NOS. 11-11021 & 11-11067

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through
Pam Bondi, Attorney General of the State of Florida;
STATE OF SOUTH CAROLINA, by and through
Alan Wilson, Attorney General of the State of South Carolina;
STATE OF NEBRASKA, by and through
Jon Bruning, Attorney General of the State of Nebraska;
STATE OF TEXAS, by and through
Greg Abbott, Attorney General of the State of Texas;
STATE OF UTAH, by and through
Mark L. Shurtleff, Attorney General of the State of Utah;
STATE OF LOUISIANA, by and through
James D. "Buddy" Caldwell, Attorney General of the State of Louisiana;
STATE OF ALABAMA, by and through
Luther Strange, Attorney General of the State of Alabama;
BILL SCHUETTE, Attorney General of the STATE OF MICHIGAN,
on behalf of the People of Michigan;
STATE OF COLORADO, by and through
John W. Suthers, Attorney General of the State of Colorado;
COMMONWEALTH OF PENNSYLVANIA, by and through
Thomas W. Corbett, Jr., Governor, and William H. Ryan, Jr., Acting Attorney
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STATE OF WASHINGTON, by and through
Robert M. McKenna, Attorney General of the State of Washington;
STATE OF IDAHO, by and through
Lawrence G. Wasden, Attorney General of the State of Idaho;
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STATE OF NORTH DAKOTA, by and through
Wayne Stenehjem, Attorney General of the State of North Dakota;
STATE OF MISSISSIPPI, by and through
Haley Barbour, Governor of the State of Mississippi;

STATE OF ARIZONA, by and through
Janice K. Brewer, Governor, and Thomas C. Horne, Attorney General,
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STATE OF NEVADA, by and through
Brian Sandoval, Governor of the State of Nevada;
STATE OF GEORGIA, by and through
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STATE OF KANSAS, by and through
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STATE OF WYOMING, by and through
Matthew H. Mead, Governor of the State of Wyoming;
STATE OF WISCONSIN, by and through
J.B. Van Hollen, Attorney General of the State of Wisconsin;
STATE OF MAINE, by and through
William J. Schneider, Attorney General of the State of Maine; and
TERRY E. BRANSTAD, Governor of the STATE OF IOWA,
on behalf of the People of Iowa,

Plaintiffs-Appellees / Cross-Appellants,

and

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants / *Cross-Appellees.*

On Appeal From the United States District Court
For the Northern District of Florida

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State of Florida, et al. v. United States
Dep't of Health & Human Svcs., et al.
Nos. 11-11021 & 11-11067

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel for the Appellee/Cross-Appellant States certifies that, to the best of his knowledge, the list of persons provided in Appellants' opening brief, served April 1, 2011, as updated by all subsequent briefs, including those of amici curiae, is complete with the following correction of previously misidentified state officials:

Plaintiffs:

State of Alaska, by and through John J. Burns, Attorney General
State of Nevada, by and through Brian Sandoval, Governor

/s/ Paul D. Clement
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Counsel for Appellee/Cross-Appellant States

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INTRODUCTION AND SUMMARY OF ARGUMENT

With respect to this cross-appeal, the government does not contest that the Affordable Care Act threatens the States with the *non plus ultra* of coercion — the loss of the entirety of their Medicaid funding, more than 40% of all federal funding — if they do not capitulate to Congress's latest demands to radically expand Medicaid coverage. Rather than deny this basic fact or its clear coercive effect, the government invites this Court to ignore the coercion doctrine altogether. That is not an invitation that a court of appeals may accept. The Supreme Court has repeatedly assured States and federal courts that there are outer limits on the federal spending power and that there is a point where federal spending programs become "so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). Without such a limit, the federal spending power threatens the entire constitutional structure — Congress can commandeer the States to any degree or impose any command that does not violate an affirmative constitutional prohibition by the simple expedient of attaching it to a pre-existing pool of federal money too large to decline.

As the government implicitly recognizes in failing to defend Congress's methods on the merits, the ACA is coercive by any imaginable measure. If the ACA does not pass the point of undue coercion, no act of Congress ever will.

Medicaid is the largest federal grant-in-aid program to States, accounting for hundreds of billions of federal tax dollars collected from States' citizens. Congress's threat to withhold *all* Medicaid funding from any State that does not comply with the new conditions imposed by the ACA plainly leaves States no choice but to capitulate to Congress's demands. States are effectively coerced by their past decisions to accept federal funds. By tying new impositions to a pre-existing pool of funds that induced compliance with earlier impositions, the federal government makes it effectively impossible for the States to exercise any meaningful choice or escape the vortex of ever-increasing conditions. Indeed, the ACA is largely premised on Congress's certainty that no State could reject its demand to adopt and fund the Act's substantial expansions to Medicaid. There is no back-up plan in the event a State says no.

Because the coercive Medicaid expansions cannot be severed from the rest of the Act, their unconstitutionality renders the entire ACA invalid. The Medicaid expansions are a central component of Congress's comprehensive scheme to achieve near-universal health insurance coverage. Without that means of forcing States to provide free insurance to millions more low-income individuals, the ACA cannot "function in a *manner* consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987), and thus cannot withstand the severance analysis.

ARGUMENT

I. The Coercion Doctrine Is A Critical Limitation On Congress's Power To Place Conditions Upon States' Acceptance Of Federal Funds.

A. The Supreme Court Has Repeatedly Recognized the Continuing Vitality of the Coercion Doctrine.

The government's principal response to the States' coercion claim is to deny the existence of the coercion doctrine. Supreme Court precedent confirms otherwise. As the Court has admonished, "[t]he spending power is of course not unlimited, … but is instead subject to several general restrictions articulated in [the Supreme Court's] cases." *Dole*, 483 U.S. at 207. *Dole* makes clear that the coercion doctrine is one of those limitations: "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Steward Mach.*, 301 U.S. at 590); *see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) ("in cases involving conditions attached to federal funding, we have acknowledged that the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" (internal quotation marks omitted)); *Sabri v. United States*, 541 U.S. 600, 608 (2004) (rejecting coercion claim on the merits).[1]

[1] The government wrongly asserts that the ACA does not "contravene [the four other] restrictions" set out in *South Dakota v. Dole* and that the States do not contend otherwise. *See* Govt.'s Response/Reply Br. 48–49. The ACA does,

That limitation is a necessary corollary of the Court's recognition that "the Constitution simply does not give Congress the authority to require the States to regulate," *New York v. United States*, 505 U.S. 144, 178 (1992), either directly or through conditions attached to coercive federal inducements.

In arguing that the Court has somehow abandoned that critical limitation on Congress's vast spending power, the government mistakenly reads the Court's efforts to explain the *limits* of the coercion doctrine as *abandoning* it altogether. *See* Govt.'s Response/Reply Br. 50–51. Placed in proper context, the statements upon which the government relies are plainly directed at the former, not the latter.

For example, although the Court cautioned in *Steward Machine* "that motive or temptation is [not] equivalent to coercion," 301 U.S. at 589-90, it did so in the context of rejecting a vastly overbroad theory of coercion, and one advanced by a private party, not a State. As the Court emphasized in rejecting that claim, no State alleged that its decision to adopt the conditions challenged by the plaintiff "was affected by duress." *Id.* The plaintiff therefore presented the Court with a coercion claim that essentially boiled down to the argument that spending conditions are *always* coercive because States must leave money on the table if

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indeed, contravene these restrictions, as the States and *amici* have noted. *See, e.g.*, States' Opening Br. 48, 51–53 (no "reasonable relationship"); *see also* Brief *Amici Curiae* of Minnesota Legislators, et al., especially at 9-10 & n.21 (ACA is ambiguous and unclear).

they reject them. It was in rejecting that untenable conception of coercion that the Court explained that *every* offer of federal funds "when conditioned upon conduct is in some measure a temptation," but that "to hold that motive or temptation *is equivalent* to coercion is to plunge the law into endless difficulties." *Id.* at 589–90 (emphasis added).

Read against the backdrop of the coercion claim pressed in *Steward Machine*, the Court's language was plainly intended to reject the argument that spending conditions are *always* coercive, not to embrace the argument that spending conditions are *never* coercive. That much is clear from the Court's ultimate holding that, "[i]n [these] circumstances, *if in no others*, inducement or persuasion does not go beyond the bounds of power." *Id.* at 591 (emphasis added). The Court went on to explain: "We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it." *Id.*

The government's suggestion that *Dole* cast doubt on the coercion doctrine is even less plausible. First and foremost, *Dole* rejected a coercion claim *on the merits*, a wholly incoherent step if the Court had at the same time meant to declare all coercion claims nonjusticiable. The Court began by explicitly and approvingly acknowledging that its past "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (*quoting*

Steward Mach., 301 U.S. at 590)).[2] The Court then held that the facts at hand did not constitute forbidden coercion, primarily because only "a relatively small percentage of certain highway funds" (about $4 million) was at stake. *Id.* Only *after* concluding that the State's coercion claim was "more rhetoric than fact" did the Court repeat *Steward Machine*'s admonishment that "to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties." *Id.* (quoting *Steward Mach.*, 301 U.S. at 589-90).

Once again, context makes clear that the Court was cautioning against overreading the coercion doctrine, not encouraging courts to ignore it. Notably, the court that has made the most serious effort to apply *Dole* and *Steward Machine* has correctly understood the Court's cautionary language as just that. *See Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) (citing *Dole* and *Steward Machine* for the proposition that "*every* financial incentive is in some measure a temptation …. [b]ut hard choices do not *alone* amount to coercion" (emphasis added)).

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[2] Notably, the two dissenters in *Dole* did not disagree with the Court's characterization (or application) of the Court's coercion doctrine. Indeed, they would have embraced an even more restrictive view of the spending power, under which Congress would have "no power … to impose requirements on a grant that go beyond specifying how the money should be spent." *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting); *see also id.* at 212 (Brennan, J., dissenting) ("Congress cannot condition a federal grant in a manner that abridges" a right reserved to the States.).

As the foregoing illustrates, the government's attempts to reduce the coercion doctrine to "a single sentence from *Dole*," Govt.'s Response/Reply Br. 50, substantially misread the Court's discussions of the doctrine. Moreover, the government wholly ignores the fact that the Court has continued to recognize the coercion doctrine years after *Dole* was decided. *See Fla. Prepaid*, 527 U.S. at 687 ("in cases involving conditions attached to federal funding, we have acknowledged that the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" (internal quotation marks omitted)); *see also Sabri*, 541 U.S. at 608 (rejecting coercion claim on merits). As these cases confirm, notwithstanding the difficulty of ascertaining "the point at which pressure turns into compulsion," *Steward Machine*, 309 U.S. at 590, the Supreme Court has steadfastly refused to abandon that analysis. It could hardly be otherwise. Acknowledging no limits on concededly coercive uses of the federal spending power would require admitting that, rather than "split[ing] the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), the Framers empowered the federal government to force the States to yield their reserved powers.

B. This Court Should Reject the Approach of Courts that Have Refused to Adjudicate Coercion Claims.

As the district court acknowledged, R.E. 2011, this Court has not yet had occasion to address the contours of the coercion doctrine. To the extent the

government suggests it did so in *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), *see* Govt.'s Response/Reply Br. 51, the government is plainly mistaken. *Benning* — a case recently overruled by the Supreme Court, *see Sossamon v. Texas*, 131 S. Ct. 1651 (2011) — did not involve a coercion claim. Quite the contrary, instead of arguing that the federal inducement at stake was so *large* as to leave it with no choice but to accept it, Georgia argued that the inducement was so *small* that States should not have to abide by the onerous condition Congress attached to it (a waiver of sovereign immunity). *See Benning*, 391 F.3d at 1308 ("Georgia also wrongly argues that the extensive conditions imposed … are not in proportion to the small amount of federal funds"). Accordingly, when the Court concluded that a State "cannot accept federal funds and then attempt to avoid their accompanying conditions by arguing that the conditions are disproportionate in scope," *id.*, it was plainly speaking of the circumstances under which a State might avoid noncoercive spending conditions, not the circumstances under which the Court might consider a spending condition coercive.

In urging this Court to reject the States' coercion claim out of hand, the government is thus forced to rely heavily on a line of cases that cannot be reconciled with (and in some cases even predate) the Supreme Court's most recent pronouncements on the coercion doctrine and the justiciability of Tenth Amendment claims.

For example, the government emphasizes (at 51–52) the D.C. Circuit's opinion in *Oklahoma v. Schweiker*, 655 F.2d 401 (1981), one of the first cases to posit that coercion claims are nonjusticiable. But the government ignores the fact that *Schweiker* was decided six years *before Dole*. That is not a mere technicality. *Schweiker*'s justiciability analysis is largely premised on its misreading of *Steward Machine* as "admonish[ing] … that courts should attempt to avoid becoming entangled" in adjudicating coercion claims. *Id.* at 413. That reading is difficult enough to square with *Steward Machine*, which expressly declined to "fix the outermost line" at which the Court will consider spending legislation persuasive rather than coercive. *Steward Mach.*, 301 U.S. at 591. It is all but impossible to reconcile with *Dole*, which made clear that *Steward Machine* did "recognize[] that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 590). It is thus far from clear (and the D.C. Circuit has not decided) whether *Schweiker*'s coercion analysis is even good law after *Dole*, which is reason enough for this Court to reject it.

The government also relies (at 52–53) on the Ninth Circuit's *obiter dictum* in *Nevada v. Skinner*, 884 F.2d 445, 448–49 (9th Cir. 1989), one of the most oft-cited cases for the proposition that coercion claims are nonjusticiable. But Judge Reinhardt's opinion in *Skinner* is, if possible, even less reconcilable with Supreme

Court precedent than *Schweiker*. First, *Skinner* implausibly posited, despite the Court's recent reaffirmation of the coercion doctrine in *Dole*, that the Court had in fact implicitly rejected the doctrine in a case decided two years *before Dole*. *See id*. at 448 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), for the proposition that courts can *never* hold that federal laws intrude on state sovereignty because "this sovereignty is adequately protected by the national political process"). If that time-bending effort to view *Garcia*, not *Dole*, as the Supreme Court's last word on coercion were not enough to discredit *Skinner*'s analysis, the Supreme Court has since conclusively rejected the very nonjusticiability reasoning of *Garcia* upon which *Skinner* so heavily relied. *See New York*, 505 U.S. at 177 (striking down federal law as unconstitutionally infringing upon state sovereignty); *Printz v. United States*, 521 U.S. 898, 935 (1997) (same).

Beyond that, the government cites a string of cases from a small number of circuits that have summarily rejected coercion claims after adopting the same faulty nonjusticiability analysis as *Schweiker* and *Skinner*. *See California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (reading *Skinner* as finding no "viability left in the coercion theory"); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (declaring, over objection of four dissenters, threatened loss of $250 million funds nothing more than "politically painful");

Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) (relying on *Schweiker* and *Skinner* to reject a coercion clam); *Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009) (rejecting coercion claim as foreclosed by Eighth Circuit precedent).[3]

These opinions make no attempt to reconcile their hostility to the coercion doctrine with the fact that the Court has repeatedly affirmed its continuing vitality notwithstanding the potentially difficult applications that *Schweiker* and *Skinner* highlighted. *See Dole*, 483 U.S. at 211 (reaffirming doctrine's existence five years after *Schweiker*); *Fla. Prepaid*, 527 U.S. at 687 (reaffirming doctrine's existence ten years after *Skinner*); *see also Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (plurality opinion) (concluding, nearly ten years after *Skinner*, that "if the Court meant what it said in *Dole*, then … a Tenth Amendment

[3] The government's characterization of *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996), as rejecting a coercion claim is mistaken. There, New York claimed the federal government had subjected it to impermissible commandeering by *requiring* the State to provide emergency medical services to illegal immigrants. *See id.* The Second Circuit rejected that claim on the ground that States are not legally required to provide such services, but instead provide them as a condition of voluntary participation in Medicaid. *See id.* In reaching that conclusion, the court gave no indication that it considered whether a State might be able to allege that participation in Medicaid is voluntary in theory but not in fact. The court did not even mention Congress's spending power, let alone *Dole*, *Steward Machine*, or the coercion doctrine. *See id.*

claim of the highest order lies" when a State is subjected to coercion).[4] This Court should decline the government's invitation to simply ignore the Supreme Court's affirmation that there are limits on the federal government's ability to coerce the States.

C. The Government's Policy Arguments Against the Coercion Doctrine Are Fundamentally Misguided.

In a last-ditch effort to persuade this Court to reject a doctrine that the Supreme Court has explicitly endorsed, the government falls back on a variety of inapposite policy arguments. Far from undermining the utility of the coercion doctrine, the government's arguments underscore its necessity as a means of keeping Congress's vast spending power in check.

First, pointing to disagreement among States as to whether the ACA's expansions to Medicaid will cost or save States money in the long run, the government asserts that courts are ill-equipped to "resolve th[e] state policy disagreements" that often underlie coercion claims. Govt.'s Response/Reply Br.

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[4] To the extent that the government implies that the Fourth Circuit has abandoned the coercion doctrine, *see* Govt.'s Response/Reply Br. 53–54, it is mistaken. Notwithstanding the fact that "the holding of *Riley* was superseded by legislation," or the Fourth Circuit's "acknowledge[ment]" that sister circuits have refused to take *Dole* at face value, Govt.'s Response/Reply Br. 53–54, the court has reiterated and adopted the *Riley* plurality's coercion analysis. *See, e.g.*, *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 290 (4th Cir. 2002) ("In this circuit, … the coercion theory is not viewed with such suspicion, but instead has been endorsed by a substantial number of judges on this court."); *Madison*, 474 F.3d at 128 ("*Dole*[] … bars coercive financial inducements.").

55. That argument largely misses the point of the coercion doctrine. The doctrine exists to protect a *State*'s prerogative to determine whether Congress is offering a good deal or a bad deal. *See New York*, 505 U.S. at 168 ("by any … permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply"). The argument that the ACA is so complex and has so many moving pieces that neither the States nor this Court can clearly perceive whether it is a good or bad deal is a justification for applying the coercion doctrine, not for obliterating it. *See Dole*, 483 U.S. at 207 (requiring that terms attached to federal funds be unambiguous so that States may "exercise their choice knowingly, cognizant of the consequences of" accepting funds (internal quotation marks omitted)).

For the same reason, it is irrelevant that Congress thinks it has offered the States a good deal. *See* Govt.'s Response/Reply Br. 55. As an initial matter, were the terms anywhere near as a good a bargain as the government claims (a point the States vigorously contest), then Congress would stand nothing to lose by giving States a real choice to accept or reject them. But more to the point, as the government itself argues, whether a State is willing and able to accept the terms attached to a federal inducement is a matter that differs from one State to the next. Congress is in no better position than the courts to usurp each State's ability to

make that assessment for itself, no matter how good a deal Congress may (erroneously) consider its offer.[5]

Finally, there is no merit to the government's argument that the States' coercion challenge "seek[s] to block the expansion of Medicaid coverage … at the expense of the states that want Medicaid expanded." Govt.'s Response/Reply Br. 56 (internal quotation marks omitted). Plaintiff States are not arguing that the coercion doctrine precludes Congress from *encouraging* States to adopt expansions to Medicaid, or from offering additional funding to States that wish to do so. They are simply arguing that Congress may not *force* States to adopt those expansions, but must instead employ means that leave States with a meaningful choice — means that induce rather than coerce. *See New York*, 505 U.S. at 166 (recognizing "a variety of methods, *short of outright coercion*, by which Congress may urge a State to adopt a legislative program consistent with federal interests" (emphasis added)).[6] If some States are willing to strike whatever bargain Congress might

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[5] Moreover, as the States pointed out in their opening brief (at 59), that Congress has tied another $434 billion in addition to the entirety of the vast pool of pre-existing Medicaid funds to States' acceptance of the ACA's Medicaid expansions renders the Act more coercive, not less, as it dramatically increases the amount of federal funding States will lose if they do not capitulate to Congress's demands.

[6] The government's (and the district court's) reliance on 42 U.S.C. § 1304 is misplaced for the same reason. *See* Govt.'s Response/Reply Br. 46; R.E. 2010. That Congress reserved "[t]he right to alter, amend, or repeal any provision of" Medicaid does not mean that Congress may employ coercion when doing so. *Id.*

propose, they are free to do so at their own peril. But their preferences, like Congress's, cannot override the desire of other States to decline.

II. The ACA's Medicaid Expansions Exceed Congress's Spending Power.

Notwithstanding its insistence that coercion claims are nonjusticiable, the government makes no effort to demonstrate that the coercion analysis set forth in the States' opening brief is incapable of meaningful judicial application. Nor does it argue that the means Congress employed in the ACA could survive that analysis. The government thus implicitly concedes that, so long as there is such a thing as an unconstitutionally coercive exercise of Congress's spending power, this is it. That concession is hardly surprising given that Congress itself recognized that the Act is coercive. This Court should do the same.

A. Congress May Not Place Wholly Disproportionate Conditions on Massive Federal Inducements to States.

Federal spending programs do not spring forth as a spontaneous outflowing of federal largesse; they reflect the spending of tax dollars the federal government collects from States' citizens. The coercion doctrine therefore limits "the extent to which the Federal Government may … impose its policy preferences upon the States by placing conditions upon the return of revenues that were collected from the States' citizenry in the first place." *Riley*, 106 F.3d at 570. It could not be otherwise. Without some limit on coercion, the federal power to tax, then spend, could eliminate our system of dual sovereignty.

"At its most basic, … the coercion inquiry focuses on the financial inducement offered by Congress," *Madison*, 474 F.3d at 128 (internal quotation marks omitted), both in actual size and in proportion to other federal and state funding. *Compare Riley*, 106 F.3d at 569-70 (finding threatened loss of $60 million coercive), *and Jim C.*, 235 F.3d at 1083 (Bowman, J., dissenting) (finding threatened loss of $250 million coercive), *with Dole*, 483 U.S. at 211 (finding threatened loss of 5% of federal highway funding (about $4 million) only "relatively mild encouragement"), *and Madison*, 474 F.3d at 128 (finding it "difficult to see how" loss of federal funds accounting for only 1.3% of State's prison funding "could leave the State without a real choice"). As these cases reflect, while it may be difficult to draw the precise line at which "pressure turns into compulsion," *Steward Machine*, 301 U.S. at 590, in most instances (as here), it is not at all difficult to determine on which side of that line an inducement falls. *See Riley*, 106 F.3d at 570 ("The difference between a $1000 grant and … a $60 million grant, insofar as their coercive potential is concerned, is self-evident.").

"[A] Spending Clause statute that conditions an entire block of federal funds on a State's compliance with a federal directive raises coercion concerns." *Madison*, 474 F.3d at 128; *see also Jim C.*, 235 F.3d at 1083 (Bowman, J., dissenting). That is particularly true when the conditions Congress seeks to impose are attached not just to newly provided funds but to pre-existing pools already

encumbered with pre-existing conditions, and thus where the new conditions bear little or no relationship to most of the funds at stake. *See Riley*, 106 F.3d at 570 ("a Tenth Amendment claim of the highest order lies where … the Federal Government … withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their obligations in some insubstantial respect"); *West Virginia*, 289 F.3d at 291 ("[F]ederal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect."). When that kind of disproportionality is coupled with the threatened loss of a massive amount of federal funding, Congress has plainly engaged in impermissible coercion.

The government mistakes this proportionality inquiry for a rule that a spending condition can only be coercive if it is "insubstantial" in relation to the broader federal program at issue. *See* Govt.'s Response/Reply Br. 54. Substantiality is not the concern at which the inquiry is aimed. It is instead a limitation derived from a principle the Supreme Court has long recognized — that "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon an assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *United States v. Butler*, 297 U.S. 1, 73 (1936). When the condition Congress seeks to impose bears no relationship to the bulk of the federal funding it

threatens to withhold, and indeed targets pre-existing streams of funding, Congress is no longer "stating the conditions upon which moneys shall be expended," but is instead forcing States "to submit to a regulation which otherwise could not be enforced." *Id.*

Congress may have some capacity to achieve the latter when the amount of money at stake is sufficiently minimal to leave States with a real choice as to whether to accept the terms it proposes. *See Dole*, 483 U.S. at 206–07. But when Congress eliminates the element of choice from the equation by threatening to withhold federal funding that States literally cannot afford to forfeit, "the Federal Government has, in an act more akin to forbidden regulation than to permissible condition, supplanted with its own policy preferences the considered judgments of the States." *Riley*, 106 F.3d at 570. As Justice O'Connor has cautioned, "given the vast financial resources of the Federal Government," such an overly broad conception of the spending power would "give[] 'power to the Congress to tear down the barriers [and] to invade the states' jurisdiction, … subject to no restrictions save such as are self-imposed.'" *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S. at 78). That "was not the Framers' plan and it is not the meaning of the Spending Clause." *Id.*

B. The Size of the Inducement and the Nature of the Conditions Attached to it Render the ACA's Medicaid Expansions Coercive.

By any measure, the size of the federal inducement at stake here is coercive. Medicaid is the largest federal grant-in-aid program, accounting for more than 40% of all federal grants to States and 7% of all federal spending. States' Opening Br. 6. The average State receives well over $1 billion a year in federal Medicaid funding, R.E.1551–55, which is 250 times as much money as the Court deemed "relatively mild encouragement" in *Dole*. 483 U.S. at 211. Federal funding covers at least half and as much as 83 percent of each State's Medicaid costs, Govt.'s Response/Reply Br. 45, which dwarfs the "mere 1.3% of prison funding" that the Fourth Circuit deemed too insignificant to amount to coercion in *Madison*. *Madison*, 474 F.3d at 128. Indeed, federal Medicaid funds account, on average, for at least 10% of a State's entire annual budget, R.E. 1555, leaving no question that States lack any feasible means "of making up those lost funds if the State elects not to" accept federal funding. *Jim C.*, 235 F.3d at 1083 (Bowman, J., dissenting).

The government does not deny that States stand to lose all of their billions of dollars of Medicaid funding, including pre-existing funds, if they do not accept the expanded coverage provisions mandated by the ACA. *See* Govt.'s Response/Reply Br. 45–47; *compare West Virginia*, 289 F.3d at 292 (rejecting coercion claim where State failed to substantiate its claim that government "with[e]ld (or threatened to withhold) the entirety of a substantial federal grant").

Nor does the government try to deny that the sheer amount of money at stake and its source — it is money largely collected from the States' citizenry in the first place — eliminates States' ability to reject it.[7] Quite the contrary, the government openly argues that even those States that support the ACA's expansions to Medicaid do so because they cannot afford to lose the enormous inducement at stake. *See* Govt.'s Response/Reply Br. 54–55.

The government also offers no response to the States' argument that the ACA is rendered even more coercive by the nature of the conditions it attaches to States' continued receipt of Medicaid funding. As the States explained in their opening brief, "the ACA does not simply (or even primarily) impose conditions on how States spend federal funds," but instead conditions receipt of *any* Medicaid funds on States' agreement "to adopt, enforce, and even help fund" the ACA's substantial expansions to Medicaid. States' Opening Br. 54; *see also Butler*, 297 U.S. at 73 ("There is an obvious difference between a statute stating the conditions

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[7] To the extent that the government suggests (at 49) that the States have conceded, or this Court has decided, that participation in Medicaid remains voluntary, that suggestion is meritless. Participation in Medicaid is of course voluntary *in theory*; the program would otherwise be facially unconstitutional. *See New York*, 505 U.S. at 178 ("the Constitution simply does not give Congress the authority to require the States to regulate"). The crux of the States' claim is that participation is not voluntary "in fact," *Dole*, 483 U.S. at 212, which is an issue addressed by neither of the cases that the government and the district court invoke. *See* Govt.'s Response/Reply Br. 49; R.E. 2010 (citing *Fla. Ass'n of Rehab. Facilities v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1211 (11th Cir. 2000), and *Doe v. Chiles*, 136 F.3d 709, 722 (11th Cir. 1998)).

upon which moneys shall be expended and one effective only upon an assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."). That is clear from the fact that the ACA distinguishes between new federal funding provided to help finance the expansions it mandates, and federal funds States are already receiving to finance the Medicaid coverage they are already providing. *See* ACA § 2001(a)(3) (adding 42 U.S.C. § 1396d(y)(1)) (providing additional federal funding at an initially increased rate "with respect to amounts expended" for coverage of individuals "newly eligible" under the ACA). Although the conditions are only arguably relevant to the former, they are also attached to the latter.

For that reason, the government's invocation of Congress's ability "to control the uses to which federal expenditures are put," Govt.'s Response/Reply Br. 54, is entirely beside the point. Congress's conditioning of *all* Medicaid funding, including pre-existing funding, upon adoption of the ACA's *new* terms was plainly not an attempt to control the uses to which the new funds would be put. Nor was it an attempt merely to induce or persuade States to accept the new terms. Instead, rather than risk the possibility that some States might choose to reject its new policy preferences, notwithstanding the availability of substantial new funds, Congress bypassed persuasion in favor of the much more expedient means of

coercion: it threatened to withhold massive amounts of unrelated Medicaid funding from States that would not capitulate to its new demands.

That Congress is capable of achieving its policy preferences through persuasion rather than coercion is readily evident from its past practices. Indeed, Congress quite recently demonstrated its ability to influence (but not dictate) States' Medicaid choices when, in an effort to prevent States from responding to the current fiscal crisis by eliminating expanded Medicaid eligibility terms that they had voluntarily adopted, Congress offered additional federal funding to States that agreed to maintain such expansions. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 5001(f). By holding out the promise of additional Medicaid funding rather than threatening the elimination of all Medicaid funding, Congress properly (and successfully) sought to entice States rather than coerce them.

By contrast, there is simply no question that the ACA was intentionally designed to "impose [Congress's] policy preferences upon the States." *Riley*, 106 F.3d at 570. As the States explained in their opening brief, Congress knew States would have no choice but to accept the ACA's substantial expansions to Medicaid, which is clear from the fact that the Act's comprehensive scheme for "near-universal" health insurance coverage, ACA § 1501(a)(2)(D), is premised upon States' continued participation in Medicaid. *See* States' Opening Br. 54; *see also*

R.E. 434 (coercion "can perhaps be inferred from the fact that Congress does not really anticipate that states will (or could) drop out of the Medicaid program"). There is no back-up plan. Far from disputing that fact, the government embraces it, arguing that Congress expected the ACA's Medicaid expansions to operate as a central "part of its comprehensive regulation" of the health care industry, by "address[ing]" the "problem" of "low-income individuals consum[ing] uncompensated care." Govt.'s Response/Reply Br. 5, 9. If the coercion doctrine bars anything, it plainly bars spending legislation that even Congress knows is coercive.

III. Congress's Coercive Medicaid Expansions Are A Central Part Of The ACA And Cannot Be Severed From The Rest Of The Act.

The government's response/reply brief confirms that the Medicaid expansions are not severable from the balance of the ACA. The government's only attempt to demonstrate to the contrary is its argument that "the Medicaid amendments are operative on their own and therefore severable." Govt.'s Response/Reply Br. 59 (internal quotation marks omitted). But whether an invalid provision is independently operative is beside the point. The question is whether the remaining provisions of the statute are independently operative, and even that question is the beginning of the severance analysis, not the end. "The more relevant inquiry in evaluating severability is whether the statute will function in a

manner consistent with the intent of Congress." *Brock*, 480 U.S. at 685. The government implicitly concedes that the remainder of the ACA will not.

By the government's own measure, the ACA's expansions to Medicaid are a central "part of [Congress's] comprehensive regulation" of the health care industry. Govt.'s Response/Reply Br. 5; *see also* R.E. 993-94 (describing Medicaid expansions as one of Act's "five main components"). As the government acknowledges, "[t]here is no doubt that low-income individuals consume uncompensated care" and are therefore within the intended reach of the individual mandate. Govt.'s Response/Reply Br. 9. Recognizing that many of those individuals would find it all but impossible to purchase private health care insurance, Congress addressed the problem created by the mandate "by expanding eligibility for Medicaid." *Id.*; *see also* R.E. 984–85 (arguing that many individuals "are unable to obtain [insurance] without the … Medicaid eligibility expansion that the Act will provide"). Without the Medicaid expansions through which Congress intended to force States to provide free insurance to millions more individuals, there would be a gaping hole in Congress's comprehensive effort to achieve "near-universal" health insurance coverage. ACA § 1501(a)(2)(D).

As the foregoing illustrates, like the individual mandate, the Medicaid expansions are a central component of the ACA, designed to "work[] in tandem" with the Act's other core insurance reforms. R.E. 141. Whether the other core

reforms are capable of operating without the Medicaid expansions is irrelevant, as they are plainly not capable of operating "in a *manner* consistent with the intent of Congress." *Brock*, 480 U.S. at 685. The same is true of the ACA's hundreds of other less central provisions.[8] As the government itself has argued, "[w]hen Congress passed the ACA, it was careful to ensure that any increased spending, *including on Medicaid*, was offset by other revenue-raising and cost-saving provisions." R.E. 1024 (emphasis added). There is simply no reason to believe Congress would have calibrated the ACA's hundreds of other provisions to achieve precisely the same delicate fiscal balance had it not anticipated spending an additional *$434 billion* on Medicaid by the end of the decade. R.E. 1425.

The government makes no meaningful attempt to demonstrate otherwise, but instead simply maintains severance is too inconvenient a remedy to employ in this situation. *See* Govt.'s Response/Reply Br. 56–57. That argument runs roughshod over the democratic processes that the severance doctrine is intended to protect. "[T]he touchstone for any decision about [severance] is legislative intent, for a

[8] The government makes much of the fact that Washington State believes the severance analysis "is arguably different" for the provision of the ACA that reauthorizes and amends the Indian Health Care Improvement Act (IHCIA). *See* Govt.'s Response/Reply Br. 56. As an initial matter, as is clear from the States' opening brief, that position is not advanced by the other 25 Plaintiff States. *See* States' Opening Br. 65 n.8. In any event, the government cannot and does not demonstrate that the unique circumstances suggesting that Congress might have passed the IHCIA independent from the rest of the ACA are applicable to any of the other reauthorization or extension provisions the government cites.

court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (internal quotation marks omitted). When "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks and citations omitted), there remains no principled basis for keeping the rest of the provisions in place. If Congress ultimately concludes that certain provisions of the ACA have already become sufficiently entrenched to warrant rescue, it is free to reenact those provisions in subsequent legislation. But that determination is for Congress, not this Court, to make.

Finally, the government's contention that the States lack standing to argue that the rest of the ACA must fall with the Medicaid expansions is erroneous. Severability is a remedial question necessitated by invalidation of the challenged provision, not a separate claim that a plaintiff must have some sort of additional standing to bring. *See Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1283 (11th Cir. 2008) ("Having determined that the [challenged provision] is a violation of the Constitution, we must consider whether [it] is severable from the rest of the statute."). So long as the States have standing to allege that the Medicaid expansions are unconstitutional (which they indisputably do), this Court may

properly determine whether the invalidation of those provisions necessitates invalidation of the entire ACA.

In any event, even if there were a separate standing inquiry for severance arguments, any such inquiry would be satisfied by a showing that the plaintiff is injured by *any* of the act's remaining provisions. *See* States' Opening Br. 66. The States have plainly made that showing. The government does not dispute, for example, that the States are directly injured by the ACA's employer mandate provisions. And the government neither acknowledges nor disputes the States' assertion (at 67-68) that they are injured by the individual mandate because it forces millions of individuals onto the Medicaid rolls — including individuals who were *already* eligible for Medicaid, but had previously declined to enroll — thereby substantially increasing the States' share of Medicaid funding. *See* Govt.'s Response/Reply 61.[9] The States have therefore satisfied any standing inquiry that might be applicable to their severance argument.

[9] As the States noted in their opening brief (at 7), the ACA only provides additional Medicaid funding for costs attributable to "newly eligible individuals." ACA § 2001(a)(3) (adding 42 U.S.C. § 1396d(y)(1)). It does not increase federal funding for costs attributable to *previously* eligible individuals who are now forced to enroll in Medicaid to comply with the individual mandate.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below invalidating the ACA in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,792 words as determined by the word-counting feature of Microsoft Word 2000 in 14-point, Times New Roman typeface.

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May 24, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 24th day of May, 2011, served a copy of the foregoing documents, by agreement with opposing counsel, by electronic mail, and by U.S. mail on the following counsel:

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