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No. 11-400

In the

Supreme Court of the United States

STATES OF FLORIDA, et al.,

Petitioners,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES , et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, CONGRESSMAN DENNY REHBERG AND DR. JEFF COLYER IN SUPPORT OF PETITIONERS (MEDICAID SPENDING/COERCION ISSUE)

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QUESTION PRESENTED

1. Against the backdrop of a federal spending program the constitutionality of which is both dubious and untested, 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's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?

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INTEREST OF AMICI CURIAE[1]

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527 (2011); *Bond v. United States*, 131 S.Ct. 2355 (2011); *Reisch v. Sisney*, No. 09-953, *cert. denied*, 130 S.Ct. 3323 (2010); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Schaffer v. O'Neill*, No. 01-94, *cert. denied,* 534 U.S. 992 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus Pacific Legal Foundation ("PLF") is widely recognized as the largest and oldest nonprofit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. PLF has participated as amicus curiae in several lawsuits challenging the constitutionality of the Patient Protection and Affordable Care Act (PPACA), including *Virginia ex rel. Cuccinelli v. Sebelius* (No. 11-420, pending); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); and *Coons v. Geithner*, No. CV-10-1714 (D. Ariz., pending). In addition, PLF attorneys represent amicus Matthew Sissel, a citizen of Iowa, and decorated Iraq War veteran and small business owner, who is the plaintiff in a lawsuit challenging the constitutionality of PPACA, *Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10 cv 01263 RJL (D.D.C., filed July 26, 2010).

Amicus Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case concerns Cato because it raises vital questions about federalism and individual liberty.

Amicus Congressman Denny Rehberg of Montana is a Member of the One Hundredth and Twelfth Congress and currently serves as Chairman of the

Appropriations Subcommittee on Labor, Health and Human Services, Education & Related Agencies, which Subcommittee has partial jurisdiction over Medicaid expenditures and operations. Congressman Rehberg takes seriously his independent duty as a Member of Congress and as Subcommittee Chairman to ensure that the Constitution is upheld, in keeping with his oath of office. He has consistently opposed the Patient Protection and Affordable Care Act from the time of its initial consideration by Congress and has led or participated in efforts in the House of Representatives to defund, amend and repeal the Act on constitutional and other grounds.

Amicus Jeff Colyer is a practicing physician and the Lieutenant Governor of the State of Kansas. As Lieutenant Governor Dr. Colyer oversees Kansas's Medicaid program and believes the PPACA unconstitutionally encroaches on the sovereignty of the state of Kansas by coercively requiring Kansas to adopt Medicaid policies that are not in the interests of the citizens of Kansas.

SUMMARY OF ARGUMENT

California risks losing $25.6 billion in federal funding annually—one quarter of its entire general-fund revenue budget—if it does not acquiesce in the new expansions to Medicaid coverage mandated by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("ACA"). Arizona risks losing $6.3 billion, and would have to increase its own annual general revenues by an astounding 67% in order to replace the federal share of funding for the existing Medicaid program if it does not yield to the new law's expansion demand. Collectively, the

States stand to lose more than a quarter trillion in existing federal funding annually, more than 25% of their total general revenue budgets, and would on average have to increase their general revenue budgets by 39.7% in order to maintain the existing level of Medicaid funding for their citizens. *See* Edmund F. Haislmaier, *Quantifying Costs to States of Noncompliance with PPACA's Medicaid Expansion*, Backgrounder No. 2640 (Heritage Foundation, Jan. 12, 2012).[2] If penalties of that magnitude do not cross the line from "inducement" to "coercion" and trigger the anti-coercion prong of this Court's Spending Clause analysis in *South Dakota v. Dole*, 483 U.S. 203 (1987), nothing ever will.

Beyond the sheer magnitude, there is something deeply troubling, from a structural federalism perspective, about a federal government grown so large that it can take over entire swaths of the States' police power under the guise of conditions on federal spending. The concerns raised in Congress about the constitutionality of the federal government's first foray into the social welfare arena demonstrate that the authority was seen as much narrower than many now believe. But what began with the small step of upholding a federal program to stop the "spread" of Depression-era unemployment from State to State has now metastasized into wholesale usurpation of the police power—that power to regulate the health and safety of the people which this Court has correctly and repeatedly recognized is reserved to the

[2] Available at http://www.heritage.org/research/reports/2012/01/quantifying-costs-to-states-of-noncompliance-with-the-ppacas-medicaid-expansion (last visited Jan. 13, 2012).

States. Just as the Commerce Clause has outer limits—and we fully endorse the holding of the Eleventh Circuit below on that score—the Spending Clause also has limits that must be enforced. *United States v. Butler*, 297 U.S. 1 (1936). Each of the prongs of the *Dole* analysis must therefore be given effect, and all of them must be developed against the premise of limited, enumerated federal powers.

ARGUMENT

I. THE AFFORDABLE CARE ACT UNCONSTITUTIONALLY COERCES STATES TO IMPLEMENT THE FEDERAL GOVERNMENT'S MEDICAID EXPANSION

A. The Coercion Prong of the *Dole* Spending Clause Analysis Must Be Given Effect.

Ever since this Court recognized in *South Dakota v. Dole* that conditional federal spending could cross the line from permissible inducement to unconstitutional coercion, 483 U.S. at 211, lower courts have struggled to apply that principle. Some have even found it hard to understand how any "gift" of funds, viewed in isolation, could be coercive. *See, e.g.*, *Nevada v. Skinner*, 884 F.2d 445, 448–49 (9th Cir. 1989); *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000).

But the "coercion" prong should not be viewed in isolation. It exists against a backdrop of a limited spending power, and in the context of federalism. Where, as with the case of the expanded Medicaid program under consideration here, the federal government grabs tax revenues from a State's own citizens, then returns some portion of those revenues to

further police power purposes that fell within the State's jurisdiction in the first place, meanwhile attaching to that "gift" some regulatory condition that the federal government lacks power to impose directly, the transaction is inherently coercive. *See* Richard Epstein, *Bargaining With the State* 152 (1993); Lynn A. Baker, *The Spending Power and the Federalist Revival,* 4 Chap. L. Rev. 195, 212 (2001). As this Court recognized in *Butler*, "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." 297 U.S. at 73. "[I]f, in lieu of compulsory regulation of subjects within the States' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end," the spending power "would become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.* at 75.

Yet that is exactly what the ACA does. Title II of the ACA requires states to expand Medicaid coverage to millions of people who are not now covered: all people under the age of 65 whose annual household income is below 138 percent of the federal poverty level, currently about $30,000 for a family of four, excluding non-cash welfare assistance from programs such as public housing and food stamps (which can add $10,000 or more to the equation), income from capital gains, income from unrelated housemates, and the value of other assets or resources. *See* ACA §§ 2001(a)(1)(C), 2002(a)(14)(C); 42

U.S.C. §§ 1397jj(c)(5), 9902(2); *see also* U.S. Census Bureau, *How the Census Bureau Measures Poverty*.[3] It also mandates a floor for coverage of all existing Medicaid recipients, and even locks in higher levels of benefits in States that had already voluntarily exceeded that floor. ACA §§ 2001(a)(2), 1501(b), 2001(b).

The federal government could not simply *command* the states to adopt these expansive Medicaid programs. That would amount to "commandeering" of the legislative policy judgment of the states, in violation of the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 161 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 288 (1981); *cf. Printz v. United States*, 521 U.S. 898, 933 (1997). Yet when conditions on federal spending are used, as here, to accomplish the same commandeering end (rather than simply insuring that the federal monies be spent for their intended purposes), the intrusion on States' sovereign authority is no less palpable, and the Tenth Amendment violation no less clear.

The coercion prong of the *Dole* analysis was apparently designed, and certainly is well-suited, to prevent the federal government from doing by indirection what it cannot do directly. It must be given effect by this Court in order to ensure that the lines of demarcation between the state and federal governments are protected.

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[3] Available at http://www.census.gov/hhes/www/poverty/about/overview/measure.html (last visited Jan. 14, 2012).

B. The ACA Violates the Prohibition Against Coercive Conditional Spending.

The need for a vigorous anti-coercion jurisprudence is particularly evident where, as here, the amount States risk losing if they do not acquiesce in the new mandate is massive and amounts to a large percentage of the total funds the States receive from the federal government. *See Com. of Va. Dept. of Educ. v. Riley*, 86 F.3d 1337, 1356 (4th Cir. 1996) (Luttig, J., dissenting), *adopted as the plurality opinion of the court on reh'g en banc*, 106 F.3d 559 (4th Cir. 1997) (holding that "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 State refuses to . . . submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States.").

A recent study by the Heritage Foundation exposes the magnitude of the "coercion" problem confronted by the States here. The projected federal share of Medicaid grants to the States in the coming fiscal year is $256.9 billion, more than a third of cumulative State general fund revenues. The federal share of Medicaid spending in California next year will be $25.6 billion, roughly a quarter of the State's $105 billion general-fund revenue budget. $31.5 billion is the amount in New York; $17.8 billion in Texas; $12.3 billion in Pennsylvania; $5.3 billion in Louisiana. The increase in State general-fund revenues needed to replace those federal funds ranges from

20.44 percent in New Jersey[4] to a staggering 67.26 percent in Arizona, with an average of 39.7 percent. *See* Haislmaier, *supra* at 3.

Were any State to decline to participate in the new, expansive Medicaid program, it would lose these funds, unaccompanied by any reduction in the share of the federal tax burden borne by the State's own citizens. As in *Butler*, such a condition "is not in fact voluntary. The [State], of course, may refuse to comply, but the price of such refusal is the loss of benefits…. This is coercion by economic pressure. The asserted … choice is illusory." 279 U.S. at 70-71.

In a perfect world, the States would never have become so dependent on federal Medicaid spending in the first place. In the first seventy years of our nation's history, presidents routinely vetoed federal appropriations for matters falling within the internal affairs of the States as a "fatal encroachment" upon the states that would create a "danger of consolidation" in the national government. Veto Message of President Polk, 43 H.R. Journal 82, 93 (1847); *see also*, *e.g.*, 30 Annals of Congress 212 (Madison); 39 Annals of Congress 1838, 1849 (Monroe).

President Jackson called the notion that Congress could spend money within the States for whatever it determined to be conducive to the general welfare a "dangerous doctrine," a "fallacy" that overlooked "the great considerations in which the federal government was founded," namely, that the States did "not consent to make a grant to the Federal Government of

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[4] Excluding Alaska, which for reasons peculiar to itself, is an outlier at 9.88%.

the general and usual powers of Government, but of such only as were specifically enumerated." 28 H.R. Journal 28 (1834). Such a system would be harmful to the federal government, President Polk subsequently noted, because it would "absorb the revenues of the country, and plunge the government into a hopeless indebtedness." 43 H.R. Journal 85 (1847).

More significantly, as President Buchanan recognized, federal funding for matters of state concern would "break down the barriers which have been so carefully constructed in the Constitution to separate the Federal from State authority," causing "an actual consolidation of the Federal and State Governments . . . , equally ruinous to both." 55 H.R. Journal 505-06 (1859). It "would operate with equal detriment to the best interests of the States," he added, because "[i]t would remove the most wholesome of all restraints on legislative bodies—that of being obliged to raise money by taxation from their constituents—and would lead to extravagance, if not corruption." *Id.* at 504.

Instead, the States have clearly become so dependent on federal spending that they are deprived of any real choice in the decision whether to obey the ACA's mandated expansion. As this Court has previously acknowledged, "a complete withdrawal of the federal prop in the system . . . could seriously cripple a state's attempts to provide other necessary medical services" to its residents. *Harris v. McRae*, 448 U.S. 297, 309 n.12 (1980) (internal citation and quotation marks omitted).

States are simply addicted to the existing federal spending, and, like any addict, they increasingly find themselves accepting any conditions that the federal

government retroactively imposes in order to get continued access to the federal financial fix. And the Government is the pusher who defends himself by claiming the user is a voluntary buyer. The first hit is always free, but the customers must keep coming back, sometimes doing unspeakable things just to get a fix. *See*, *e.g.*, *United States v. Saunders*, 943 F.2d 388 (4th Cir. 1991) (upholding rape conviction against defense that the woman had a habit of trading sex for drugs); *cf.* Catharine MacKinnon, "Trafficking, Prostitution, and Inequality," 46 Harv. C.R.-C.L. L. Rev. 271, 287 (2011).

The States are thus commandeered to do the federal government's bidding, and the sheer mass of the command makes Title II of the ACA more vulnerable to attack than the modest programs that were invalidated in both *New York* and *Printz*. It also explains why this case is easily distinguishable from the two precedents on which the government relies. The modest five percent of federal highway funds at issue in *Dole* that would be withheld from any State for refusing to raise its drinking age to 21 was a mere pinprick in the side of State government. The federal tax on employers upheld in *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937), did not pose nearly the same threat to the States because it preserved their autonomy to establish their own unemployment-compensation programs, by refunding 90 percent of the tax to employers located in any State that established its own program to achieve that end.

But the size of the federal penalty for non-acquiescence here is only half the problem. If a State had the temerity to go cold turkey on the federal spending and withdraw from the Medicaid system

entirely, the federal tax burden would still be imposed on the State's citizens to fund the nationwide system of Medicaid for everyone else, effectively precluding the State from imposing taxes sufficient to maintain its current level of medical services for its own citizens while discharging its other obligations.

Even if a State did have an untapped tax base substantial enough to create a substitute system for indigent medical care, it would run into other federal barriers. The 1986 Emergency Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, effectively prevents any State from re-establishing a system of county hospitals for the indigent of the sort that was once highly successful. *See* Jeffrey A. Singer, M.D., *Why Medicaid is No Longer a Voluntary Program*, Reason.com (Dec. 30, 2011).[5] EMTALA forbids private hospitals from transferring indigent, uninsured patients to county hospitals in most circumstances. 42 U.S.C. § 1395dd(c)(1).

In sum, the ACA demands from the States a massive expansion in Medicaid coverage, on pain of losing so much federal funding that refusal is not a real option.

C. Notions of "Political Process Federalism" Cannot Salvage the ACA.

The notion of "political process federalism," adopted by a closely-divided Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), does not rescue the ACA from this problem of un-

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[5] Available at http://reason.com/archives/2011/12/30/why-medicaid-is-no-longer-a-voluntary-pr (last visited Jan. 14, 2012).

constitutional coercion for at least two reasons. First, the Court has not applied the "political process federalism" idea in commandeering cases. In *New York v. United States,* for example, this Court expressly disclaimed reliance on *Garcia*, noting that the anti-commandeering challenge at issue in that case presented "no occasion to apply or revisit the holdings of any of these cases [including *Garcia*], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." 505 U.S. at 160. And in *Printz*, the Court rebuffed the "political process federalism" challenge that was strenuously pressed by Justice Stevens in dissent. Instead, the Court noted that "the very *principle* of separate state sovereignty" is offended by federal laws that commandeer state officials, and that "the courts have traditionally invalidated measures deviating from" the form of government set forth in the Constitution, including the division of power among federal and state sovereigns. 521 U.S. at 932-33 (quoting, *inter alia*, *New York*, 505 U.S. at 187); *id.* at 956 (Stevens, J., dissenting).

Second, even if the line of demarcation between State as regulated entity and State as commandeered agent of the federal government were not an absolute bar to a "political process federalism" defense for the ACA, the cavalier way in which Congress treated its existing processes in order to push the ACA through demonstrates beyond peradventure that "political process federalism" is an insufficient substitute for judicial review in protecting basic federalism principles.

The abuse of process leading up to the passage of the ACA is notorious. The bill was pushed through

the Senate in a rare Christmas-Eve vote in 2009,[6] after the final votes necessary for passage were essentially "bought" with egregious provisions that violated the most basic premise that "law" is to be generally applicable.[7] Nebraska's senior Senator, for example, obtained for his State a guarantee, dubbed the "Cornhusker kickback," that the federal government would pay the full cost of expanded Medicaid coverage for Nebraska in perpetuity, a guarantee not accorded any other state. ACA, P.L. 111-148, 124 Stat. 119, §10201(c)(4)(z)(3).[8]

Moreover, unlike previous efforts at major social legislation, this one was approved on a straight, party-line vote in the Senate, and a nearly straight party-line vote in the House.[9] The normal process of reconciling the Senate bill with an earlier, different version adopted by the House of Representatives was cast aside when a special election in Massachusetts resulted in the election of a new Senator who had campaigned to be the vote necessary to stop passage

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[6] Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. Times at A1 (Dec. 24, 2009), available at http://www.nytimes.com/2009/12/25/health/policy/25health.html (last visited Jan. 14, 2012).

[7] *The Price is Right? Payoffs for Senators Typical in Health Care Bill*, FoxNews.com (Dec. 21, 2009), available at http://www.foxnews.com/ politics/2009/12/21/price-right-payoffs-senators-typical-health-care/ (last visited Jan. 14, 2012).

[8] *See also* Greg Hitt and Janet Adamy, *Senate Democrats Clear Health Hurdle*, Wall St. J. A7 (Dec. 22, 2009). Available at http://online.wsj.com/article/SB126132489013599195.html (last visited Jan. 14, 2012).

[9] Pear, *supra* n. 6, at A1.

of the bill. House leaders then trolled for mechanisms that would allow the final bill to be adopted without having to return for a second vote in the Senate or requiring House members cast a vote in favor of the objectionable parts of the Senate bill. At one point, the House even proposed simply "deeming" the Senate bill passed without actually holding a vote.[10] Ultimately, the Senate version of the bill was passed by the House, with the necessary votes secured by an arguably unconstitutional promise by the President not to enforce one of the provisions that was objectionable to some of those who otherwise supported the bill,[11] and a promise of "amendments" that would be classified as a "reconciliation" bill in order to circumvent Senate cloture rules.[12]

It may be true, as Bismarck reputedly remarked, that laws are like sausage—it is better not to see them being made. But the abusive process outlined above really undermines the "political process federalism" argument. A principle as fundamental as fe-

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[10] Adam Nagourney, *Procedural Maneuvering and Public Opinion*, N.Y. Times at WK1 (March 21, 2010), available at http://www.nytimes.com/2010/03/21/weekinreview/21nagourney.html?ref=healthcarereform (last visited Jan. 14, 2012).

[11] Lori Montgomery and Shailagh Murray, *In Deal with Stupak, White House announces executive order on abortion,* Wash. Post (March 21, 2010), available at http://voices.washingtonpost.com/44/2010/03/white-house-announces-executiv.html (last visited Jan. 14, 2012).

[12] Gail Russell Chaddock, *Republicans rage against reconciliation for healthcare reform*, Christian Science Monitor (March 3, 2010), available at http://www.csmonitor.com/USA/Politics/2010/0303/Republicans-rage-against-reconciliation-for-healthcare-reform (last visited Jan. 14, 2012).

deralism should never be left to such cavalier disregard for existing processes. It requires the active defense by this Court, particularly when the legislation involved significantly transforms the federal-state relationship. Even had Congress developed a broad-based consensus to support a massive Medicaid expansion, it could not commandeer the States to be its wards. The federalist form of our government matters. As this Court observed in *New York*, "the Constitution protects us from our own best intentions: it divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 505 U.S. at 187.

II. THE SPENDING CLAUSE, LIKE THE COMMERCE CLAUSE, HAS OUTER LIMITS.

The need for a vigorous anti-coercion jurisprudence in the conditional spending arena is even more pronounced here, where the precursor spending programs which the ACA expands were already pushing the constitutional envelope. It is important, therefore, to consider the coercion challenge pressed by the States against the backdrop of Congress' spending authority itself, and the limits on that authority set out in the Constitution.

A. Spending Clause Jurisprudence Since *Butler* Has Not Paid Sufficient Heed to the "Outer Limits" of Constitutional Authority.

The history of Spending Clause jurisprudence since this Court decided *United States v. Butler* in 1936 has been a rather dramatic slippery slope.

With concerns about constitutionality raised repeatedly during the several months of debate, Congress carefully circumscribed the original Social Security program to *augment* rather than supplant state efforts to provide for the unemployed and aged needy. Title I of the Act authorized federal matching grants only to states that had approved old-age assistance plans, for example. The federal grant could only cover fifty percent of the State's expenses, up to a maximum of fifteen dollars per person covered. 79 Cong. Rec. 5469-70 (1935). As noted by Represen-tative Doughton, Chairman of the House Ways and Means Committee and one of the principal co-sponsors of the bill, the matching-grant aspect of the system was designed because Congress recognized that caring for the aged was "primarily a State and local responsibility." *Id.* at 5469 (Statement of Rep. Doughton). State law, not federal law, determined how much aid an individual received in his old-age pension. *Id.* at 5475.

Similarly, Congress set up a matching-grant system for unemployment benefits, and strove to "limit very strictly" the Social Security Board's power over states so as to "provide a maximum of State control." *Id.* at 5469. Likewise, states were generally free to determine the provisions of unemployment benefit programs, including the scale of benefits. *Id.* 5475-76.

Representative Doughton also made a prescient prediction:

> If the Federal Government were to go further and take over the entire problem of old-age pensions, as is advocated by some, it would be contrary to our fundamental political institu-

> tions and would place upon the National Government a tremendous financial burden without the protection of local vigilance which will prevail if local taxpayers are required to bear part of the cost.

Id. at 5470.

In short, Congress itself recognized that while it might encourage state and local efforts to aid dependents, it could not wholly control the process. Creating a national program would violate the American government's federalist structure and, in distancing taxpayers from the process, would be financially unsound.

Opponents of the bill thought these measures were insufficient to render the Act constitutional. It was "generally agreed," noted New York Democratic Senator Robert Wagner, that the General Welfare Clause was "a restriction upon the power to tax rather than an independent grant of legislative authority." 79 Cong. Rec. 9286 (1935). And when it turned to creating a direct federal pension system for the non-"needy," both proponents and opponents seemed to agree that creating a national insurance system would be unconstitutional. Representative Ransley, for example, noted that "there is grave doubt as to the constitutionality of [that] part of the bill; the Government, in the minds of many, has not the power to enforce social insurance under the guise of a tax." *Id.* at 5466 (Apr. 11, 1935). Representative Treadway, who supported portions of the Act providing support grants to the States, thought that the payroll tax and retirement benefits scheme proposed in Titles II and VIII of the bill was patently unconstitutional. "The Federal Government has no express

or inherent power under the Constitution to set up such a scheme," he asserted. 79 Cong. Rec. 5530 (April 12, 1935). And Senator Long, one of the bill's supporters in the Senate, baldly stated:

> Everyone doubts the constitutionality of the bill. Even the proponents of the bill doubt it. . . . I do not believe it is possible for the bill as it is now written to be held constitutional. I would bet everything I have on it. I do not mean that it will be held unconstitutional by a divided court, either. . . . Not a single member of the Supreme Court of the United States will hold this bill constitutional as now written.

79 Cong. Rec. 9531 (June 18, 1935).

Because of these constitutional concerns, proponents of the bill split the retirement provisions into two separate titles—the "tax" provisions of Title VIII, and the benefits provisions of Title II—hoping that this Court would afford some measure of deference to Congress' taxing authority when considering the inevitable constitutional challenge. *See* 79 Cong. Rec. 5530 (Rep. Treadway) ("The reason that these two titles are separated in the bill is that if they were combined, as they should be, they would on their face be unconstitutional, since the Federal Government cannot lay a tax for any other purpose than the raising of revenue for public uses"). Representative Treadway of Massachusetts described this as an attempt by the bill's proponents to "delude" this Court. *Id.*

Congress' efforts were nevertheless upheld. First, Title III of the Social Security Act of 1935, 42 U.S.C. § 501 *et seq.*, was upheld by this Court in 1937 (after

external pressure threatened the Court's composition and independence[13]) because it was limited to unemployment benefits, *Steward Mach.*, 301 U.S. at 586-87, and unemployment was "[s]preading from state to state," thus necessitating a national solution, *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

But there was no constitutional analysis in the *Steward* opinion. The Court merely noted that "[i]t is too late today for the argument to be heard with tolerance that in a crisis so extreme [as the Great Depression] the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare." 301 U.S. at 586-87. In support of that *ipse dixit*, the Court provided a "cf." citation to *Butler*, 297 U.S. at 65, 66, which just the year before had *struck down* the Agricultural Adjustment Act as beyond the authority of the General Welfare Clause because it did not further a purpose entrusted to the national government.[14] *Butler*, 297 U.S. at 78. How "unemployment" was any more entrusted to the national government than was "agriculture," the *Steward* Court did not say.

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[13] *See, e.g.,* Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 202 n.1 (1994).

[14] The Court also cited *Helvering v. Davis*, 301 U.S. 619, 672 (1937), decided the same day, but *Helvering* itself adds nothing to the analysis, merely stating that the question of the constitutionality of the Social Security Act's retirement provisions was similar to that of the unemployment provisions, already decided in *Steward*. Rarely has there been greater circularity of reasoning in the pages of the *U.S. Reports*.

The same day, in *Helvering*, the Court extended the ruling from unemployment to retirement benefits, again citing *Butler* and, circularly, *Steward*. Here is the full extent of the analysis:

> Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. . . . But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it.

Helvering, 301 U.S. at 641. Despite the obvious difference between the two, Title II of the Social Security Act was also upheld.

Thirty years later, Congress entered the health care arena, another realm that had traditionally been viewed as exclusively within the sovereign authority of the States. By then, the view that the General Welfare Clause imposed no limits on Congress had become so pervasive, *Butler* to the contrary notwithstanding, that the 1965 Medicare and Medicaid Amendments to the Social Security Act[15] do not appear to have ever faced a constitutional challenge. If providing both unemployment benefits and old age pensions was permissible because taking care of the needy was in the *general* welfare rather than the concern of the individual states, then providing

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[15] Social Security Amendments of 1965, Pub. L. No. 89-97, §§ 102(a), 121(a), 1965 U.S.C.C.A.N. (79 Stat. 286, 291, 343) 305, 311, 370 (amended 1967) (codified as amended at 42 U.S.C. §§ 1395c to 1395w-4, 1396 to 1396v).

health care benefits for the poor (Medicaid) and aged (Medicare) must also be permissible, the original rationale that unemployment was "spreading" from one State to another now being forgotten.

Nevertheless, even the proponents of the 1965 Medicare and Medicaid amendments to the Social Security Act thought it necessary to restrict their efforts to narrowly targeted groups with special health-coverage needs. Medicaid was created only for "the medically indigent, aged, blind, and disabled persons, dependent children and their parents." 111 Cong. Rec. 7369 (1965). Medicare was likewise "*tailored* to meet the needs of our elderly," created in response to the view that existing Social Security benefits were "so low" that many elderly could not afford basic medical care. *Id*. at 7360 (emphasis added); *see also id*. at 7371-72. Congressman Peter Rodino, one of the bill's primary sponsors, rejected efforts for more universal coverage. "Public assistance," he noted, "by its very nature can only benefit the very needy—there must be a requirement that the person demonstrate that he can no longer get along on his own." *Id*. at 7360-61.

Whether the fact that the Medicare and Medicaid programs were originally targeted to particular needy groups would have allowed those programs to withstand a federalism-based constitutional challenge, had one been brought, this Court has subsequently acknowledged that even the Spending Clause has limits. *Dole*, 483 U.S. at 207.

B. Basic Separation of Powers Principles Require This Court to Enforce Constitutional Limits on Spending Authority.

Congress has a solemn duty to exercise power only within the limits of its constitutionally delegated authority. U.S. Const. Art. VI, cl. 3 ("The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution"). But, recognizing that power tends not to police itself very well, the Founders designed a constitutional system in which legislative power would be checked by the other branches of government as well. *See, e.g.,* The Federalist No. 51, at 320 (Madison) (C. Rossiter, ed., 1961) (the Constitution was designed so that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"); *Id.* No. 78, at 467 (Hamilton) ("the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority").

For more than a half century, presidents performed that check admirably, through an effective use of the veto power. *See, e.g.,* Veto Message of President Madison, 30 Annals of Cong. 211 (1817); Veto Message of President Monroe, 39 Annals of Cong. 1838 (1822); Veto Message of President Jackson, 28 H.R. Journal 29 (1834); Veto Message of President Buchanan 55 H.R. Journal 505-06 (1859). And for another three quarters of a century after that, this Court did as well, invalidating a congressional spending program in *Butler* that did not further powers delegated to the national government. *See generally, e.g.*, John C. Eastman, *Restoring the*

"General" to the General Welfare Clause, 4 Chap. L. Rev. 63 (2001); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1 (2003); David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1 (1994). Even when this Court adopted an expansive interpretation of the Spending Clause in *Helvering v. Davis*, it noted that "[t]he line must still be drawn between one welfare and another, between particular and general." 301 U.S. at 640.

Butler demonstrates how the spending power must conform to the overall constitutional design. "*Wholly apart from*" the question "whether an appropriation in aid of agriculture" falls within "the scope of the phrase 'general welfare of the United States,'" the Court held in *Butler* that the Agricultural Adjustment Act was unconstitutional because its purpose was to regulate and control "a matter beyond the powers delegated to the federal government." 297 U.S. at 68 (emphasis added). "[T]he act invades the reserved rights of the states," wrote Justice Roberts for the Court. "The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end." *Id.* at 68.

Although *Butler* remains valid, it is almost uniformly ignored in the lower courts, encouraged by the lack of a strong commitment in *Dole* to enforcing the constitutional rule that spending must be for "purposes . . . of general, not local, national, not state, benefit." Veto Message of President Monroe, 39 Annals of Cong. 1849; *see Dole*, 483 U.S. at 207 and n.2 (noting that "courts should defer substantially to the judgment of Congress" and questioning "whether

'general welfare' is a judicially enforceable restriction at all").

Yet the "spending power is of course not unlimited." *Dole*, 483 U.S. at 207. The limits are ascertainable, and as this case amply demonstrates, they must be enforced lest the carefully-wrought distinction between what is national and what is local be lost. As Justice Kennedy noted in his opinion concurring in the judgment in *United States v. Comstock*, 130 S.Ct. 1949, 1967 (2010), "[t]he limits upon the spending power have not been much discussed, but if the relevant standard is parallel to the Commerce Clause cases, then the limits and the analytic approach in those precedents should be respected."

The present challenge by the States is not to the constitutionality of the federal spending itself, of course, but rather to the onerous conditions the federal government now seeks to attach to *existing* spending on which the States have come to rely. Nevertheless, both *Butler* and *Dole* recognized that spending must be for a constitutionally-authorized purpose. Whether the massive expansion in spending underlying the States' coercion claim has crossed the line from permissible to impermissible is surely relevant to the subsidiary inquiry whether the States have been unduly coerced into participating.

In sum, Congress is seeking to massively expand its exercise of a police power, the quintessential power reserved to the states and not delegated to the national government. That it is doing so under the strained pretext of its Spending Clause authority does not alter that fact. As the Court's holding in *Butler* confirms, Chief Justice Marshall's admonition in *M'Culloch* v. *Maryland* with respect to the Com-

merce Clause is equally germane to the spending power: "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.) 316, 423 (1819).

CONCLUSION

This Court has previously ratified extensive incursions by the federal government into areas within the States' traditional police powers, incursions that were already pressing the limits of constitutional authority. The ACA is a massive step beyond anything previously undertaken. That it has, through the mechanism of spending conditions, unconstitutionally coerced the States to participate only worsens the constitutional infirmity. If *any* limits on the spending authority of the federal government are to remain, the Medicaid expansion provisions of the ACA must be held unconstitutional.

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