No. 11-400

In The
# Supreme Court of the United States

STATE OF FLORIDA, et al.,

*Petitioners,*

v.

DEPT. 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 THE INDEPENDENCE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## MEDICAID MANDATE

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## STATEMENT OF AMICUS INTEREST[1]

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts. Its amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* were cited in the opinions of Justices Alito, Breyer, and Stevens. McDonald v. Chicago, 130 S.Ct. 3020, 3026 n.2, 3106 n.31, 3115 (2010) (Alito, J., majority opinion; Stevens, J., dissenting); District of Columbia v. Heller, 554 U.S. 570, 700, 701, 710 (2008) (Breyer, J., dissenting) (in both cases cited under name of lead amicus International Law Enforcement Educators & Trainers Association).

## SUMMARY OF ARGUMENT

By imposing the Medicaid mandates in the Affordable Care Act ("ACA"), Congress exceeded the scope of its enumerated powers. If allowed to stand, those mandates could be the death-knell for the Constitution's finely calibrated system of federalism.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The states truly would be little more than agencies for Congress to "commandeer" at will.

The Founders created and the People ratified a Constitution protecting the States' role as limited "sovereigns." As this Court has ruled repeatedly, the states' sovereign "independence" entitles them to make decisions within their sphere based on their own policy judgments, free of federal coercion. As explained below, this rule and the closely-related principle of federal non-coercion is of particular constitutional importance in financing health and social services.

In sustaining the Medicaid mandates, the United States Court of Appeals for the Eleventh Circuit overlooked both Founding-Era constitutional principle and modern Supreme Court doctrine. It also overlooked aspects of the Medicaid mandates that particularly aggravate their coercive qualities. Insofar as the ACA authorizes withdrawal of all Medicaid funds from States that choose not to submit to the Medicaid mandates, that statute slashes at the heart of American federalism. It is unconstitutional and void.

## ARGUMENT

### I. The text of the Constitution and the debates surrounding its adoption, as duly applied by Supreme Court case law, show that although the Constitution granted sovereignty over some subjects to the federal government, the Constitution also retained the states as sovereign entities.

#### A. The Founders recognized that the Constitution divided sovereignty.

One of the great achievements of the constitutional settlement of 1787-1791 was division of sovereignty between a central government (as to enumerated subjects) and the states (as to other subjects). Alden v. Maine, 527 U.S. 706, 751 (1999) (opinion by Justice Kennedy, quoting several earlier holdings).

Previously, the prevailing orthodoxy had been that sovereign power was indivisible, and that to attempt to split it was to commit the fallacy of *imperium in imperio* – that is, "supreme power within supreme power." In accordance with that orthodoxy, prior governments had either been "consolidated" (lodging all sovereignty in one central authority) or "confoederal" (lodging sovereignty in provinces or states that deputized the central authority for certain purposes). *See, e.g.*, Arts. Confed., art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this

Confederation expressly delegated to the United States, in Congress assembled.").

While the Constitution was under consideration, one source of doubts about its viability was whether a system of truly split sovereignty could operate effectively. As might have been expected, Anti-Federalists had such doubts. *See, e.g.*, The Impartial Examiner, Letter I, VA. INDEPENDENT CHRONICLE, Feb. 20, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 387, 393 (Merrill Jensen et al. eds., 1976) ["DOCUMENTARY HISTORY"] ("For the idea of two sovereignties existing within the same community is a perfect solecism."); James Monroe, *Some Observations on the Constitution*, c. May 25, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, at 844, 858 ("For in government it is, as in phisicks, a maxim, that two powers cannot occupy the same space at the same time."). But even some Federalists, among them James Madison, had doubts as well. James Madison to Thomas Jefferson, Oct. 24 – Nov. 1, 1787, *reprinted in* 8 DOCUMENTARY HISTORY at 97, 100 (expressing the fear that lack of a congressional veto over state laws would create the evil of *imperia in imperio* – that is, supreme *powers* within the supreme power).

Yet the Constitution *did* create a system of split sovereignty, and that is what the courts are obliged to defend. As Justice Kennedy wrote in *Alden v. Maine*, "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as

residuary sovereigns and joint participants in the governance of the Nation." 527 U.S. at 748.

### B. The constitutional text shows intent to divide sovereignty.

The sovereignty of both federal government and individual states is reflected in the text of the Constitution. The Supremacy Clause declares federal sovereignty within the scope of the enumerated powers granted by the Constitution. U.S. Const., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."). Similarly, several textual provisions recognize complementary state sovereignty. Article III grants to states the same privilege of Supreme Court original jurisdiction extended to representatives of sovereign foreign governments. U.S. Const., art. III, §2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."). Likewise, the rule that each state, irrespective of population, is entitled to two Senators implicitly recognizes that the states are discrete sovereignties. *Id.*, art. I, §3, cl. 1. Indeed, the Constitutional Convention disregarded suggestions that state boundaries be redrawn to equalize population,[2]

[2] The suggestion was made by William Paterson. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 178 & 251 (Max Farrand ed., 1937), but not seriously entertained.

thus implying that the delegates understood they had no power to tamper with the sovereign existence of the states.

In addition, the Constitution recognizes that states enjoy the sovereign attribute of indivisibility. Art. IV, §3, cl. 1 ("[N]o new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."). Accordingly, this Court's famous description of "an indissoluble union of indestructible states," Virginia v. West Virginia, 246 U.S. 565, 603 (1918), recognizes that both the Union and the States possess the attributes of sovereignty.

Indeed, the Constitution treats state sovereignty as having supra-constitutional status: It forbids any amendment that deprives a state without its consent of equal representation in the Senate. Art. V.

State sovereignty is confirmed by the Bill of Rights – specifically its final element, the Tenth Amendment. In accordance with Founding-Era drafting practice, the Bill concluded with rules for interpretation. ROBERT G. NATELSON, THE ORIGINAL CONSTITUTION, WHAT IT ACTUALLY SAID AND MEANT 35, 155-56 & 204 (2d ed., 2011). As an interpretive rule, the Tenth Amendment informs judges, and everyone else who takes an oath to uphold the Constitution, that the States have retained whatever residual sovereignty the People (the ultimate sovereigns) have

bestowed upon the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . . ." U.S. Const., amend. X.

### C. The ratification record shows intent to divide sovereignty.

Other than the constitutional text, the most important sources of evidence for the original meaning of the Constitution, and for the public understanding behind it, are the records of the Ratification-Era debates. It was then that the advocates of the Constitution convinced the people to adopt the Constitution, and did so by explicating what the proposed Constitution would and *would not* allow the federal government to do. During the ratification debates, leading advocates for the Constitution repeatedly and expressly assured the delegates to the state ratifying conventions, as well as the wider public, that the Constitution preserved much of the sovereignty of the States.

#### 1. James Madison, Roger Sherman, and others.

Shortly after the Constitutional Convention adjourned, Pierce Butler, who had served as a delegate from South Carolina (and would later be a three-term U.S. Senator), wrote that "The powers of the General Government are so defined, as not to destroy the Sovereignty of the Individual States." Pierce Butler to Weeden Butler, Oct. 8, 1787, *reprinted in* 13

DOCUMENTARY HISTORY, *supra*, at 351, 352. In a report to the governor of Connecticut, the influential delegate Roger Sherman[3] and his fellow Connecticut delegate Oliver Ellsworth (later Chief Justice of this Court) emphasized that the new powers granted to the federal government "are specially defined, so that the particular states retain their *Sovereignty* in all other matters." *The Report of Connecticut's Delegates to the Constitutional Convention*, NEW HAVEN GAZETTE, Oct. 25, 1787, *reprinted in* 13 DOCUMENTARY HISTORY at 470, 471 (emphasis in original). Sherman repeated the same point in a letter written a few weeks later, Roger Sherman to Unknown Addressee, Dec. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, at 386, 387.

Responding to fears that in practice the new government might turn out to be "consolidated," the

[3] Connecticut attorney Roger Sherman was the only person to sign all four of the great state papers of the American Founding: the Continental Association, the Declaration of Independence, the Articles of Confederation and the Constitution. Sherman served on the Committee of Five that drafted the Declaration of Independence. At the Constitutional Convention, he proposed the Connecticut Compromise (representation by population in the House, equal state representation in the Senate) that made agreement on the Constitution possible. He later served on the U.S. House Committee that created the Bill of Rights. His virtues were universally recognized by his contemporaries. Patrick Henry called him one of the three greatest men at the Constitutional Convention, while Thomas Jefferson wrote that Sherman "never said a foolish thing in his life." 3 THE NEW ENGLAND FARMER 334 (S.W. Cole & Simon Brown eds., 1851).

Constitution's advocates frequently represented to the ratifying public that the States were to remain "sovereign" within their sphere. Illustrative is the essay of Alexander White, a prominent Virginia lawyer (and later a Representative in the First Congress), who responded to "The Impartial Examiner," *supra*, by explaining that under the Constitution, "The State governments retain their sovereignty over all objects which respect their particular states only." Alexander White, WINCHESTER VA. GAZETTE, Feb. 29, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, at 438, 442. To similar effect were comments such as those of "A Freeholder," VA. INDEPENDENT CHRONICLE, April 9, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, at 719, 720 (referring to the states under the new Constitution as "sovereign and independent" as to their purposes).

The "Father of the Constitution" issued similar representations. In Federalist No. 39, James Madison wrote that "Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act," Alexander Hamilton, John Jay & James Madison, THE FEDERALIST 197 (George W. Carey & James McClellan eds. 2001). Because federal "jurisdiction extends to certain enumerated objects only," the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects." *Id.* at 198. Madison reiterated the point in Federalist No. 45: "[T]he States will retain, under the proposed

Constitution, a very extensive portion of active sovereignty." *Id.* at 239.

Many of the Constitution's proponents justified equal state representation in the Senate as a necessary result of reserved state sovereignty. For example, "A Democratic Federalist" (a Pennsylvania advocate for the Constitution) extolled the Senate because it was comprised of representatives of the sovereign states – unlike the British House of Lords, which merely represented hereditary aristocrats:

> The federal senate are the representatives of the sovereignties of their respective states. . . . instead of an hereditary upper house, the American Confederacy has created a body, the temporary representatives of their component sovereignties, dignified only by their being the immediate delegates and guardians of sovereign states selected from the body of the people for that purpose. . . .

A Democratic Federalist, INDEPENDENT GAZETTEER, Nov. 26, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra*, at 294, 296 (emphasis in original). *See also* Cassius III, VA. INDEPENDENT CHRONICLE, Apr. 23, 1788, *reprinted in* 9 DOCUMENTARY HISTORY 749, 750; Federal Farmer, Letter XI, Jan. 10, 1788, *reprinted in* 20 DOCUMENTARY HISTORY at 1011, 1012 (an Anti-Federalist conceding that Senators "represent the states, as bodies politic, sovereign to certain purposes").

**2. Tench Coxe.**

Particularly influential with the general public were the Federalist essays of the Philadelphia businessman Tench Coxe. Although he is not widely known today, during the ratification controversy Coxe was a leading molder of public opinion. His widely-distributed essays rivaled, perhaps exceeded, the influence of *The Federalist*. *See* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, 88 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (describing Coxe as a "leading defender" of the Constitution); JACOB COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978) ("Although Coxe's essays were not in the same literary league [as the *Federalist*], they perhaps were contemporaneously more influential, precisely because they were less scholarly and thus easier for most readers to follow. . . . As Madison, Rush, and other contemporaries recognized, Coxe's writings . . . contributed materially to the Constitution's adoption."). Justice William Brennan, citing one of Coxe's essays about the jurisdiction of federal courts, noted that Coxe had been "widely reprinted" during the ratification debates. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 273 n.24 (1985) (Brennan, J., dissenting). Justice White described Coxe's essays as "the first major defense of the Constitution published in the United States." Nixon v. Fitzgerald, 457 U.S. 731, 773 n.14 (1982) (White, J., dissenting). Coxe went on to serve in the subcabinets of Presidents Washington, Adams, Jefferson, and Madison. *See* Stephen P. Halbrook & David

B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms in the Early Republic*, 7 WM. & MARY BILL OF RIGHTS J. 347 (1999).

Coxe repeatedly emphasized the role that states would play as sovereigns in the constitutional system. He mentioned the "clear and permanent marks and lines of *separate sovereignty*, which must ever distinguish and circumscribe each of the several states, and *prevent their annihilation* by the federal government, or any of its operations." Tench Coxe, "A Freeman," Essay I, *reprinted in* FRIENDS OF THE CONSTITUTION, *supra*, at 89 (emphasis in original); Tench Coxe, *A Pennsylvanian to the New York Convention*, PA. GAZETTE, Jun. 11, 1788, *reprinted in* 2 DOCUMENTARY HISTORY at 1138, 1142 (listing some of the powers held by the states to exclusion of the federal government, and adding that the nature of the amendment process demonstrated that the states were sovereignties).[4]

[4] Regarding the "Pennsylvanian" series, Coxe's modern biographer has written:

> The articles signed "A Pennsylvanian" were Coxe's most noteworthy contribution to the ratification debate and invite comparison to the best of the literature spawned by that controversy, including the *Federalist* essays, which Coxe approvingly quoted and to which his work was superior in its treatment of some subjects.

COOKE, *supra*, at 118.

Supreme Court jurisprudence completely agrees with this position. *E.g.*, New York v. United States, 505 U.S. 144, 155 (1992) (protecting "the province of state sovereignty reserved by the Tenth Amendment"); Alden v. Maine, *supra*, 527 U.S. at 713 (collecting cases).

## II. Inherent in "sovereignty" is the constitutional concept of "independence."

During the Founding Era, the term "sovereign" included widely-understood concepts of "dignity and essential attributes." Alden v. Maine, *supra*, 527 U.S. at 714. One attribute of sovereignty was "independence," an expression serving as a term of art whose meaning is explained in Part III, *infra*. Because independence was an attribute of sovereignty, Founding-Era writers often coupled the two words. For example, the Articles of Confederation reserved to each state its "sovereignty, freedom, and independence." Arts. Confed., art. II.

Advocates on both sides of the ratification debate accepted the close connection between sovereignty and independence, and agreed that it was essential to preserve both qualities for the States. The only dispute on the issue was how well the proposed Constitution did so. The New York Anti-Federalist "Cato" denounced the Constitution as insufficiently protecting the "sovereignty and independency" of the states. Cato, Letter II, N.Y.J., Oct. 11, 1787, *reprinted in* 13 DOCUMENTARY HISTORY at 369, 371. The

Anti-Federalist "Federal Farmer" conceded that a goal of the Constitution was for the states to be "sovereign and independent" for certain purposes. Federal Farmer, Letter XI, Jan. 10, 1788, *reprinted in* 20 DOCUMENTARY HISTORY at 1011, 1012.

Advocates of the Constitution found sufficient "independence" inherent in the states' reserved sovereignty. A Virginia Federalist writing as "A Freeholder" argued that states would remain "sovereign and independent" as to their purposes. A Freeholder, VA. INDEPENDENT CHRONICLE, April 9, 1788, *reprinted in* 9 DOCUMENTARY HISTORY at 719, 720. Another Virginia Federalist emphasized that, within their sphere, states would remain "sovereign and independent" and that "the grand object, which each state had in view, by uniting in a general government, must have been the retaining its sovereignty and independence." Cassius III, VA. INDEPENDENT CHRONICLE, Apr. 23, 1788, *reprinted in* 9 DOCUMENTARY HISTORY at 749, 750.

Similarly, Tench Coxe explained that, within their scope, state powers would be exercised *independently* of federal influence. Thus, after listing powers the states could exercise independently of the federal government, he asked, "in short where is the county in the union, or in the world, that can exercise in any instance *independent legislative, executive or judicial powers*?. . . . So *independent* will the state governments remain, that their laws may, and in some instances will, be *severer* than those of the

union." FRIENDS OF THE CONSTITUTION, *supra*, Letter III, at 98-99 (emphasis in original).

In Federalist No. 40, Madison wrote, "Do [the principles of the Confederation] require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They are so regarded by the Constitution proposed." THE FEDERALIST, *supra*, at 202. Madison added:

> Do these principles . . . in fine, require that the powers of the general government should be limited, and that, beyond this limit, the States should be left in possession of their *sovereignty and independence*? We have seen that in the new government, as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

*Id.* at 203 (emphasis added).

Thus, integral to the constitutional design of divided sovereignty is state government independence from federal coercion. As Justice Brandeis, writing for the Court, observed in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938):

> [T]he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states, – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to

> matters by the constitution specifically authorized or delegated to the United States.

304 U.S. at 78-79. *See also* Alden v. Maine, *supra*, 527 U.S. at 754 (quoting this passage).

## III. The constitutional concept of "independence" includes states' power to make policy, particularly fiscal policy, for their citizens within their sphere, free from federal coercion.

As the Court understood in *Alden, supra*, and in the passage quoted above from *Erie Railroad*, when leading Founders insisted that states would enjoy "independence" as part of their sovereignty, those Founders did *not* mean that the States would be separate from the Union in the sense that, for example, America had become independent of Great Britain. Rather, in this context "independence" was a term of art: The "independence" of a decision maker was freedom from the coercion or undue influence of others. As applied to the states, "independence" meant freedom from coercion or undue influence imposed by the central government. Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L. J. 353, 382-86, 390-405 (2002-03). This sort of independence was inherent in what the "Federal Farmer" referred to as "the ideal equality of sovereignties." Federal Farmer, Letter XI, Jan. 10, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra*, at 1011, 1012.

The Founders believed that "independence" was crucial to enable the states to protect individual freedom against federal overreaching. *See, e.g.*, Curtius, Letter III, N.Y. DAILY ADVERTISER, Nov. 3, 1787, *reprinted in* 19 DOCUMENTARY HISTORY at 174, 179 (discussing the role of states in protecting against federal usurpations); The Triumphs of Reason, POUGHKEEPSIE COUNTRY J., Mar. 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY at 853, 857-58 (describing the states as rivals and counterbalances to the federal government).

More importantly for present purposes, however, "independence" embodied the power of the states to make those policy choices they deemed best suited for their own populations – a value the Founders saw as crucial to good decision-making. Natelson, *A Reminder, supra*. Some of the most thoughtful opponents of the Constitution worried that the scope of federal powers would not permit states to be sufficiently "independent" to make their own policy choices. Among these was "Brutus," one of the best of the Anti-Federalist writers and the foil for the "Publius" of *The Federalist*. Brutus, Letter V, N.Y.J., Dec. 13, 1787, *reprinted in* 19 DOCUMENTARY HISTORY at 410, 415 (arguing that the federal taxing power would leave the states insufficiently "independent," but that they would be "dependent on the will of the general legislature" and thus without "the power to conduct certain internal concerns"); *see also* Brutus, Letter VI, N.Y.J,. Dec. 27, 1787, *reprinted in id.*, at

466 (states must be "secured in their rights to manage the internal police of the respective states").

Of particular concern to Anti-Federalists was that the congressional *fiscal powers* might be construed so broadly as to fatally impair state financial integrity. "Brutus" warned:

> It is clear that the legislatures of the respective states must be altogether dependent on the will of the general legislature, for the means of supporting their government. The legislature of the United States will have a right to exhaust every source of revenue in every state . . . unless therefore we can suppose the state governments can exist without money . . . we must conclude they will exist no longer than the general legislatures choose they should. Indeed the idea of any government existing, in any respect, as an independent one, without any means of support in their own hands, is an absurdity.

Brutus, Letter V, N.Y.J., Dec. 13, 1787, at 410, 414. He added that "[T]he states should have the command of such revenues, as to answer the ends they have to obtain." Letter VI, N.Y.J., Dec. 27, 1787, *reprinted in id.*, at 466, 472-73.

Advocates of the Constitution, such as the Federalist author "Curtius," responded that the states would retain independence because the Constitution left "the local concerns of states, or the necessities of particular districts . . . under the direction of the states individually. From this beautiful arrangement,

subjects so different in their nature . . . will for ever claim the unembarrassed [i.e., unobstructed] attention of men best competent to their discussion." Curtius, Letter III, N.Y. DAILY ADVERTISER, Nov. 3, 1787, *reprinted in* 19 DOCUMENTARY HISTORY at 174, 179. The Constitution's advocates further promised the public that congressional fiscal powers could not be exercised so as to bankrupt the states. Alexander Hamilton devoted an entire number of *The Federalist* to this argument. THE FEDERALIST No. 32, *supra*, at 154-57.

## IV. Long-standing Supreme Court jurisprudence protects state "independence" by invalidating federal coercion of states.

The Supreme Court has long held that the States, when acting within their spheres, are entitled to independent decision making free of federal coercion. In part, this is to enable federalism to serve its role in preserving personal freedom. As this Court stated last term:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . .
>
> Federalism also protects the liberty of all persons within a State by ensuring that

> laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

Bond v. United States, 564 U.S. ___, 131 S.Ct. 2355, 2364 (2011). *See also* New York v. United States, *supra*, 505 U.S. at 181 (discussing the role of the state/federal division of power in preserving individual liberty).

In addition, however, federalism enables states to respond to the unique policy preferences of their own citizens. *Alden, supra*, at 750-51 (the States' "independence" ensures "the States' ability to govern in accordance with the will of their citizens.").

Supreme Court cases preserving the independence of state policymaking all serve the same ultimate purpose, but they fall into several doctrinal categories. Among the most prominent have been those protecting state sovereign immunity from federally-authorized lawsuits. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); *Alden v. Maine, supra*; Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). The holdings of such cases rest partly on the representations of leading Founders that individuals would not be permitted to

sue the "sovereign" states without state consent. *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed., 2d ed. 1891) (reporting argument of future Chief Justice John Marshall);[5] Alexander Hamilton, THE FEDERALIST No. 81, *supra*, at 422.[6] When the Supreme Court disregarded the state sovereign immunity doctrine in Chisholm v. Georgia, 2 U.S. 419 (1793), Congress and the states rapidly adopted the Eleventh Amendment to restore the original understanding. *Seminole Tribe v. Florida,*

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[5] At the Virginia ratifying convention John Marshall, a strong Federalist, declared:

> I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court.

3 THE DEBATES IN THE SEVERAL STATES, *supra*, at 555.

[6] Hamilton wrote:

> . . . I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.

THE FEDERALIST No. 81, *supra*, at 422.

*supra*, at 69 (". . . the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution. . . . That decision created 'such a shock of surprise that the Eleventh Amendment was at once proposed and adopted,'" *quoting* Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

However, the sovereign immunity cases represent but one subset of decisions serving the larger principle that the federal government may not use its Article I power to coerce the states. *Alden, supra*, at 749 ("A power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State. . . ."). Similarly protective of State sovereignty are cases striking down other efforts at federal coercion. These include holdings that protect the integrity of state legislative decision making, New York v. United States, 505 U.S. 144 (1992), and those that preserve the integrity of state executive functions. Printz v. United States, 521 U.S. 898 (1997). One teaching of these decisions is that a federal statute attempting impermissibly to coerce state governments is unenforceable because it is not a "proper" law as required by the Necessary and Proper Clause. *Id.* at 924.

The principle of preserving state "independence" from federal "coercion" embodied in the foregoing cases also applies to federal conditions imposed in grants-in-aid to the states. South Dakota v. Dole, 483 U.S. 203 (1987). To be sure, Congress may require

that federal funds be applied consistently with the intent of the program. *Id.* However, overly-severe penalties for disobeying a condition render that condition "coercive" and void. *Id.* at 211 (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

The application of the non-coercion principle in grant-in-aid cases is entirely correct, because *that principle has particular force in fiscal affairs*. It fulfills the promise of the Constitution's advocates that congressional fiscal powers could not be used to impair state financial viability. Part III, *supra*. As Justice Kennedy wrote for the Court in *Alden*:

> It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

527 U.S. at 750.

Key to modern Supreme Court jurisprudence in this area, therefore, is the need to fulfill the Federalist commitment to protect the states from the fiscal

"nightmare scenario" posited by Anti-Federalists such as "Brutus."

## V. Several aspects of the Medicaid mandates render them uniquely coercive compared to other funded federal mandates.

### A. The Founding-Era record reveals a specific understanding that especially in the area of social services, the states could make free decisions, uncoerced by the federal government.

The Founding-Era record reveals an express decision to leave primary jurisdiction over social services, including health care for the poor, to state, rather than federal jurisdiction. *See* Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 486 (2003). In addition to general representations to the ratifying public by Federalist spokesmen that "internal police" was to be the exclusive province of the states, *see generally id.*, Federalists addressed a number of representations *specifically* to social services. For example, Tench Coxe (who, as noted *supra*, was a particularly prominent Federalist spokesperson) emphasized the exclusive state power to "establish *poor houses, hospitals*, and houses of employment," Coxe, "A Freeman," Letter II, *reprinted in* FRIENDS OF THE CONSTITUTION, *supra*, at 96 (emphasis added).

Other Federalists said similar things. The influential pamphlet promoting the Constitution written

by Maryland Judge Alexander Contee Hanson, Sr., described "protection of the weak" as an exclusive state power. Natelson, *The Enumerated Powers of States*, *supra*, at 486, n.109. In their efforts to secure ratification in Massachusetts, both the *Massachusetts Gazette* and Massachusetts Supreme Judicial Court Justice Nathaniel Peasley Sargeant represented that under the Constitution care for the poor was exclusively a state, not a federal concern. *Id.* at n.111.

Chief Justice John Marshall, not known as an opponent of legitimate federal authority, held a similar view. Marshall, who had been a prominent spokesman for the Constitution at the Virginia ratifying convention, asserted emphatically that "health laws of every description" are exclusively within the state, and outside the federal, sphere. Gibbons v. Odgen, 22 U.S. 1, 203 (1824). In the same case in which he refused to define "commerce" narrowly, Marshall repudiated the notion that "commerce . . . among the several states" could be construed to comprise health laws. Although like "inspection laws" they might "have a remote and considerable influence on commerce," they "form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass." *Id.*

The Founders' emphasis on reserved state authority over social services distinguishes the instant

case from precedents such as *South Dakota v. Dole*, *supra*, and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). The mandate upheld in Dole arose from conduct (automobile driving) in interstate commerce (*cf.* U.S. Const., art. I, §8, cl. 3 [setting forth the power of Congress to regulate interstate commerce]), particularly that occurring on interstate highways (*cf. id.* at cl. 7 [setting forth the power of Congress to "establish . . . post Roads"]), and the mandate was attached to an interstate highway funding program. Likewise, the mandate upheld in *Rumsfeld*, although imposed on state universities (as well as other universities), was upheld as part of Congress's enumerated authority to "raise and support Armies." U.S. Const., art. I, §8, cl. 12.

Although under modern Supreme Court jurisprudence the federal government certainly may assist the states with grants-in-aid, United States v. Butler, 297 U.S. 1, 65 (1936) (dictum); Helvering v. Davis, 301 U.S. 619, 640 (1937),[7] the representations made

[7] To be sure, the Founding-Era record tends to show that New Deal jurisprudence was inaccurate in conceding to Congress a "general welfare" spending power. The *Butler* dictum appears to have been an anachronistic rendering of the constitutional text, Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003), and the single Founding-Era source for its conclusion, Alexander Hamilton's *Report on Manufactures* (*Butler, supra*, 297 U.S. at 67), was not published until *after* all states had ratified the Constitution.

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to the public to secure the Constitution's ratification strongly suggest that the non-coercion principle should be applied more rigorously in areas traditionally reserved for the states than in areas the Constitution specifically assigns to Congress, such as those at issue in prior funded-mandate cases.

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Moreover, Hamilton was an advocate of an unlimited federal government, and his assertion of a "general welfare" spending power contradicted his representations of constitutional meaning prior to ratification. *Contrast* Alexander Hamilton, THE FEDERALIST No. 17, *supra*, at 81 (declaring that "The . . . supervision of agriculture and of other concerns of a similar nature . . . can never be desirable cares of a general jurisdiction") with Alexander Hamilton, *Report on Manufactures* in 4 WORKS OF ALEXANDER HAMILTON 250 (Henry Cabot Lodge ed., 1904) (Dec. 5, 1791) ("whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money."). The *Report on Manufactures* also contradicted pre-ratification representations mentioned in the text of this brief.

James Monroe's *Special Message to the House of Representatives Containing the Views of the President of the United States on the Subject of Internal Improvements*, available at American Presidency Project (U. Cal. Santa Barbara), http://www.presidency.ucsb.edu/ws/?pid=66323, also cited in *Butler*, was not issued until 1822, several decades after the Founding, and by an author who had opposed the Constitution.

However, the question in the present case is not whether the Constitution authorizes "general welfare" spending as an abstract proposition, but whether Congress can use that power to *coerce* the states in the exercise of their own sovereign powers. As pointed out in *Dole, supra*, 483 U.S. 203, 207-08, the two issues are separate.

### B. The ACA's Medicaid mandates do not comply with the standards previously outlined by this Court.

The cost for non-compliance with the ACA's Medicaid mandates far exceeds that upheld in *Dole*, *supra*, and probably exceeds the cost of the law invalidated in Alden, *supra*. Unlike in *Dole*, where a state could lose only five percent of program funding, the ACA authorizes the Department of Health and Human Services to strip a recalcitrant state of all of Medicaid revenue. Because of the size of the Medicaid program, this would result in state budgetary havoc of the highest order. *See* Opening/Response Brief of Appellee/Cross-Appellant States, at 6-8, *in* State of Florida et al. v. U.S. Dep't of Health and Human Services, 648 F.3d 1235 (11th Cir.), *cert. granted*, ___ U.S. ___, 2011 WL 5515165 (2011). Moreover, as noted earlier, two of the reasons the Court invalidated the federal statute in *Alden* are that the claimed congressional power "could create staggering [fiscal] burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design" and that the "potential national power would pose a severe and notorious danger to the States and their resources." 527 U.S. at 750. This certainly describes the penalties inflicted by the ACA.

Consider the plight of any state adopting a policy different from that mandated by the ACA. Loss of all Medicaid funding would not end Medicaid-related tax liability imposed on that state's taxpayers. Those taxpayers still would have to pay for Medicaid, but all

of their money would go to other states. Indeed, one might well question whether any scheme that taxed the citizens of some states to operate such a large program exclusively for the benefit of other states would still serve the "general welfare," as opposed to regional or partial welfare. Additionally, because in today's hyper-inflating health care system, political reality requires *some* provision for health care for the poor, a state evicted from Medicaid would have to create and fund its own program. *This would result in that state's citizens being taxed twice*: once to support Medicaid exclusively for other states, and again to support their own program. This result would be reminiscent of the financial nightmare scenario posited by Anti-Federalists arguing against the Constitution and rejected by the Constitution's supporters, Part III *supra*, and guarded against by this Court. Part IV *supra*.

Thus, for practical purposes state Medicaid participation is essentially mandatory under current circumstances, and the "option" of withdrawal quite illusory. This, in turn, renders the ACA's conditions coercive.[8]

[8] Congress could solve this dilemma by block-granting Medicaid funds, but has not done so.

### C. Under the ACA, state budgetary decisions are placed at the boundless discretion of federal bureaucrats.

The Court of Appeals for the Eleventh Circuit observed that the ACA authorizes the Department of Health and Human Services to impose a penalty below 100 percent of funding. Florida v. Dept. of Health & Human Services, 648 F.3d 1235, 1268 (11th Cir. 2011), *cert. granted*, ___ U.S. ___, 2011 WL 5515165 (2011). Although that court considered this provision a mitigating factor, in fact it is an *aggravating* one.

The default rule in the ACA is the loss of all funding. HHS is permitted to withdraw a lesser amount at its discretion, but the ACA contains no real standards for exercise of this HHS discretion. 42 U.S.C. §1396c. Thus, the ACA delegates to unelected bureaucrats enormous uncontrolled power over state budgetary policy. Should a state refuse to comply with one or more mandates, that state would be punished with paralyzing uncertainty at best. A grant of such uncontrolled bureaucratic power over state governments surely is inconsistent with the sovereign dignity reserved to the states as recognized by the Constitution's text, the understanding at the Founding, and the decisions of this Court.

### D. The Medicaid mandates are an effort by Congress unilaterally to rewrite the Constitution.

Central to the American system of federalism is the freedom of the States, as sovereign within their sphere, to make their own policy judgments. This is particularly true of such areas as social services, a subject expressly recognized at the Founding as a matter for exclusive *state* jurisdiction. The ACA's coercive Medicaid mandates, enforced by penalties designed to cripple any state that demurs, comprise a clear example of a congressional effort to rewrite the Constitution's system of federalism into one in which the states are mere puppets of Congress. As such, those mandates are unconstitutional and void.



## CONCLUSION

The decision of the Court of Appeals on the Medicaid mandates should be reversed.

Respectfully submitted,

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