No. 11-400

In the Supreme Court of the United States

STATES OF FLORIDA, SOUTH CAROLINA, NEBRASKA, TEXAS, UTAH, LOUISIANA, ALABAMA, COLORADO, PENNSYLVANIA, WASHINGTON, IDAHO, SOUTH DAKOTA, INDIANA, NORTH DAKOTA, MISSISSIPPI, ARIZONA, NEVADA, GEORGIA, ALASKA, OHIO, KANSAS, WYOMING, WISCONSIN, AND MAINE; BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN; AND TERRY BRANSTAD, GOVERNOR OF IOWA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF STATE PETITIONERS ON MEDICAID

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QUESTION PRESENTED

Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress' spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?

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REPLY BRIEF

The federal government's effort to defend the Affordable Care Act's massive Medicaid expansion is remarkable for what it omits. Rather than attempt to show that the ACA does not coerce the States into expanding their Medicaid programs, the federal government takes the extraordinary position that the spending power has no anti-coercion limit and encompasses the power to commandeer the States through coercion. That position cannot be reconciled with the notion that "our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

And because the federal government denies the existence of an anti-coercion limit on the spending power, it offers no real response to the States' argument that the coercive nature of the ACA's massive Medicaid expansion is evident on the face of the Act. It does not—and cannot—deny that Congress provided low-income individuals with no means *other than Medicaid* for complying with the individual mandate. And it never explains how the States' participation in Medicaid can be accurately described as voluntary when it is necessary to satisfy a mandate. Nor does the federal government even try to explain how a State could possibly reject new terms attached to billions of dollars of pre-existing funds under the single largest federal-state spending program in existence—particularly when that would mean forfeiting not only all of the tax dollars already being collected from its residents to fund Medicaid, but also billions in new federal spending that the ACA creates. It instead offers a misplaced policy

argument to the effect that States really would be better off accepting the federal conditions.

Rather than engage in a futile effort to deny the coercion at work in the ACA, the federal government accuses the States of seeking to dictate the terms of federal spending and of endangering the constitutionality of other spending legislation. But the States do not claim any right to receive money stripped of federal conditions; they merely insist that the conditions comply with the Constitution. Nor would striking down the uniquely coercive ACA necessarily threaten any other spending program. Not only is Medicaid the largest federal grant-in-aid program, and not only does the ACA leverage existing funds to coerce compliance with new conditions, but the Medicaid expansion's direct link to the individual mandate makes it unique and belies any effort to describe the States' participation as voluntary. The real threat here is not that invalidating the ACA's massive Medicaid expansion will endanger other federal spending programs, but that approving it will endanger our basic federalist structure. If the federal government can coerce States to administer federal programs, by threatening to withhold billions of dollars extracted from in-State taxpayers, then very little is left of the anti-commandeering doctrine. And if Congress can require States to adopt the few policies it cannot impose directly on pain of forfeiting the kind of massive revenue streams implicated by the ACA, then our federal government is one of limited powers in theory, but not in fact.

ARGUMENT

I. The Court Should Reaffirm The Anti-Coercion Limit On Congress' Spending Power.

As the States have explained, *see* States' Br. 24–32, the case for an anti-coercion limit on Congress' spending power is straightforward. Not only has the Court recognized such a limit in *South Dakota v. Dole*, 483 U.S. 203 (1987), but it has also held 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). If the Constitution denies Congress the power to compel States to regulate, then it surely forbids "coercive" uses of the spending power that leave States with no choice but to regulate on the terms that Congress prescribes. The federal government resists this conclusion by asserting that even modest limits on coercive use of the spending power would conflict with Congress' appropriations power or put courts in an untenable position. Neither argument has merit. The spending power, like every other congressional power, is a limited one, and the limit on coercive use of that power to force States to regulate is vital to our constitutional structure.

1. The federal government initially resists an anti-coercion limit on the spending power by invoking the specter of States "insist[ing] that money from the Treasury be appropriated" on terms other than those that "Congress has prescribed." Govt.'s Br. 26. The federal government can rest assured that Congress alone can determine *whether* to spend federal funds and which conditions to impose. But

this Court gets the final word when it comes to determining whether the resulting spending legislation complies with the Constitution. If this Court invalidates spending legislation as impermissibly coercive and commandeering, the result is not that the States get to take the money free and clear, or that they get to dictate the terms on which federal moneys are appropriated. Instead, this Court simply vindicates the Constitution by striking down the invalid legislation, and Congress retains its substantial discretion to spend money in a constitutionally valid manner.

That is why the federal government's reliance on *OPM v. Richmond*, 496 U.S. 414 (1990), is so misplaced. *OPM* held that courts may not order Congress to spend funds "in direct contravention of the federal statute upon which [a] claim to the funds … rest[s]." *Id.* at 424. But the States are not asking the Court to order Congress to continue funding Medicaid, let alone to continue funding it on terms that directly contravene the Medicaid statute. Quite the contrary, the States readily concede that they have no "vested right that the program w[ill] continue indefinitely or upon the same terms." States' Br. 41.

To be sure, if the Court invalidates the ACA's Medicaid expansion, the States presumably will continue to receive federal Medicaid funding at pre-ACA levels based on pre-ACA conditions. But that is not because States will have "unilaterally … alter[ed] the conditions on which federal funds will be paid out of the Treasury." Govt.'s Br. 37. It is because (as the federal government is quick to point out, *see* Govt.'s Br. 19) invalidating the ACA's

amendments to Medicaid would not invalidate Medicaid itself.

If, going forward, Congress decides to make *constitutionally valid* amendments to Medicaid—for example, by offering discrete new funds to States willing to take on discrete new obligations—the States will remain obligated to abide by whatever conditions are attached to whatever funds they voluntarily accept. Indeed, Congress retains the option of spending money in ways that do not involve States at all. For example, Congress can spend money directly through federal instrumentalities, as the ACA will do in States that decline to establish exchanges. *See* ACA § 1321(c). But when Congress decides to involve the States, it is not free to treat them as federal instrumentalities that can be ordered around at will. States retain their dignity and residual sovereignty even when they participate in a federal spending program. Congress obtains substantial benefits—in terms of both efficiency and acceptance by a citizenry wary of expanding federal bureaucracy—by spending federal money though States rather than new federal instrumentalities. But to obtain those benefits, Congress must respect the States' sovereignty and give them a real choice to turn down the funds. Any other result not only undermines the States' sovereignty, but also hopelessly blurs accountability between the federal and state governments.

2. The federal government also complains that the anti-coercion principle empowers courts to usurp the States' right to decide "whether promotion of the general welfare would be best achieved … by entering into a cooperative financial arrangement"

with the federal government. Govt.'s Br. 35. But that argument assumes its conclusion. To the extent that a spending program is truly voluntary, then a decision to invalidate the program would deny States a choice. But when, as here, the federal spending program is not voluntary and coerces state involvement, a judicial role is critical to ensuring that the States retain the voluntary choice that is the entire justification for evaluating spending legislation differently from direct regulatory impositions. The whole point of the anti-coercion limit is to enforce the constitutional requirement that, "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." *New York*, 505 U.S. at 168 (emphasis added).

The federal government's argument to the contrary rests on the faulty premise that coercion analysis requires courts to assess the onerousness of the *conditions* Congress forces upon the States. It does not. The question is whether the States have a meaningful ability to reject the *inducement* Congress offers, not whether the States are willing or able to comply with the accompanying conditions. *See Dole*, 483 U.S. at 211 (analyzing "whether *the financial inducement* offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion" (internal quotation marks omitted; emphasis added)); *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) ("the coercion inquiry focuses on the financial inducement" (internal quotation marks omitted)).

The federal government's repeated attempts to debate the policy merits of the ACA thus are a non-sequitur. The ACA is unconstitutionally coercive because it forces States to implement federal policy, not because it forces the States to implement *bad* federal policy. To be sure, the States vigorously dispute the wisdom of the ACA's Medicaid expansion and the federal government's characterization of the Act as some minor adjustment to "address[] existing gaps in Medicaid coverage," Govt.'s Br. 23. But the fact that 26 States simultaneously dispute the wisdom of the ACA's Medicaid expansion and yet have no practical ability to turn down the funds only highlights the coercion.

Nor can the federal government short-circuit the analysis by arguing that the commandeering the ACA effects is not "significantly onerous." Govt.'s Br. 26. That claim blinks reality—no one believes the States' undertakings will be insignificant—but is legally irrelevant in any event. "[T]he Constitution simply does not give Congress the authority to require the States to regulate," either directly or through the spending power. *New York*, 505 U.S. at 178. There is no *de minimis* exception to that rule.

And in reality, there is nothing *de minimis* about the ACA and its transformation of Medicaid. Even States that support the ACA's Medicaid expansion readily concede that it works "a fundamental shift in the program," *Amicus* Br. of Oregon *et al.* 21, transforming Medicaid from a program that serves limited groups of categorically needy into one designed to provide all low-income individuals with the means to comply with an unprecedented mandate to maintain insurance. The federal government

attempts to divert attention from that "major philosophical change in the purpose of the program," *id.* at 20, by emphasizing that States may still "choose whether to provide coverage for optional categories of beneficiaries and whether to offer optional benefits to both mandatory and optional beneficiaries." Govt.'s Br. 29. But that simply ignores that the universe of "optional beneficiaries" has been radically reduced (because the coverage of many heretofore optional beneficiaries has become mandatory in order to satisfy the mandate) and that the federal floor above which States may provide optional benefits has been radically raised. *See, e.g.*, ACA § 2001(a) (expanding eligibility to include currently optional individuals), (c)(2)(B) (adding prescription drug coverage and other services to mandatory "benchmark" benefits); *cf.* Kaiser Family Foundation, *Medicaid Enrollment and Expenditures by Federal Core Requirements and State Options* 12 (Jan. 2012) (estimating that prescription drug coverage accounted for 15% of optional spending in 2007).

Of course, if some States consider expanding Medicaid "an affordable and preferable alternative," Govt.'s Br. 34 (internal quotation marks omitted), then Congress is free to offer, and those States are free to accept, *additional* funds for that purpose—so long as Congress does not couple that offer with the threat to withhold all *existing* funds from States that disagree.[1] Unlike the ACA, such a statute would

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[1] That does not mean that the ACA is "constitutional as applied to … States" that "consent[]" to the coercion. Govt.'s Br. 53.

respect the "central principle of our system of dual sovereignty that the United States and the States will exercise *independent* judgment concerning what spending measures will best promote the public welfare within their respective spheres." Govt.'s Br. 35 (emphasis added).

3. Finally, that there are *other* limits on Congress' spending power provides no basis for abandoning the anti-coercion limit. Any contention to the contrary is conclusively refuted by *Dole*, as the Court considered the coercion challenge raised there only *after* concluding that the condition at issue satisfied the other four limits on Congress' spending power. *See Dole*, 483 U.S. at 211. Moreover, none of the other limits on Congress' spending power

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Congress cannot deprive a State of the right to choose whether to accept federal funds and conditions just because if the State had a choice it would choose to accept. *See New York*, 505 U.S. at 182.

Indeed, if the Court holds the ACA's Medicaid amendments unconstitutional, it should invalidate not just those provisions, but the entire ACA. *See* States' Severability Br. 50–51, 53–56. As the federal government concedes, the Medicaid expansion is "[o]ne of the principal means" by which Congress sought to increase insurance coverage in the ACA. Govt.'s Br. 8. It accounts for fully 50% of the projected increase in coverage under the ACA and is one of the Act's most expensive components. *See* States' Severability Br. 46, 53. As the States have explained elsewhere, *see* States' Severability Br. 27–37, there is no merit to the federal government's argument that the Court may not consider whether those and other factors identified by the States render the Medicaid expansion non-severable. Nor does the expansion's severability from *Medicaid* have any bearing on its severability from *the ACA*. *But see* Govt.'s Br. 52.

addresses its potential to obliterate state sovereignty. Providing States—*and* other potential recipients of federal funds—clear notice of conditions is certainly important, but it is cold comfort if Congress can impose any clear condition—no matter how coercive—on the States. Thus, the only way to ensure that the spending power does not render anti-commandeering principles mere parchment barriers is to reaffirm that whether to implement federal policy in exchange for federal funds must "remain[] the prerogative of the States not merely in theory but in fact." *Dole*, 483 U.S. at 211–12.

II. The ACA's Medicaid Amendments Are Unconstitutionally Coercive.

If there is an anti-coercion limit to the spending power, the ACA's Medicaid expansion clearly violates it. Indeed, as the States illustrated in their opening brief, *see* States Br. 32–53, if the ACA does not cross the coercion line, then no Act of Congress ever will. The federal government's attempts to prove otherwise distort the States' arguments and the ACA itself. First, the States acknowledge that many Medicaid-eligible individuals are exempt from the *penalty* for violating the individual mandate. But they are not exempt from the *mandate* itself. Although the federal government attempts to conflate the two, Congress kept them separate and provided the Medicaid expansion as the only mechanism for most Medicaid-eligible individuals to comply with the mandate. Second, contrary to the federal government's suggestion, the States do not concede that Congress could avoid the coercion problem by enacting the ACA's reconceived version

of Medicaid in a single statute. The fact that Congress attempted to hold States' hostage to their past decisions to participate in Medicaid is a clear indicator of coercion, but it is hardly the only one. Finally, because the ACA is uniquely coercive for multiple reasons, holding it unconstitutional need not render existing conditions on Medicaid or other spending programs constitutionally suspect.

A. The Coerciveness of the ACA's Medicaid Amendment Is Clear in the Act Itself.

The coerciveness of the ACA is evident on the face of the Act. Congress created an unprecedented mandate for individuals to obtain health insurance, extended that mandate to individuals who could not afford to purchase such insurance, and provided no mechanism for their mandated compliance other than Medicaid, as expanded and transformed by the ACA. If a State opts out of Medicaid, the Act does not work. There is no alternative means for the Medicaid-eligible to satisfy the mandate. There would be mandated demand without a means of supply. Under those circumstances, to call the ACA's chosen means of supply for low-income individuals—expanded Medicaid—"voluntary" is Orwellian and gives Congress too little credit. Congress did not fail to provide alternative means for these millions of individuals to comply with the mandate through oversight. It did so because it knew the States had no choice but to supply them with Medicaid.

The federal government does not attempt to demonstrate that individuals covered by the expansion have any alternative to Medicaid, or that

Congress ever contemplated the possibility that such an alternative might be necessary. It instead simply insists that those individuals need not comply with the mandate at all. That argument blatantly distorts the statute that Congress enacted.

The federal government claims the ACA "does not 'force[]' low-income individuals to obtain" insurance because Congress exempted many of those individuals from the *penalty* for failure to comply with the mandate. Govt.'s Br. 49. But Congress did not exempt those individuals from the *mandate*. The plain text of the statute forecloses any other conclusion: the mandate requires individuals to maintain qualifying coverage without regard to any penalties, and Congress carefully delineated separate sets of exemptions from the mandate and the penalty, with the former considerably narrower. *Compare* ACA § 1501(b), 26 U.S.C.A. § 5000A(d), *with id.* § 5000A(e); *see also* States' Minimum Coverage Br. 52–57. Moreover, Congress specified that enrollment in Medicaid is a means of satisfying the mandate. *Id.* § 5000A(f)(1)(A)(ii). Individuals are not excused from complying with a law just because they will not be penalized for violating it; suggesting otherwise trivializes the interest of law-abiding citizens in compliance. The ACA unambiguously requires individuals covered by the Medicaid expansion to maintain insurance, and violating federal law is no small matter. The federal government cannot change that fact by abandoning defense of the statute that Congress actually enacted.

Nor can the federal government reconcile its mischaracterization of the ACA with its concession that 6 to 7 million fewer individuals would enroll in

Medicaid without the mandate. *See* Govt.'s Severability Br. 3–4 (citing Cong. Budget Office (CBO), *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010)). The notion that 20% of the total projected increase in insurance coverage attributable to the ACA was nothing more than a happy accident is inconceivable—particularly when Congress' own advisors explained that a mandate would have precisely that effect *with or without a penalty*. *See* CBO, *Key Issues in Analyzing Major Health Insurance Proposals* 53 (Dec. 2008) ("Many individuals … would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws."). Indeed, the federal government has admitted in this very case that the mandate applies to individuals "unable to obtain [insurance] without the … Medicaid eligibility expansion." Govt.'s Mem. Supp. Mot. Summ. J. 1–2 [R.E. 984–85].

In short, there is no escaping the conclusion that the mandate fully applies to individuals covered by the Medicaid expansion, and that Congress provided no means other than that expansion through which those individuals might satisfy the mandate. That was not an oversight. Congress provided no alternative because it was more expedient to *force* the States to supply that need than to devise a federal alternative to fill the gaping hole that would be left in its scheme for "near-universal coverage," ACA § 1501(a)(2)(D), if States were free to decline to transform their Medicaid programs. Congress' motives are understandable—creating a federal alternative capable of satisfying the insurance needs

of individuals up to 138% of the federal poverty level would have been an onerous and unpopular undertaking. But the fact that achieving its objectives directly would be difficult does not license Congress to convert States into federal instrumentalities by commandeering them through a coercive use of its spending power.

In all events, the federal government ultimately concedes, as it must, that the ACA is premised on the expectation that the States will continue to participate in Medicaid. Any other reading would compel the untenable conclusion that Congress was agnostic not only as to whether low-income individuals would comply with the mandate, but as to whether they had access to insurance *at all*. The federal government attempts to downplay the significance of its concession by arguing that Congress assumed continued participation because the States have participated in Medicaid for decades. *See* Govt.'s Br. 50–51. But that only underscores the problem. If Congress simply conditioned new money on new conditions, its confidence about continuing participation might be a mere predictive judgment. But when Congress puts billions of dollars in federal funding under a massive and entrenched program at risk, its confidence in continued participation is not mere prognostication. It is coercion.

The federal government alternatively contends that "Congress's perceived expectations have no bearing on the question whether Congress has unconstitutionally coerced the States." Govt.'s Br. 51. To be sure, the ultimate constitutional question remains whether Congress *in fact* coerced the States, not just whether Congress *intended* to do so. But

when Congress premises an entire regulatory scheme on the assumption that the States have no choice but to play the part it demands, that is powerful evidence that spending legislation is coercive in both intent and effect—particularly when that assumption is backed by a threat to withhold every penny of federal spending under the largest federal-state aid program in existence. And when Congress mandates that Medicaid-eligible individuals maintain insurance, but provides no alternative means for them to obtain it, it is impossible to label the States' participation in Medicaid voluntary. It is every bit as mandatory as the individual mandate to which it is inextricably linked.

B. Congress Cannot and Did Not Reserve the Right to Make Unconstitutionally Coercive Amendments to Medicaid.

The federal government contends that Congress' reservation of "the right to alter, amend, or repeal any provision" of Medicaid, 42 U.S.C. § 1304, means Congress may "'provide by amendment whatever rules it might have prescribed' in its initial enactment." Govt.'s Br. 39–40 (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54 (1986)). Because the federal government deems it "clear" that "Congress could have included in its initial enactment of the Medicaid Act the entire set of terms and conditions that will be in effect" under the ACA, Govt.'s Br. 47, 40, it maintains there can be no objection to Congress amending Medicaid to reach the same result. That logic is flawed at every turn.

First, the federal government misreads the Court's decision in *Public Agencies*. That was a *takings* case involving whether Congress violated a State's *contractual* rights under the Social Security Act by repealing a statutory provision that allowed States to withdraw their employees from social security. 477 U.S. at 51–52. The Court concluded that the State had no vested property right to take because it had entered into the program "under an Act that contained the language of reservation … expressly notif[ying] the State that Congress retained the power to amend the law." *Id.* at 54. The Court neither held nor even suggested, however, that Congress' reservation would preclude the State from raising *other* constitutional objections to the amendment. Quite the contrary, the Court expressly noted that no Tenth Amendment claim remained in the case. *See id.* at 50 n.16.

Public Agencies has no bearing on the question before the Court. The States contend that the ACA is unconstitutional because it coerces the States into regulating, not because it effects a taking of a contractual right to continue participating in Medicaid under current terms. The States do not claim a vested right to continued participation under the old terms; they assert a constitutional right not to be coerced into accepting the new terms. They did not and could not forfeit that right by acknowledging their lack of vested rights, and nothing in *Public Agencies* (or any other decision of this Court) is to the contrary. *See New York*, 505 U.S. at 182 ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed.").

Nor do the States "concede[] that Congress constitutionally could have enacted the Medicaid program at the outset in one statute that contained all of the features of the program as it will exist" under the ACA. Govt.'s Br. 47. To be sure, Congress' exploitation of the States' dependency on existing Medicaid infrastructure and the constituencies that have built up over years of participation underscore the coercion here. And the fact that Congress established new conditions that are clearly distinguishable from the pre-existing program, yet made acceptance of those conditions a requirement of continued participation in the entire program, makes the coercion easy to identify. But if an entirely new program forced States to make the same untenable non-choice between forfeiting billions of federal tax dollars each year or regulating health insurance for the needy according to Congress' dictates, it would pose largely the same constitutional problem. And Congress could not avoid that problem by repealing Medicaid and enacting the ACA's amended version in a single statute. Simply calling it something else would not make it any more constitutional.

More fundamentally, the federal government's erroneous insistence that Congress could achieve the same end through different means is as constitutionally suspect here as it is in its defense of the individual mandate. In theory, Congress might be able to repeal Medicaid and run an insurance program for low-income individuals through a federal bureaucracy with offices in every State. But even if Congress could do that in theory, there are powerful practical *political* impediments to the direct federal takeover of an area of traditional state and local

concern. What is more, if those practical constraints could be overcome, the resulting federal program would leave no doubt as to which level of government was responsible for the resulting costs and benefits. Someone with complaints about a federal program could contact a federal office with a federal complaint. The notion that Congress may circumvent political constraints and blur accountability by forcing States to administer this massive new federal undertaking is at considerable odds with the principle that "[f]ederalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

C. The ACA Is Uniquely Coercive.

At bottom, the federal government has no real response to the reality that the sheer amount of funding at stake under the ACA leaves the States with no choice but to acquiesce to Congress' demands. It instead complains that acknowledging the unconstitutionality of the ACA might cast doubt on the constitutionality of other spending legislation. Not so. The ACA and its efforts to leverage the entirety of an expanded Medicaid program in service of the individual mandate are truly unique. Thus, striking down this coercive effort need not threaten any other spending program, but upholding it would sound the death knell for any anti-coercion limit on the spending power.

The ACA's Medicaid expansion is unique in two respects: the amount of funding at stake and the expansion's relationship to the individual mandate. The vast majority of federal spending programs are sufficiently small to make any "argument as to

coercion … more rhetoric than fact." *Dole*, 483 U.S. at 211; *see* States' Br. 56–57. Medicaid, by contrast, was the largest grant-in-aid program to the States *even before its massive expansion by the ACA.* What is more, the program's direct link to the decidedly non-voluntary mandate belies any effort to describe the States' participation as voluntary. Although Congress has imposed mandatory conditions on continued Medicaid participation in the past, none was tied to a novel federal mandate that depended upon its coerciveness, and none expanded funding to the massive levels of the ACA. Thus, whatever questions may have existed as to the constitutionality of aspects of Medicaid before the ACA, this Court need not resolve those questions to resolve this case in the States' favor.

The federal government responds that it "cannot possibly be the law" that adding to the pot of funds makes spending legislation more coercive. Govt.'s Br. 41. But that is both reality and the law. Coercion is measured by a State's ability to withstand the loss of the inducement at stake, not by how invasive the resulting commandeering would be. *See infra*, pp. 6–7. By dramatically increasing the size of the already massive federal Medicaid inducement, the ACA dramatically increases the coerciveness of the threat to withhold it. And the increase truly is dramatic: In the first six years of the expansion's existence, federal Medicaid spending will grow by a whopping *$434 billion*. *See* Govt.'s Br. 10, 27. The growth will not stop there; federal spending levels will continue to rise as individuals continue to enroll. By the time the expansion is fully phased in, the federal government expects to be

providing another $100 billion *each year* in Medicaid funding—nearly a 40% increase over current levels. *See* Letter from Douglas Elmendorf, Director, to the Hon. Nancy Pelosi, Speaker, U.S. House of Reps., Table 4 (March 20, 2010).

The idea that a State could sit on the sidelines while such massive amounts of tax revenues are extracted from its citizens and while the federal government provides no alternative for assisting its low-income residents is complete fiction. It would be one thing if the federal government were expected to spend equivalent amounts on the State's low-income residents if the State did not sign up to be a federal instrumentality (as was the case in *Steward Machine*). And it would be another if this money were collected from a source other than a State's own taxpayers. In either case, the federal government's characterization of the ACA's coercion as "generosity" might be comprehensible. Govt.'s Br. 50. But there is nothing generous—let alone "exceedingly" so, *id.*—about "placing conditions upon the return of" billions of dollars of federal "revenues that were collected from the States' citizenry in the first place." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (plurality opinion of Luttig, J.).

The federal government protests that "[f]ederal taxpayers … are also citizens of the United States," Govt.'s Br. 43 (internal quotation marks omitted). Exactly. The States are acutely aware that their citizens must pay taxes to two sovereigns, and that increased federal taxes reduce the ability and willingness of their residents to pay additional State taxes. That is precisely why the federal government is being coercive—and not generous—when it

extracts revenues from state residents to fund its massive expansion of Medicaid and then withholds those funds from the States unless they "choose" to accept the federal conditions. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1936–37 (Dec. 1995) ("the states implicitly [are] able to tax only the income and property remaining to their residents and property owners after the federal government has taken its yearly share") (footnote omitted)).[2]

That does not mean that *every* condition upon return of federal tax dollars to the States is "constitutionally suspect." Govt.'s Br. 42. Even in the rare instance when an inducement is large enough to raise coercion concerns, spending legislation is not necessarily unconstitutional just because it is coercive. For example, when Congress has the authority to impose a condition *directly*, there is no constitutional impediment to using its spending power to coerce compliance with that condition. *Cf. Pierce County, Wash. v. Guillen*, 537 U.S. 129, 147 n.9 (2003) (rejecting challenge to spending legislation when "Congress had authority under the Commerce Clause to enact" challenged conditions). Thus, nothing in the anti-coercion principle would preclude Congress from coercing state recipients of federal funds to comply with civil

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[2] It is no coincidence that questions regarding use of the spending power to coerce the States into regulating did not arise until the 1920s—Congress was largely without the means to attempt to do so until the Sixteenth Amendment authorized the federal income tax in 1913.

rights requirements that fall within Congress' power under section 5 of the Fourteenth Amendment.

The federal government also attempts to obscure the commandeering problem by insisting that the ACA simply imposes conditions on how federal funds may be spent. *See* Govt.'s Br. 16, 24. But that is not a fair or accurate description of the Act. Perhaps the ACA could be said to impose conditions on how States may spend the *new* funds that it provides. But its requirement that States expand their Medicaid programs to cover millions of additional individuals has nothing to do with how States will spend the *existing* funds that the ACA leverages to ensure compliance with its new conditions. As to those funds, the ACA imposes a simple directive to legislate: Unless States extend Medicaid coverage to all individuals up to 138% of the federal poverty level, they may no longer receive billions of dollars in federal funding to help pay for the millions of individuals already enrolled in their Medicaid programs. Because Congress could not just direct the States to expand their Medicaid programs, the potential for commandeering is obvious.

While the ACA is uniquely coercive and thus distinguishable from other spending legislation, upholding it would mean abandoning the notion that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). Indeed, it is both telling and troubling that the federal government's arguments are rooted

in a case that rejected a coercion argument by reasoning that state sovereignty "is adequately protected by the national political process." *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989); *see also Amicus* Br. of Senate Majority Leader Harry Reid *et al.* 16 (urging rejection of anti-coercion principle because "'State sovereign interests … are more properly protected by procedural safeguards … than by judicially created limitations on federal power'" (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985)).

The ACA is Exhibit A that the "national political process" and Congress' "underdeveloped capacity for self-restraint," *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting), are insufficient to protect States from coercive spending legislation. Federal legislators have no obvious incentive to resist enlarging the federal share of taxes and controlling States by "giving back" some of that revenue only if States agree to the federal legislators' preferred conditions.

In nearly all other contexts, this Court has refused to shrink from the sometimes difficult task of enforcing the Constitution's structural protections. The spending power as envisioned by the federal government threatens to render the limits on every other enumerated power—and the very process of enumeration itself—beside the point. Virtually any power denied to Congress directly could be attached as a condition to massive federal spending. The Constitution's basic structure and the sovereignty of the States are simply too fundamental for this Court to accept the federal government's submission.

CONCLUSION

The Court should hold the ACA's Medicaid expansion unconstitutional and the ACA invalid in its entirety.

Respectfully submitted,

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March 12, 2012

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