imposes a major cost on society that's borne
24 by all of us and therefore --

25 MS. BRINKMANN: We're talking --

1 JUDGE KAVANAUGH: -- Congress can regulate that.

2 JUDGE SILBERMAN: But isn't the --

3 MS. BRINKMANN: We are talking about a regulation of
4 market participants in a particular healthcare market and
5 people who cannot guarantee they won't need those services,
6 can't guarantee they won't buy and yet, are not paying it.
7 There's no cost to show right to avoid insurance, have other
8 people pay for your medical bills.

9 JUDGE SILBERMAN: Isn't the critical assumption here
10 that Congress made, whether you buy it or not, that all of us
11 have health issues? I mean, that's the difference with all
12 these other hypotheticals. The consumers cannot be said in
13 most of these other hypotheticals. Everyone doesn't drive a
14 car.

15 MS. BRINKMANN: That's absolutely right, Your Honor,
16 and that means you're --

17 JUDGE SILBERMAN: Congress said everyone has health
18 issues. That was their critical assumption. That's how you
19 tie up the requirement on the two sides. It's a regulated
20 industry and there are participants, and their assumption is
21 everyone, whether they claim otherwise or not, everyone is
22 involved. It's an entirely different picture than the other
23 hypotheticals.

24 MS. BRINKMANN: That's absolutely right, Your Honor,
25 and I'd add another very --

1 JUDGE KAVANAUGH: Isn't that --

2 MS. BRINKMANN: -- unusual fact to that is that in
3 this market, part of the issue is that providers have to pay,
4 have to provide services to those who can't pay. And so this
5 is regulating finance. It's very different from Lopez and
6 Morrison. If I just can, Your Honor. This is --

7 JUDGE KAVANAUGH: How about the old age? We're all,
8 hopefully, going to get old.

9 MS. BRINKMANN: Well, if you're talking about
10 insurance for --

11 JUDGE KAVANAUGH: So a mandatory --

12 MS. BRINKMANN: -- elder care or long term?

13 JUDGE KAVANAUGH: A mandatory retirement account
14 which I think is the lurking, maybe not well much discussed
15 but for me, it's the lurking next step in this kind of
16 regulatory scheme.

17 MS. BRINKMANN: What's different from that is, Your
18 Honor, there isn't an identifiable interstate commercial
19 market that we're talking about. We're talking about here,
20 about the healthcare market and this is core --

21 JUDGE KAVANAUGH: A pension market is not a, and the
22 401k markets?

23 MS. BRINKMANN: Is there empirical evidence that
24 somehow, that the financing is going to, you know, disrupt the
25 market in a way? I mean --

1 JUDGE SILBERMAN: I think, actually, Chile does use
2 exactly the technique Judge Kavanaugh is describing.

3 MS. BRINKMANN: Here, it is already a financing
4 issue per services that are being obtained, and these are
5 services for which other people in the market are paying for.
6 That really is core impact, substantial, direct impact.
7 Unlike Lopez and Morrison, this is not some attenuated,
8 perhaps, ultimate impact on national productivity. This is on
9 a specific particular market with participants in that market,
10 in a market where there are market forces that have led to
11 insurance being the typical way to pay. That is not typical
12 of other markets and it's because Congress and the deference
13 that this court is doing, what Congress is doing in its task
14 to find a way to resolve that crisis is to take the customary
15 means of insurance and require that as a means of financing
16 for individuals who are participants in that market. And the
17 presumption of constitutionality, the standard review that is
18 given here does make this a valid exercise of --

19 JUDGE KAVANAUGH: I agree completely, especially
20 with the last thing you said. That presumption of
21 constitutionality is a key factor and the great restraint that
22 Justice Kennedy counseled in Lopez. But looking at it from a
23 bigger picture than you were just saying, we have the history,
24 never been done in 220 years. That alone is cause for
25 judicial hesitation.

1 The implications. Despite your good efforts, I am
2 very dubious that this can be cabined off as just a health
3 insurance only precedent in any kind of remotely principled
4 way. I know you have to keep fighting that.

5 And then third, Congress has traditionally done this
6 and still could do this so easily through the tax code.
7 Indeed, the House bill did it. The House bill was 100 percent
8 constitutional. It could have all the same money in terms of
9 the tax issue, all the same money payments, but it didn't have
10 a mandate. It was if you don't have the health insurance, you
11 pay the money.

12 And why would we potentially open a whole new avenue
13 of Commerce Clause jurisprudence when there's, Congress so
14 readily can do this through its traditional tools. Never
15 needed this tool before.

16 MS. BRINKMANN: Let me try it this way on two
17 points. This is about insurance. Insurance as a means of
18 financing. Now, insurance is generally linked to a
19 transaction like a car purchase but here, we can't do that
20 because of the nature of the obligation to provide care even
21 for people who can't pay at the point of purchase, so it is a
22 means of financing current market participants in a market.
23 That is very far afield from the hypotheticals that you have
24 posed and there are limits, Your Honor. We look at Lopez, we
25 look at Morrison, and I would urge, that was a --

1 JUDGE SILBERMAN: Well, Lopez and Morrison are
2 limited based on local or domestic law enforcement concerns,
3 not economic concerns.

4 MS. BRINKMANN: Well, also, Your Honor --

5 JUDGE SILBERMAN: The hypotheticals that both Judge
6 Kavanaugh and I were thinking about are economic ones in which
7 there are mandates. And so, and I haven't yet heard from you
8 a principle line. Now, you might respond that the Supreme
9 Court doesn't always look for principle lines referring to the
10 same justice that Judge Kavanaugh just referred to. I'm
11 reminded of the Massey (phonetic sp.) case where it was held
12 that it was unconstitutional for a State court judge to take
13 campaign contributions of a certain size but there was no
14 limiting principle in the case. So you can, one argument you
15 might make is the Supreme Court often decides constitutional
16 questions without limiting principles. Would you make that
17 argument?

18 MS. BRINKMANN: Well, certainly, Your Honor, here I
19 think that the fact is that there is this significant role
20 that this minimum coverage provision plays in the broader
21 regulatory scheme. I think there is clear Supreme Court
22 precedent that puts this in the heartland of permissible
23 Commerce Clause regulations.

24 JUDGE SILBERMAN: Counsel, whatever this case is,
25 it's hardly the heartland.

1 JUDGE KAVANAUGH: It's not the heartland.

2 MS. BRINKMANN: It is in their rationale, Your
3 Honor, of --

4 JUDGE SILBERMAN: If I were you, I would hammer
5 harder on Wickard because, do you think I, just as a softball,
6 do you think I analyzed that correctly?

7 MS. BRINKMANN: I think both Wickard and Raich, You
8 Honor. Certainly these, this is --

9 JUDGE SILBERMAN: No. Didn't you understand the
10 distinction. In Wickard, after all --

11 MS. BRINKMANN: Yes.

12 JUDGE SILBERMAN: -- there's a requirement, implicit
13 requirement that the individual buy in the interstate market
14 or the wheat in the outside market, so it could be thought of
15 as very close to a mandate.

16 MS. BRINKMANN: But in this --

17 JUDGE SILBERMAN: That is not true in Gonzales where
18 there's an effort to try to prevent the individual from going
19 into the market.

20 MS. BRINKMANN: But this is an easier case because
21 these participants are in the market already. That is why
22 this is an easier case than those cases.

23 JUDGE SILBERMAN: They're in the market already?
24 Which one?

25 MS. BRINKMANN: They're in the market for healthcare

1 services. Congress, as long as they have a reasonable basis
2 for classifying the group that is being regulated, Perez says
3 this, Raich says this, do not have to excise out the
4 idiosyncratic, the one exception, the few exceptions. And as
5 a class, as an aggregate, these are market participants and
6 the choice of their means for financing what they are already
7 getting. Does it work? It feels like --

8 JUDGE SILBERMAN: Well, that goes to the question --

9 MS. BRINKMANN: -- tens of billions of dollars.

10 JUDGE KAVANAUGH: Excuse me, Counsel. That goes to
11 the question which market? You're conflating the market for
12 health with the market for insurance for the health, and is
13 that fair?

14 MS. BRINKMANN: Yes, Your Honor, it is. There is a
15 healthcare market and the insurance --

16 JUDGE SILBERMAN: We understand the healthcare but
17 you're requiring people to go in the insurance market, not the
18 health market.

19 MS. BRINKMANN: We are requiring people who are
20 currently in a market to finance it in a particular way, and
21 that is an easier case than Wickard. And Raich really
22 reinforces, again, the aspect of a broader regulatory scheme.
23 Certainly, they're -- the intrastate possession of marijuana
24 was recognized to be part of the broader regulatory scheme
25 that Congress had enacted to prohibit the interstate commerce

1 in drugs.

2 JUDGE KAVANAUGH: The underlying conduct I think
3 they said in Lopez for that doctrine has to be, arise out of
4 or be connected with a commercial transaction.

5 MS. BRINKMANN: These are commercial transactions in
6 the aggregate.

7 JUDGE KAVANAUGH: They will happen. What you're
8 saying is that the commercial transaction will --

9 MS. BRINKMANN: Are happening. Are happening on a
10 regular basis. In our brief, we set forth the huge --

11 JUDGE KAVANAUGH: No. But someone who doesn't have
12 health insurance and doesn't get healthcare very often.

13 MS. BRINKMANN: That's what's unique here, Your
14 Honor. They may get it in five minutes when they get hit by a
15 car. They may already have cancer that needs treatment, you
16 know, young and healthy is a misnomer. People are not even
17 aware of diagnoses yet to be reached that they already have.
18 I do think that it's important to remember here, Your Honor,
19 under Congress' authority, the role that this does play in the
20 broader regulatory scheme and the necessity that this, the
21 necessity of this to make the guaranteed issue and community
22 rating work in an effective manner.

23 I think I would move onto the tax issue, Your Honor.
24 The minimum coverage provision is also independently
25 authorized by Congress' taxing power. In light of your

1 earlier questions, Judge Kavanaugh, I would just make quite
2 clear that the difference in form here does not matter. The
3 only consequence here --

4 JUDGE KAVANAUGH: Let me ask you this. Is it
5 illegal not to have health insurance?

6 MS. BRINKMANN: No. The only consequence --

7 JUDGE KAVANAUGH: It's not?

8 MS. BRINKMANN: The only consequence --

9 JUDGE KAVANAUGH: There's a specific mandate that
10 says a covered person shall have health insurance. You're
11 saying it's not illegal?

12 MS. BRINKMANN: I think you're suggestion would be
13 who would have standing, who would be harmed by that?

14 JUDGE KAVANAUGH: No. Okay.

15 JUDGE SILBERMAN: No.

16 JUDGE KAVANAUGH: A covered person shall, an
17 applicable person, covered person shall have health insurance
18 or pay a penalty of \$1500 if you do not.

19 MS. BRINKMANN: It doesn't get --

20 JUDGE KAVANAUGH: Is it illegal?

21 MS. BRINKMANN: It doesn't --

22 JUDGE KAVANAUGH: When you go on your FBI background
23 investigation in 2018 and they say have you done anything
24 illegal, do you say I didn't have health insurance?

25 MS. BRINKMANN: Here, the only consequence is a tax

1 consequence.

2 JUDGE KAVANAUGH: That's an important question I
3 think to tease out whether this is a tax or not.

4 JUDGE SILBERMAN: You know, Counsel, I think it is
5 illegal and I think it's essential for your argument to make
6 it that, otherwise, you're going to run into trouble on the
7 Anti-Injunction Act.

8 MS. BRINKMANN: No, Your Honor.

9 JUDGE SILBERMAN: Do you understand the dialogue
10 that Judge Kavanaugh was having with Counsel --

11 MS. BRINKMANN: Yes.

12 JUDGE SILBERMAN: -- raising the question of whether
13 the Anti-Junction Act would deprive us of jurisdiction?

14 MS. BRINKMANN: Yes.

15 JUDGE SILBERMAN: And my response in part was that
16 the mandate is an independent obligation on individuals
17 without regard to the penalty, isn't that correct?

18 MS. BRINKMANN: Your Honor, first I would just want
19 to step back for a minute and talk about the difference of
20 analysis between the constitutional tax power and the Anti-
21 Injunction Act. I'm talking about constitutional, not
22 statutory terminology which is very different.

23 JUDGE SILBERMAN: Okay. Well, put aside the Anti-
24 Injunction Act for a moment because I think the order --

25 JUDGE KAVANAUGH: Yes. We'll stick to the

1 constitutional issue.

2 JUDGE SILBERMAN: We'll stick with constitutional.

3 And on the constitutional issue, shouldn't we be influenced by
4 what Congress said it was doing, and it made it clear it was
5 not relying on the taxing authority? It may have been that
6 it's sort of easy for them to have done it but they didn't do
7 it, did they?

8 MS. BRINKMANN: I agree strongly with you, Your
9 Honor. They did not --

10 JUDGE SILBERMAN: You disagree?

11 MS. BRINKMANN: Yes. I disagree with you. They did
12 not --

13 JUDGE SILBERMAN: They did rely on the taxing
14 authority?

15 MS. BRINKMANN: They did not disclaim their taxing
16 authority.

17 JUDGE SILBERMAN: No. Did they rely on the taxing
18 authority?

19 MS. BRINKMANN: They relied on the taxing authority.
20 The Senate did, for example, on a point of order. There is a
21 House report --

22 JUDGE SILBERMAN: In the statute, do they rely on
23 the taxing authority, yea or nay?

24 MS. BRINKMANN: Yes, Your Honor. To rely on the
25 taxing authority, Congress does not have to include a finding

1 or a specific provision in the statute. What matters is the
2 function. And here, Your Honor, they put it in the tax code.

3 JUDGE SILBERMAN: Now, wait. Doesn't the President
4 have a role in legislation? Didn't he sign this legislation?

5 MS. BRINKMANN: Yes, Your Honor, and it was --

6 JUDGE SILBERMAN: And didn't he say over and over
7 again he was not imposing a tax?

8 MS. BRINKMANN: No, Your Honor. What the President
9 said, he was, there was no tax increase, to be specific, if
10 we're referring to the same press account. But moving back to
11 actually the political accountability, Your Honor, Congress
12 put it in the tax code and every April 15th, not just when it
13 was enacted, every single year, every taxpayer is going to
14 look at their form and know that this is from the tax power.
15 So I don't think that that --

16 JUDGE SILBERMAN: Aren't you --

17 MS. BRINKMANN: -- political accountability is --

18 JUDGE SILBERMAN: Aren't you between a rock and a
19 hard place. If you say you're relying on the tax authority,
20 then aren't we going to get ourselves into a jurisdictional
21 problem under the Anti-Injunction Act?

22 MS. BRINKMANN: No, Your Honor. That is a question
23 of statutory interpretation and the terminology. There's a
24 very precise usage in the tax code. But before I went there,
25 I wanted to say a couple other things about the tax power

1 here. The use of the tax power here is very consistent with
2 both other provisions of the Affordable Care Act and with
3 Congress' longstanding use of the tax code to promote the use
4 of healthcare insurance to finance healthcare services.

5 For ages, on your income as an employee, the
6 premiums that your employer pays are not counted as part of
7 your income. At the same time, the employer can deduct as a
8 business deduction the premiums that he pays for your health
9 insurance. In addition, in the Affordable Care Act, there are
10 several tax measures that are part of this regulatory
11 framework. There are tax incentives for small employers.
12 There are tax credits for middle income people to help pay for
13 premiums. Just like a tax credit, we have here a tax penalty.
14 That is, that is the taxing authority.

15 JUDGE KAVANAUGH: The distinction is the mandate.
16 When it's accompanied by a mandate or prohibition, that is not
17 ordinarily referred to as a tax. I think the Texas amicus
18 brief pointed out, as the SG argued, in the child labor tax
19 cases in trying to distinguish a tax from a penalty, said that
20 the statute prohibits the doing of an act and as a sanction,
21 imposes a pecuniary punishment for violating the act. Then it
22 is a penalty and not a tax at all. So it's --

23 MS. BRINKMANN: Well, Your Honor, I think that --

24 JUDGE KAVANAUGH: -- the standard of conduct if it's
25 encouraging or discouraging. In other words, pay the money if

1 you engage in the behavior or don't engage in the behavior,
2 that's taxes usually. If it's it is unlawful to engage in the
3 behavior and here's the penalty, that's not usually considered
4 a tax. In fact, I can't find it ever being considered a tax
5 for purposes of a tax power.

6 MS. BRINKMANN: Well, I'd like to make three points,
7 Your Honor. As Your Honor already mentioned, Bob Jones made
8 clear that the Supreme Court is no longer in the business of
9 determining, you know, revenue versus regulatory provisions.
10 I'd also bring the --

11 JUDGE KAVANAUGH: I'm with you on that, yes.

12 MS. BRINKMANN: I'd bring the Court's attention to
13 New York v. United States which we gave an example where there
14 is a requirement --

15 JUDGE KAVANAUGH: Yes.

16 MS. BRINKMANN: There was a requirement on states --

17 JUDGE KAVANAUGH: On states I guess was the
18 difference. I --

19 MS. BRINKMANN: Oh, I don't think that they're
20 different at all. They were there as a taxpayer. They were
21 challenging that provision.

22 JUDGE KAVANAUGH: It's a helpful case for you. I
23 agree.

24 MS. BRINKMANN: And the Court said we're not going
25 to pry this apart, and it said you have a statutory

1 obligation. Judge Silberman, going to your question there, it
2 said statutory obligation and if you don't and do part of this
3 complicated process, there's going to be part of a surcharge,
4 and that was nonetheless upheld as under the Congress' taxing
5 authority.

6 JUDGE KAVANAUGH: Could Congress, after Lopez, ban
7 possession of guns near schools and impose a civil penalty?

8 MS. BRINKMANN: That becomes more difficult because
9 of the questions about, particularly under the lines of
10 cases --

11 JUDGE KAVANAUGH: A nonpunitive civil penalty.

12 MS. BRINKMANN: I think the question would be the
13 punitive aspect of it because certainly, under --

14 JUDGE KAVANAUGH: No. It's nonpunitive under the
15 Kurth Ranch. It's a nonpunitive civil penalty.

16 MS. BRINKMANN: But I think you're begging the
17 question, Your Honor, that it's nonpunitive under the Kurth
18 Ranch because one of the questions is whether or not --

19 JUDGE KAVANAUGH: Then you're getting back --

20 MS. BRINKMANN: It's imposed on criminal conduct.

21 JUDGE KAVANAUGH: It's not criminal at all. It's,
22 they don't impose prison time at all, assume in my
23 hypothetical. So after Lopez, it's just a new statute that
24 says if you, it shall be unlawful to possess a gun near a
25 school. The penalty for this is a nonpunitive civil penalty

1 of \$1,000. Constitutional or not?

2 MS. BRINKMANN: If it did not --

3 JUDGE KAVANAUGH: Under the taxing power.

4 MS. BRINKMANN: Under the taxing power. If it did
5 not create the issues, I mean, we're taking into account a lot
6 under Mendoza Martinez and that what, you look there to see if
7 it causes double jeopardy problems, that type of thing, I
8 mean, if all of those are included within your hypothetical, I
9 think there may not be a problem.

10 JUDGE KAVANAUGH: Right. So I think that's your
11 position, actually, and I think your position is that all
12 nonpunitive, under the Kurth Ranch test, all nonpunitive civil
13 penalties can be justified under the tax power.

14 MS. BRINKMANN: Well, not necessarily. There has to
15 be some incidence on which the tax falls and here, it is the
16 financing of healthcare without insurance and the consequences
17 that that brings about.

18 JUDGE KAVANAUGH: There has to be behavior on which
19 the penalty is imposed, sure, but I'm not aware of precedent
20 that necessarily supports that theory of the taxing power to
21 basically allow nonpunitive civil penalties on all these
22 things that Congress couldn't reach through the commerce
23 power.

24 MS. BRINKMANN: Well, here, the only consequence is
25 tax liability. This is not like the child labor cases where

1 there's some other, you know, enforced mandates outside of the
2 IRS.

3 JUDGE KAVANAUGH: So if the same law were passed and
4 it was a civil penalty and it was enforced by the U.S.
5 Attorney, civil penalty, same exact penalty is called a
6 penalty, it's still justified under the tax power?

7 MS. BRINKMANN: Well, you'd have to step back, I
8 think, and look through the analysis and whether it was
9 functioning as a tax, and we've gone through several of the
10 reasons why this functions as a tax. For example, payment --
11 Judge Silberman, I think this goes to your original question
12 too, the payment of a tax eliminates any requirement under the
13 minimum coverage provision. It's not as if you're robbing
14 someone. If you're robbing, you're punished for that but you
15 get to keep what you, you stole. Here, it eliminates any
16 underlying requirement. It also --

17 JUDGE SILBERMAN: So there's no moral or legal
18 obligation on somebody to buy insurance under this statute?

19 MS. BRINKMANN: The only consequence is the tax
20 penalty.

21 JUDGE SILBERMAN: That's not my question. There's
22 no obligation, legal obligation to buy insurance.

23 MS. BRINKMANN: No more than there was on the states
24 in New York v. United States where the Supreme Court talked
25 about the statutory obligation that was imposed there but

1 realized and said this cannot be divorced from the other
2 aspects of this, one of them being a surcharge that was upheld
3 under the tax authority. And that was a requirement, that was
4 an obligation.

5 JUDGE KAVANAUGH: Just so I'm clear, and I touched
6 on this earlier, but are you aware of a precedent where
7 conduct is made illegal and sanctioned by a monetary exaction,
8 and that's been justified under the taxing power?

9 MS. BRINKMANN: Well, certainly, in the Sanchez
10 case, for example --

11 JUDGE KAVANAUGH: Conduct wasn't made illegal. It
12 was a tax on a transfer.

13 MS. BRINKMANN: But there was a requirement that you
14 get a license --

15 JUDGE KAVANAUGH: Yes.

16 MS. BRINKMANN: -- and pay that special tax.

17 JUDGE KAVANAUGH: And in the license tax case but
18 once you --

19 MS. BRINKMANN: No. This was in the Sanchez case.

20 JUDGE KAVANAUGH: I know. In both of them.

21 MS. BRINKMANN: And you pay \$1 per ounce and if you
22 don't do that, then you pay \$100 per ounce, requirement tax.
23 That was upheld as a tax.

24 JUDGE KAVANAUGH: Here's a potential distinction
25 that I'd like you to respond which is once you pay the fee for

1 a license, you are acting lawfully in selling the lottery
2 tickets, in selling the liquor in the license tax cases, in
3 selling the marijuana in Sanchez once you get the license.
4 Here, although your answer has been a little different, as I
5 understand it, once you've paid the tax, you're still acting
6 unlawfully because you're going to have to pay, you're
7 incurring a continuing tax liability each month.

8 MS. BRINKMANN: Well, you're just paying the tax for
9 the period in which you do not maintain the minimum
10 requirement, and it is month by month. And if you have a
11 partial coverage --

12 JUDGE KAVANAUGH: So you would equate it --

13 MS. BRINKMANN: -- during the month, it is prorated
14 according to the months and that year.

15 JUDGE KAVANAUGH: I think this is a close call.
16 You're equating it to a license to not have health insurance.

17 MS. BRINKMANN: No. I want to pull it back to this
18 idea that it's like a tax credit.

19 JUDGE KAVANAUGH: That was a helpful question.

20 MS. BRINKMANN: But I also, you know, you have tax
21 credits, you have tax penalties. This is part of -- the
22 consequence is the bottom line of your taxes and that's what
23 can support, as an independent basis, a congressional
24 authority to enact this.

25 JUDGE KAVANAUGH: If we thought you were right on

1 both grounds, the Court thought you were right on both
2 grounds, the taxing power is far narrower, correct, because
3 the commerce, because all you can do is impose monetary
4 exactions. The Commerce Clause theory would allow you to
5 impose prison time on people who didn't comply with the
6 mandate in future statutes, correct?

7 MS. BRINKMANN: Well, I pause, hesitate to say would
8 it --

9 JUDGE SILBERMAN: Well, exactly.

10 MS. BRINKMANN: -- allow it because there are other
11 constitutional limitations but I think under that view, it
12 could be viewed as the narrower ground.

13 JUDGE SILBERMAN: Well, you could impose prison time
14 for failure to pay the taxes.

15 MS. BRINKMANN: Well, under the --

16 JUDGE KAVANAUGH: Yes, but not under the underlying
17 conduct under the taxing power.

18 JUDGE SILBERMAN: Right. Right.

19 MS. BRINKMANN: That's right. That, it is
20 eliminated. The only consequence here is tax. There is no
21 other sanction for not obtaining it.

22 I would then like to turn to the final question
23 about the Anti-Injunction Act. And just to go right to your
24 questions there, Judge Kavanaugh, obviously, in the nitty-
25 gritty of this technical interpretation of the statute, it is

1 very different than the constitution analysis of the taxing
2 authority. We're talking about the terminology that Congress
3 used. And we understand that tax penalties are sometimes
4 treated as taxes under the code, but Congress did not do that
5 for the minimum coverage provision.

6 And it's a difficult reading. Obviously, we not
7 think this is the better reading. And it can be read against
8 the backdrop of the fact that if this was not challenged,
9 there would be millions of insurance --

10 JUDGE KAVANAUGH: What did you say it was difficult
11 reading? I didn't hear that. You said something was
12 difficult.

13 MS. BRINKMANN: I think this is a difficult
14 interpretation as I think my colleague's effort before --

15 JUDGE KAVANAUGH: Your interpretation is difficult?

16 MS. BRINKMANN: No. To parse through all the
17 language of the --

18 JUDGE KAVANAUGH: Oh.

19 MS. BRINKMANN: -- tax code and all the language of
20 the --

21 JUDGE KAVANAUGH: I don't think it's that hard.

22 MS. BRINKMANN: -- Affordable Care Act. Let me
23 explain then why I think. When you refer to the assess and
24 collection, Your Honor --

25 JUDGE KAVANAUGH: It's three provisions.

1 MS. BRINKMANN: Assess and collection is talking
2 about how. It's not talking about when. And assess and
3 collection is in the first sentence of 6671(a), not the second
4 sentence. The second sentence is an independent sentence that
5 explains --

6 JUDGE KAVANAUGH: Right.

7 MS. BRINKMANN: -- that taxes are deemed to include
8 penalties. Which penalties? The penalties in chapter 68, not
9 chapter 48.

10 JUDGE KAVANAUGH: So let me just started. Are
11 subchapter B of chapter 68 penalties covered by the Anti-
12 Injunction Act?

13 MS. BRINKMANN: Yes.

14 JUDGE KAVANAUGH: Okay.

15 MS. BRINKMANN: Because of the second sentence.

16 JUDGE KAVANAUGH: I understand. I got the because.

17 MS. BRINKMANN: Okay. Okay.

18 JUDGE KAVANAUGH: That's a yes.

19 MS. BRINKMANN: Okay.

20 JUDGE KAVANAUGH: And then it says chapter 48 which
21 is where the Affordable Care Act is. It says the penalty for
22 not having health insurance shall be assessed and collected in
23 the same manner as the penalty in subchapter B of chapter 68.
24 How can it be assessed, but especially collected, in the same
25 manner as the chapter 68 penalty if it's not insulated from

1 the pre-enforcement suit, that the IRS won't be able to get
2 the money in the same way that they can get the chapter 68
3 penalties?

4 MS. BRINKMANN: Because assessment and collection
5 goes to what the IRS does, is a very specific term of art.

6 JUDGE KAVANAUGH: Right.

7 MS. BRINKMANN: When you're talking about the Anti-
8 Injunction Act, you're telling what courts can do. The
9 assessment and collection is about how you do it.

10 JUDGE KAVANAUGH: Courts can't entertain suits for
11 the purpose of restraining, by the way, it uses the same two
12 words, assessment or collection of taxes.

13 MS. BRINKMANN: That's right. It's not saying how
14 you assess and collect. You say whether it's going to happen
15 at all and when. That is different. And that is why there
16 are two different sentences.

17 JUDGE KAVANAUGH: You don't think when is part of in
18 the same manner as?

19 MS. BRINKMANN: No, I don't.

20 JUDGE KAVANAUGH: Okay.

21 MS. BRINKMANN: No, Your Honor. Not at all. And I
22 think as you read those provisions together, it becomes clear
23 they're not. The IRS is doing the how, the court is doing the
24 when. We also --

25 JUDGE KAVANAUGH: Isn't the how going to be much

1 different if it's, you have to deal with a pre-enforcement
2 suit as opposed to collected the tax? That's how you'll
3 collect it now and then have to deal with a refund suit in a
4 different court. Isn't that a change in the how?

5 MS. BRINKMANN: No because the assessment and
6 collection is the, what the IRS is doing and they have their
7 same procedures that they would go through when they're
8 assessing and collecting the tax. That is different than when
9 the timing for a challenge can be brought which is what the
10 Anti-Injunction Act goes to.

11 JUDGE SILBERMAN: Well, do I understand you
12 correctly that under your interpretation, the Anti-Injunction
13 Act doesn't bar our hearing this case but it would bar, let us
14 say, a case brought in the future, assuming this was
15 constitutional, if someone objected to the assessment of a
16 tax, the penalty, on the grounds that they had some individual
17 claim?

18 MS. BRINKMANN: That wouldn't necessarily --

19 JUDGE SILBERMAN: Could they bring a pre-enforcement
20 action?

21 MS. BRINKMANN: They likely could under this
22 interpretation of what Congress did. And I just, I think --

23 JUDGE SILBERMAN: So then no one would be stopped
24 under the Anti-Injunction Act from contesting any penalty
25 under this statute.

1 MS. BRINKMANN: Well, certainly, there would be
2 exhaustion --

3 JUDGE SILBERMAN: Before. Long before it was
4 assessed.

5 MS. BRINKMANN: There would certainly be questions
6 about ripeness and exhaustion that would arise in that
7 situation.

8 JUDGE SILBERMAN: No. I'm talking about the Anti-
9 Injunction Act.

10

11 MS. BRINKMANN: Yes.

12 JUDGE SILBERMAN: So anybody --

13 MS. BRINKMANN: The Anti-Injunction would not apply.
14 There would be other questions about ripeness and exhaustion.
15 I want to make two other statutory --

16 JUDGE EDWARDS: Wait. Say that again? The Anti-
17 Injunction. I'm not sure what your answer is to Judge
18 Silberman. It applies or no?

19 MS. BRINKMANN: The Anti-Injunction Act would not be
20 what would bar those other pre-enforcement suits under this
21 particular provision of the code. And there's two other
22 statutory textual framework that I think support this also,
23 Your Honor. There are other provisions in the Affordable Care
24 Act, including one that is in the tax code, that expressly
25 referred to subtitle F which subtitle F, as you know, includes

1 chapter 68 but not chapter 48.

2 JUDGE KAVANAUGH: Right.

3 MS. BRINKMANN: That is Affordable Care Act 6301.

4 It was enacted as 4377 of the code and certainly, that shows
5 that Congress would know how to do it if that's what they
6 meant here, and the reference here being assessment and
7 collection to the first sentence of 6671A, not to the second
8 sentence. And that second sentence, I want to come back to.
9 If everything was covered by the first sentence, you wouldn't
10 need the second sentence. The second sentence, this is what
11 it says.

12 JUDGE SILBERMAN: Read the second sentence again.

13 MS. BRINKMANN: The second sentence is what says
14 that taxes are deemed to include penalties but only penalties
15 that are in subchapter, in chapter 68, the --

16 JUDGE KAVANAUGH: Subchapter B.

17 MS. BRINKMANN: Let me just -- I'm sorry. Let me --

18 JUDGE SILBERMAN: Yes. That's what I read and
19 that's why I assumed it was limited to penalties under --

20 JUDGE EDWARDS: You haven't read it. You haven't
21 read it yet, have you?

22 MS. BRINKMANN: 6671A. No.

23 JUDGE SILBERMAN: Read it, please.

24 MS. BRINKMANN: The first sentence says the
25 following. The penalties and liabilities provided by this

1 subchapter shall be paid upon notice and demand by the
2 secretary and shall be assessed and collected in the same
3 manner as taxes. Except as otherwise provided, any reference
4 in this title to tax imposed by this title shall be deemed
5 also refer to the penalties and liabilities provided by this
6 subchapter. If our penalties and liabilities were already
7 encompassed by the assessed and collected language, that
8 second sentence would serve no purpose.

9 JUDGE KAVANAUGH: Yes. And I, if it were just
10 chapter 48 where this penalty was, it would be easy. It's the
11 cross-reference to 68. When I said it wasn't hard to I read
12 the cross-reference, I didn't mean to imply that it's not
13 close. I think it's an extraordinarily close question of
14 statutory interpretation.

15 MS. BRINKMANN: And I do have to say it does not
16 refer, however, to the specific statutory provision but --

17 JUDGE KAVANAUGH: You had a broader argument on the
18 AIA I think that, at least in other courts, that Congress
19 somehow intended for these to be heard quickly. Are you still
20 advancing that argument?

21 MS. BRINKMANN: It is certainly reasonable to look
22 at what type of provision you're talking about and when you're
23 interpreting the statutory language to determine against what
24 backdrop Congress is acting and whether or not this
25 interpretation makes sense. And we do think part of the

1 reason this is the better reading is that Congress enacted the
2 minimum coverage provision as part and parcel of the community
3 rating, the guarantee issue, and there will be millions of
4 private insurance transactions in the next four years before
5 this effective date and before a, a refund action could be
6 brought. So we think --

7 JUDGE KAVANAUGH: The people who worked on this,
8 very experienced members in the Senate Finance and the Ways &
9 Means Committee, very experienced staffers, very familiar with
10 the tax code and the Anti-Injunction Act, lots of exceptions
11 in there. The cross-reference to chapter 68, as I read it and
12 pieced it together, was a desire not to use the "T" word in
13 chapter 48 and so used the cross-reference to 68. 68, in
14 turn, makes clear it's enforced in the same manner as taxes,
15 kind of, as I said earlier, the A equals B and B equals C
16 rather than saying the penalty is a tax which people, for
17 understandable reasons, wanted to avoid saying directly.

18 MS. BRINKMANN: But just I think three things then,
19 Your Honor. It's in the tax code. It's going to be on your
20 tax form. It is right there under the taxing authority. But
21 moreover, Your Honor, the cross-reference was to assess and
22 collection, it was to the general chapter. It was not to, the
23 specific provision of the second sentence which does the
24 lifting, if it hadn't had referenced in that second
25 sentence --

1 JUDGE KAVANAUGH: Well, I think your argument in the
2 same manner is a challenging one. I don't know how it comes
3 out.

4 MS. BRINKMANN: Okay. Thank you, Your Honor. If
5 there's nothing further?

6 JUDGE KAVANAUGH: Thank you. Mr. White, we'll give
7 you five minutes.

8 ORAL ARGUMENT OF EDWARD L. WHITE, III, ESQ.

9 ON BEHALF OF THE APPELLANTS

10 MR. WHITE: As in other cases that are pending with
11 the healthcare law, the Government again has not set forth any
12 limiting principles that are judicially administered as the
13 11th Circuit pointed. Under their logic, they can require us
14 to get long term care health insurance, buy an apple and even
15 admitted in the Northern District of Florida case, they can
16 require you to buy a General Motors car.

17 Even though they say the healthcare market is unique
18 and we're involved in it, okay, a lot of people are involved
19 in it, okay? There are other markets out there where everyone
20 is involved in it. You're involved in the food market.
21 You're definitely involved in the death market. All right.
22 You can die and have an extraordinary debt and cost shift to
23 all types of people. That doesn't then mean Congress can now
24 impose a requirement that everyone has to have, you know,
25 \$200,000 of life insurance so there's no cost shifting.

1 Uniqueness of the healthcare market, as pointed out
2 by the 11th Circuit in its case, is a distraction here because
3 uniqueness then is just different circumstances, not a
4 constitutional limitation as judicially administered. What
5 the question is --

6 JUDGE SILBERMAN: Your line between activity and
7 inactivity. What about in Gonzales? Suppose in that
8 situation, I inherit a house and there are drugs in the house
9 and I, I am illegally in possession under that statute,
10 correct?

11 MR. WHITE: Correct.

12 JUDGE SILBERMAN: I didn't do a thing.

13 MR. WHITE: You bought the --

14 JUDGE SILBERMAN: What's my activity?

15 MR. WHITE: By buying the house, you --

16 JUDGE SILBERMAN: I bought the house. Oh, I see.

17 MR. WHITE: Right. You bought the --

18 JUDGE SILBERMAN: I bought the house and there
19 happened to be drugs in the house, so that's my activity.

20 MR. WHITE: No. What your activity then is
21 triggered, is the fact that you happened to buy a house that
22 has illegal drugs in it. Then it's your obligation to act to
23 remove illegal drugs if Congress had prohibited the illegal
24 drugs. And so that --

25 JUDGE SILBERMAN: Suppose I don't even know the

1 drugs are there.

2 MR. WHITE: But once you -- then you have not
3 engaged in economic activity because the economic activity, as
4 defined in Raich is the manufactured distribution or
5 consumption, okay? You're not consuming, you're not
6 distributing.

7 JUDGE SILBERMAN: I thought it included possession,
8 and possession could be a situation where you do nothing.

9 MR. WHITE: Possession though, under the facts of
10 Raich where these people were using the drugs for medicinal
11 reasons. They just didn't have --

12 JUDGE SILBERMAN: No, no, no. You're right about
13 that. I'm just stretching the statute out in this
14 application.

15 MR. WHITE: Yes. And I think at the point of, if
16 you walk into your brand new home and you go into the basement
17 for the first time, you see stockpiled 15 kilos of crack
18 cocaine.

19 JUDGE SILBERMAN: And you do nothing.

20 MR. WHITE: Okay. You do nothing while then the DEA
21 kicks in your front door with a search warrant, you're going
22 to have a lot of explaining to do, okay, why you didn't do it.

23 JUDGE SILBERMAN: So the activity is the
24 explanation?

25 MR. WHITE: No. The activity would be you need to

1 get rid of the drugs, okay, unless you want --

2 JUDGE SILBERMAN: So that's a mandate then. That's
3 a mandated activity.

4 MR. WHITE: The mandate is, it's only because
5 there's a prohibition. There's a difference. Congress, you
6 know, it's because --

7 JUDGE SILBERMAN: I see.

8 MR. WHITE: It's the reverse of everything here.

9 JUDGE SILBERMAN: I see. I see.

10 MR. WHITE: All right. Congress can prohibit,
11 Congress can do but --

12 JUDGE KAVANAUGH: Did Raich refer to possession?

13 JUDGE SILBERMAN: The statute did.

14 MR. WHITE: The statute may have but Raich, the
15 definition of economics.

16 JUDGE KAVANAUGH: It defined economics. It didn't
17 refer to possession.

18 MR. WHITE: Economics was just manufacturing,
19 distributing, consuming. It didn't talk about possessing
20 because obviously, you would possess if you have to consume or
21 distribute or do anything. It's assumed within there.

22 JUDGE EDWARDS: Why is Judge Sutton wrong in saying
23 that no one is inactive when deciding how to pay for
24 healthcare? You have self-insurance, private insurance, two
25 forms addressing the same risk. You're not inactive. You've

1 got to make a decision. If you decide to act, you self-
2 insure, that is action.

3 MR. WHITE: But self --

4 JUDGE EDWARDS: I mean, I don't get it. Just so you
5 understand my question. For the reasons he gave, I don't get
6 the distinction in any event but I think he makes the larger
7 point that if we're going to play your word game, you are
8 taking action if you decide to self-insure.

9 MR. WHITE: But self-insurance is something, you
10 know, like Wal-Mart does. They stockpile a whole bunch of
11 money for lawsuits and things like that. People who do not
12 have insurance are not necessarily planning on getting sick,
13 are not necessarily stockpiling money for that thing. That is
14 more, would be like self-financing. So I go to the doctor. I
15 have a \$1,000 bill. I would say to him okay, look, I'll pay
16 you \$10 a month until it's paid off. I can do something like
17 that. It's not as though I just put aside the \$1,000.

18 A lot of people don't even think about getting sick
19 and we talked before, the main group that they're targeting
20 are the young. The young and the stupid never think they're
21 ever going to get sick. They don't have health insurance.
22 They don't think anything is going to happen. They don't
23 think they're going to get hit by a bus, they're going to get
24 struck by lightning, nothing, okay? It's that group. You
25 have the people who are just going about life honkey-dorey,

1 they don't think about it.

2 But when you talk about cost shifting here for
3 healthcare, they're working under the piling of inferences.
4 It's you're going to get sick, you don't have insurance, you
5 go to the doctor, you get treated, you can't pay the doctor
6 and you can't either come up with a payment plan or charity or
7 other people kicking in money and then you're cost shifting.
8 Not everyone who has, does not have insurance cost shifts.
9 And again, the individual mandate has exempted out large
10 numbers who do cost shift. Nineteen percent of the cost
11 shifting is done by illegal aliens who are exempted out.

12 If I may go quickly to Wickard, and this also ties
13 in with your questions about Raich, if I could just have one
14 second, is the question always, before you get to the rational
15 basis is, what is Congress regulating? Is it economic
16 activity? We only get to the rational basis after we answer
17 the first question. The rational basis deals with the
18 substantial effect on the economy.

19 JUDGE KAVANAUGH: The rational basis goes to the
20 intrastate being aggregated, correct?

21 MR. WHITE: Correct. But only after you say
22 Congress has the power in the first place.

23 JUDGE KAVANAUGH: Right. It doesn't go to the first
24 question.

25 MR. WHITE: And then also with Wickard, about the --

1 JUDGE EDWARDS: But the power to regulate the
2 interstate market here which is conceded. It says Justice
3 Scalia -- you're asking where's the principle. I think it's
4 fair, the Court doesn't say, the Court doesn't, Supreme Court
5 doesn't decide all possible hypotheticals in advance. What
6 they did was what Justice Scalia did, said there are bottom
7 line principles that govern us here and if they're intrastate
8 activities that will impact on the area, that Congress may
9 regulate in interstate commerce, that's permissible.

10 MR. WHITE: Right. But he started off by answering
11 the first question yes. Here, the question is can Congress
12 require people to buy a private product, healthcare, when they
13 don't want to. That has to be answered before you get to can
14 Congress now use the means. And what Justice Scalia is
15 looking at, he's working under the assumption that Congress
16 has the power to make this closed regulatory scheme --

17 JUDGE EDWARDS: I think you're talking about a due
18 process question, not a Commerce Clause question.

19 MR. WHITE: With all due respect, I am --

20 JUDGE EDWARDS: With or without due respect, what do
21 you want to say?

22 MR. WHITE: I'll meet you outside after all, when
23 you have your robot.

24 JUDGE EDWARDS: Lunch or what?

25 MR. WHITE: But also on the Wickard thing, there's a

1 difference between putting limitations on someone that has a
2 consequence why he or she may have to buy a product, just like
3 we go back to the closed regulatory system. Congress is
4 outlawing drugs, it's putting drug dealers into a different
5 line of work. It's not mandating the line of work they have.

6 And with regard to the Anti-Injunction Act, there's
7 a difference with me saying A is collected the same as B, does
8 not mean that B is the same as A just like my garbage and my
9 recycling --

10 JUDGE KAVANAUGH: What?

11 MR. WHITE: Wait. Just as my garbage --

12 JUDGE KAVANAUGH: You lost me with that one.

13 MR. WHITE: -- and my recycling are collected in the
14 same manner, that doesn't make my garbage the same as my
15 recycling. And under Section 68(b), it says it's assessed and
16 collected the same way but that doesn't make a chapter 48
17 penalty the same as a chapter 68 penalty. And just think of
18 my garbage and recycling.

19 JUDGE KAVANAUGH: I'll be thinking about that one.

20 JUDGE SILBERMAN: Counsel, what about, so you take
21 the position the mandate is independent, legally independent
22 of the penalty.

23 MR. WHITE: You can never get to the penalty without
24 the mandate. The mandate is --

25 JUDGE SILBERMAN: No. That's not my question. Is

1 the mandate -- it goes to the issue whether a refusal to
2 engage, to comply with a mandate is unlawful or in some way,
3 criticizable even, or as the Government is suggesting, that
4 the only implication is the penalty?

5 MR. WHITE: No because it's not an option. It's
6 like I used my example of the speed limit. I have to go 70
7 miles an hour. I don't have the option. It's a consequence
8 of me failing to abide by a law.

9 JUDGE SILBERMAN: Well, now wait a minute. If you
10 go more than 70 miles an hour when the speed limit is 70 miles
11 an hour, well, you're engage in unlawful activity.

12 MR. WHITE: In that particular case yes. And
13 here --

14 JUDGE SILBERMAN: Is this true here?

15 MR. WHITE: I don't think it's a crime not to have
16 the insurance. It is --

17 JUDGE SILBERMAN: Is it unlawful in any --

18 MR. WHITE: It's unlawful in the term of you are
19 violating a mandatory statement by Congress that you shall get
20 the minimum essential coverage, okay? You have to comply with
21 that. You don't have the option to say --

22 JUDGE SILBERMAN: It's not a question whether it's
23 criminal. It's whether there's a legal obligation --

24 MR. WHITE: Right. It's a legal --

25 JUDGE SILBERMAN: -- independent, independent of the

1 penalty.

2 MR. WHITE: Correct because --

3 JUDGE KAVANAUGH: It's a legal obligation forced by
4 the penalty.

5 MR. WHITE: Correct.

6 JUDGE KAVANAUGH: Correct?

7 MR. WHITE: Yes because it says shall and if you
8 don't do that, then there's the consequence.

9 And in closing, I just want to say again this court
10 has the obligation to make sure that Congress is not
11 overstepping its constitutional powers and to impose
12 meaningful limits. The individual mandate exceeds Congress'
13 Article 1 power and it is invalid law as Justice Ginsburg said
14 recently in the Bond case, quote, "A law beyond the power of
15 Congress for any reason is no law at all." The individual
16 mandate is a law that is beyond power of the Article 1 power
17 of Congress. We request you rule it unconstitutional, reverse
18 the final decision of the District Court and remand this case
19 for further proceedings. And thank you very much for all of
20 your time and consideration.

21 JUDGE KAVANAUGH: Thank you, Mr. White and Ms.
22 Brinkmann for excellent arguments in an extremely challenging
23 set of issues. I also want to thank, on behalf of the panel,
24 all the Amici who provided very helpful amicus briefs, and we
25 will take a 10 minute break before hearing the next case.

1 (Whereupon, at 11:23 a.m., the proceedings were
2 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Josephine Hayes

Josephine Hayes

September 28, 2011

DEPOSITION SERVICES, INC.