No. 11-400

In the Supreme Court of the United States

STATE OF FLORIDA, ET AL.,
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

BRIEF OF JAMES F. BLUMSTEIN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS (Medicaid Issue)

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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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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is filed by and on behalf of James F. Blumstein. Mr. Blumstein is University Professor of Constitutional Law and Health Law and Policy at Vanderbilt Law School and Vanderbilt University Medical School, Director of the Vanderbilt Health Policy Center, Adjunct Professor of Health Law at Dartmouth Medical School, and, during 2010-11, Scholar-in-Residence at the Robert Wood Johnson Health Policy Center at Meharry Medical College. Professor Blumstein has been an active teacher/scholar in health law and policy for over thirty-five years and believes that his perspective will assist this Court in its deliberations. A brief biography of Professor Blumstein is in the Appendix.

In this brief, Professor Blumstein speaks for himself, not his institutional affiliations.[1]

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[1] No counsel for any party authored this brief in whole or in part, nor did any party, person or entity other than *amicus* make a monetary contribution to the preparation/submission of this brief. Reimbursement for printing expenses will be sought from funds made available by Vanderbilt Law School to support faculty work related to faculty professional/research interests. Such financial support does not signify a position by the University on the merits of the positions advanced in this Brief. The parties have blanketly consented to the filing of *amicus* briefs.

SUMMARY OF ARGUMENT

Medicaid, enacted under the federal spending power, "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

Contract law distinguishes between contract formation and contract modification. At contract formation, parties have maximum freedom to determine whether or not to enter into an agreement and to settle on the terms of that agreement. At contract modification, concerns about excessive leveraging significantly constrain the behavior of the contracting parties. The law limits opportunistic/predatory behavior.

Under the anti-commandeering principle, the federal government cannot constitutionally compel states to enter into such contracts, nor can it impose conditions involuntarily on states. Printz v. United States, 521 U.S. 898, 925 (1997); New York v. United States, 505 U.S. 144, 166, 174-78 (1992).

The anti-commandeering principle has been recognized not only in the regulatory but also in the spending context. States are and constitutionally must be free to determine whether or not to enter into a contract with the federal government to receive federal funds. Thus, this Court has acknowledged that "[t]he legitimacy of Congress' power to legislate under the spending power… rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Pennhurst, 451 U.S. at 17.

State autonomy is protected under the anti-commandeering principle in two related ways. Federal conditions on spending programs must not be coercive – a functional dimension of anti-commandeering; and states must receive "clear notice" in advance of entering into a federal spending program of the obligations/conditions it incurs.

Acting at contract modification, PPACA is coercive because it puts states to a set of choices that the federal government may not impose on states.

PPACA also violates the Pennhurst clear-notice obligation because that obligation accrues in this case at contract formation, not contract modification.

Pennhurst requires that, when states choose to participate in a federal program, they do so fully informed of the fiscal consequences. And there cannot be "knowing acceptance" by a state of federal conditions on a program if it is "unaware of the conditions" being imposed or is unable to "ascertain what is expected of it." Therefore, for conditions on federal spending to be binding on a state, the federal government must state those conditions "unambiguously" so as to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." Id.("clear-notice rule"). See South Dakota v. Dole, 483 U.S. 203, 207 (1987)(reaffirming that restrictions on federal spending power include Pennhurst's clear-notice rule). Thus, the federal government had an obligation, when states voluntarily signed-up to participate in Medicaid (the contract-formation stage), to put states on notice unambiguously of the nature, scope, and magnitude of their potential financial obligations under the

program. Pennhurst, 451 U.S. at 17. Providing notice of substantial and unforeseeable changes to Medicaid, as effected by PPACA at the contract-modification stage, does not satisfy the federal government's clear-notice obligation under Pennhurst.

The essence of Pennhurst's clear notice rule is that notice is given in advance – allowing states and their decisionmakers to make informed choices about accepting conditions on federal funding that states cannot otherwise be compelled to accept. This Court views the issue "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." Does the federal program provide "clear notice" regarding the scope of a state's obligations, and would the state and its officials "clearly understand" the conditions that attach to a state's decision to enter into a cooperative federalism contract? Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 298 (2006).

The clear-notice rule protects a state's constitutionally-derived authority to make "an informed choice," Pennhurst, 451 U.S. at 25, when it chooses to enter into a federal-state contract and accepts federal funding. The federal government may not "surpris[e] participating States with postacceptance or 'retroactive' conditions." Id. The clear-notice rule protects the rights of states not to enter into or "implement" Medicaid – *i.e.*, not to form a federal-state contract. Printz, 521 U.S. at 925; New York, 505 U.S. at 176.

The clear-notice rule is not satisfied when states are lured into a federal—state relationship on one set

of expectations and then informed that, through contract modification, the fiscal implications of remaining in the program have been substantially and unforeseeably ratcheted up. Providing states with notice of their right of "exit" from an ongoing, already-formed relationship – mandating affirmative enactment of state legislation to exit the federal-state program – is not a substitute for enabling states to "exercise their choice" of entering into a federal-state contract "cognizant of the consequences of their participation," Pennhurst, 451 U.S. at 17, and thereby "knowingly undertak[ing]" an obligation based on an "informed choice." Id. at 25.

Traditional Medicaid does not satisfy the Pennhurst clear-notice requirement, nor does PPACA.

Medicaid. When enacted in 1965, Medicaid was linked to eligibility for public assistance. It was widely understood as poverty medicine. When they agreed to participate in Medicaid, states could not reasonably foresee that a condition of participation (as established under PPACA) would be the mandated inclusion of adults with incomes up to 133% of poverty in state Medicaid programs – a substantial modification of the terms and conditions of states' participation.

PPACA. PPACA provides notice that, effective January 1, 2014, states must include in their Medicaid programs all persons with incomes below 133% of poverty or act affirmatively to exit Medicaid entirely. That notice is insufficient under Pennhurst. It occurs too late – after states have already made the decision to implement a Medicaid program based on the terms and conditions at the contract-formation stage. It imposes on states a duty to act affirmatively to resist

the new terms and conditions, undoing state legislation enacted to comply with Medicaid. Forcing that type of affirmative state conduct because of the federal imposition of substantial mid-stream changes in conditions of participation in Medicaid is in tension with Printz's ban on commandeering. It is not the notice required by Pennhurst.

PPACA's notice does not come at the contract-formation stage – when states made their constitutionally protected choice to enter into Medicaid – but at the contract-modification stage of an ongoing, already-formed federal-state contractual relationship. By analogy to procedural due process, this notice does not come "at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80 (1972)(internal cite omitted).

PPACA allows states with already-formed and ongoing federal-state Medicaid contractual relationships to leave Medicaid entirely through affirmative political action of opting out; but providing notice that allows a state affirmatively to abandon an already-existing and ongoing contractual relationship does not satisfy the Pennhurst obligation to provide notice before a state chooses to participate in the Medicaid program in the first place so that a state can exercise its constitutionally-protected choice to determine whether to participate "cognizant of the consequences of their participation." 451 U.S. at 17.

In sum, what Pennhurst requires is more than what PPACA provides. Notice of substantial, unforeseeable, and expensive mandatory modifications to Medicaid, accompanied by an opportunity to exit through an affirmative state legislative act – to undo

a previously-entered and ongoing contractual relationship – is not a substitute for the notice required by Pennhurst when program modifications (i) are substantial and unforeseeable at the sign-up stage (contract formation), (ii) have a significant fiscal impact on state-administered programs, and (iii) comprise a substantial component of a state's overall budget (as Medicaid does).

ARGUMENT

I. Federal Spending Programs: The Contract Paradigm

Spending Clause legislation such as Medicaid (a cooperative federalism program) is "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions," Pennhurst, 451 U.S. at 17, which the federal government cannot impose through compulsion. New York, 505 U.S. at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program"). The nature, scope, and implementation/enforcement of obligations attached to federal spending are governed by principles of contract law.[2]

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[2] Contract law is an "analogy." Barnes v. Gorman, 536 U.S. 181, 186 (2002). Not all contract-law rules apply to Spending Clause legislation. Id. at 188 n.2.

A. Contract Formation Versus Contract Modification: The Leveraging Problem

The law of contract draws a critical distinction between contract formation and contract modification. Parties are subject to more restraints when they modify than when they form a contract. See Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521 (1981); WILLISTON ON CONTRACTS (4th ed. 2008)(Richard A. Lord ed.), vol. 3 at 695-719. For example, there is a duty of fair and equitable treatment at contract modification that has no counterpart at contract formation. And the notion of "fair and equitable" goes beyond absence of coercion. Rest.2d Contracts, §89, comment b.

At contract modification, a major concern is excessive/predatory leveraging. Parties build up reliance and dependence in an ongoing relationship. That can allow for opportunistic behavior that uses predatory leverage to yield results that are beyond what was originally contemplated.[3] Consider the following illustration of the problem:

> **A fishing vessel goes out to sea. Once the ship is in fishing waters, the crew demands a substantial wage increase as a condition of performing its work. That is predatory leveraging and unenforceable at contract modification. In contrast, it is entirely**

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[3] See Robert W. Gordon, Macaulay, MacNeil, and the Discovery of Solidarity and Power in Contract Law, 1985 WIS. L. REV. 565, 570 (1985)(noting that, over time, a power imbalance in the initial contract formation can "deepen[] into persistent domination on one side and dependence on the other").

permissible for the crew to demand higher wages before the ship sets sail – *i.e.*, during the contract-formation stage.

Alaska Packers Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902).

B. Conditional Spending Concepts Reflect Contract Formation Principles

The paradigmatic spending-power circumstance is that of a state seeking out federal funding – *i.e.*, contract formation. States voluntarily and knowingly take affirmative steps to apply for federal funds. That voluntary and knowing decision is protected by Pennhurst's "clear notice" rule, which requires conditions on spending be stated unambiguously and made known to states in advance of their decision to enter into and accept the conditions attached to a federal spending program.

The Court of Appeals erred by applying the "clear notice" rule not to contract formation but to contract modification – finding that notice of PPACA's changes satisfied Pennhurst's clear-notice rule. Subject to certain qualifications, *infra*, the clear-notice rule applies at the contract-formation stage, when states decide whether or not to enter into a federal spending program. See I. Glenn Cohen & James F. Blumstein, *The Constitutionality of the ACA's Medicaid-Expansion Mandate*, NEW ENG. J. MED. (Online First Dec. 7, 2011), available at http://www.nejm.org/doi/full/10.1056/NEJMp1113416 [Cohen & Blumstein].

Contract modification poses much thornier problems. The federal-state contract already exists, as

in Medicaid, and is ongoing. Unilateral federal modification, when linked to and made a condition for maintaining that pre-existing contract as under PPACA, deprives states of their freedom not to act.

Contract modification fundamentally alters the spending-clause paradigm. States cannot just decline to seek out an opportunity – to seek out a carrot. They must act affirmatively to departicipate from an ongoing, pre-existing contractual relationship if the new conditions make the pre-existing program unattractive from a state's perspective. Arlington, 548 U.S. at 298 (state's perspective is key).

At contract formation, doctrinal *laissez faire* retains state autonomy, but not so at contract modification. Contract rules regarding contract modification call for more intense scrutiny and oversight, reflecting this concern about changed circumstances and detrimental reliance that can result in excessive leveraging (as in the case of PPACA). The owner of the fishing vessel is compromised once the ship is out at sea in a way it is not before the ship sets sail.

C. Cooperative Federalism Contracts Reflect Ongoing Relationships

Cooperative federalism programs like Medicaid have an ongoing character and "cannot be viewed in the same manner as a bilateral contract governing a discrete transaction." Bennett v. Kentucky Dept of Educ., 470 U.S. 656, 669 (1985) [Kentucky]. In contractual terms, they are – or are analogous to –

relational contracts.[4] The terms of relational contracts are not set in stone when the contract is formed. The parties are involved in a complex set of interactions that make it difficult to ascertain future contingencies or allocate risks at the time of contracting.[5] Relational contracts, therefore, assume that modifications to a contract may be made over time, as circumstances change.[6]

The federal-state contract is formed when states agree to participate in the program. The ongoing nature of the relationship contemplates interpretation and "[g]iven the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of [federal] requirements." Id. That is, the relational nature of the contract means that some ambiguity must be tolerated.

But in important ways this Court has constrained federal authority to interpret the post-acceptance terms of these relationship-driven contracts and thereby modify the contractual terms and conditions.

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[4] For discussions of relational contracts in the commercial context, see Richard E. Speidel, The Characteristics and Challenges of Relational Contracts, 94 NW. U. L. REV. 823, 828 (2000); Ian R. MacNeil, Values in Contract: Internal and External, 78 NW. U. L. REV. 340, 361 (1983).

[5] Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089, 1090 (1981).

[6] Gordon, 1985 WIS. L. REV. at 569 (relational contracts "are not frozen at the initial moment of commitment, but change as circumstances change…").

In Kentucky, the Court refused to apply a deferential arbitrariness standard to federal interpretations – the normal administrative law standard. Instead, federal interpretation must "be informed by the statutory provisions, regulations, and other guidelines provided by" the federal government "when the State agreed to comply" with federal terms and conditions – namely, at the time that the "grants were made." Post-acceptance federal interpretations of terms and conditions are constrained by the "legal requirements in place" at the contract-formation stage. Id. at 670.

The nature of an ongoing federal-state relational contract allows some flexibility in the administration of that contract, but that flexibility does not allow the federal government to redo willy nilly the terms of the contract when entered into. The terms at contract formation govern. Reasonable implied terms of the original contract are acceptable as binding, Barnes, 536 U.S. at 188, but the rule is that states' "obligations generally should be determined by reference to the law in effect when the grants were made." Bennett v. New Jersey, 470 U.S. 632, 638 (1985). Subsequently enacted legislative amendments "do not affect obligations under previously made grants." Id. at 637. If states must re-apply for funds through an affirmative application process – a contract-formation situation –, then the obligations in effect at that point govern the new contract. But where the contract is ongoing, as in Medicaid, the states' obligations are governed by the terms and conditions in effect at the time the state agreed to participate.

II. Factual Background and Implications

Medicaid was enacted in 1965 under the Social Security Act to provide medical assistance for qualified low-income persons. See Robert Stevens & Rosemary Stevens, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID (1974)(describing early experience under Medicaid). "Historically, medical support programs have tended to follow and to be built upon government's income maintenance initiatives." Clark C. Havighurst et al., Strategies in Underwriting the Costs of Catastrophic Disease, 40 LAW & CONTEMP. PROBS. 122, 183 (1976). That was the case with Medicaid and Medicare, both of which "built upon pre-existing programs of income support and, categorically, relied upon the definition of eligibility in those foundational income maintenance entitlements" – Social Security for Medicare and Aid to Families with Dependent Children (AFDC, later Temporary Assistance for Needy Families or TANF) for Medicaid. James F. Blumstein & Frank A. Sloan, Health Care Reform Through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and a Paradigm, 53 VAND. L. REV. 125, 136-37 & n.32 (2000)[Blumstein & Sloan]. States have had flexibility to set income standards under TANF; not all adults with poverty-level incomes must be eligible for TANF or Medicaid.

Under Medicaid, federal dollars match qualified state expenditures based on a formula. Traditionally, the federal government has set floors and ceilings on such matters as beneficiary eligibility and available services. States have had "the authority to add beneficiaries… and to add services, within program constraints imposed by the federal government." Id. at 138 & n.38. All states have chosen to sign up for

Medicaid, id. at n.37, which is a constitutionally-protected voluntary choice by states. Printz, 521 U.S. at 925.

Typically, Medicaid constitutes one of a state's two most expensive programs – the other being K-12 education. In Tennessee, for example, the Medicaid budget nearly tripled from 1987-93, expanding to over 25% of the state's budget and precipitating Tennessee's TennCare program in 1994 (a Medicaid managed care program). Blumstein & Sloan, at 150 & n.82.

PPACA aims to cover over 30 million previously medically uninsured persons. Over half of these additional insureds are projected to come from the expanded Medicaid mandate imposed on states: Effective January 1, 2014, states must cover all persons, including adults, with incomes under 133% of poverty under Medicaid[7] or take steps affirmatively to opt out of Medicaid entirely.[8]

In effect, PPACA terminates traditional Medicaid as conventionally understood. But it achieves that outcome without formally terminating the program and states' obligations thereunder – choosing instead to retain the structure and modifying Medicaid's terms unilaterally.

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[7] This rises to 138% of poverty when an income-disregard provision is taken into account. See Florida Brief at 7.

[8] Mandating coverage of persons with incomes under 133% of poverty eliminates an essential ingredient of traditional Medicaid – flexibility for states to determine levels of income eligibility. See Cohen & Blumstein.

Instead of recreating a contract-formation situation by legislating the end of traditional Medicaid or by allowing states to opt in to the new conditions independently as a matter of contract formation, PPACA thrusts the political onus for acknowledging and/or managing the new reality, legislated by the federal government, on the states. And the choices to which states are put infringe on their constitutionally-protected autonomy.

Under PPACA, a state cannot retain its traditional Medicaid program since that program ceases to exist in 2014 by dint of federal legislation. The status quo is not an option.

State inaction without adverse consequences, the contract paradigm of spending-power cases at contract formation, is not an option. In the face of PPACA, states face coercive choices to which they may not be put by the federal government.

At contract formation, if a state chooses not to sign-up for a federal spending program, it does not benefit from federal funding, but otherwise no adverse consequences exist compared to the status quo. States' inaction – the true measure of their political autonomy – results in no program enhancements from particpating in a federal program, but leaves them no worse off. It reflects no more than failing to eat a carrot. But in the context of the unilateral contract modification imposed by PPACA, state inaction without consequences is not an option.

State inaction leaves in place pre-existing Medicaid obligations unless and until repealed. But PPACA eliminates federal matching support for pre-existing

Medicaid *in toto*, so states' inaction means that their care obligations under pre-existing Medicaid remain and, fiscally, automatically increase from a fraction of the total cost (between one-sixth and one-half) to 100% of the total cost of a program that on average already absorbs 20% of state budgets.

So, unlike the contract-formation context, PPACA's leveraging on pre-existing Medicaid contracts makes state inaction without consequences impossible. The result of state inaction is the never-contemplated provision of medical care to previously eligible Medicaid beneficiaries entirely at state expense. This is no longer a failure to eat a carrot but being sanctioned fiscally and coercively with a big stick.

Inaction without consequences not being an option, states are forced to act affirmatively. They have two choices: act to embrace the new conditions or act to departicipate from Medicaid. Neither option respects state autonomy by respecting states' rights not to act without consequences.

States can act affirmatively to departicipate from Medicaid, but that puts the political onus not only to act but also to take political accountability for an action not of the states' doing. The federal government, not the states, decided to terminate traditional Medicaid and not offer states the option of accepting or rejecting the new terms through a discrete opt-in approach, whereas the states are obliged to take political heartburn for action they did not initiate or control. *Cf.* Printz, 521 U.S. at 930 (noting accountability problem when states "are… put in the position of taking the blame" for burdensome federal actions).

Alternatively, states can accept PPACA's new conditions and thereby accept the additional fiscal obligations. While that opportunity might be appropriate in the context of contract formation – when states could choose to secure the benefits of PPACA and shoulder the fiscal burdens as well --, it is inappropriate at contract modification when failure to act is not status-quo-neutral but has dire and impermissible consequences. This set of choices, therefore, is coercive, beyond what the federal government can impose on states.

In short, this is not a case of a state declining to apply for a federal grant through inaction at the contract-formation stage. To decline the terms of PPACA's New Medicaid (or Medicaid 2.0), states cannot remain passive. They must act to undo existing Medicaid legislation. This is not the same as deciding, at contract formation, whether or not to participate in Medicaid. This is the kind of unforeseeable, coerced action states are protected against under the anti-commandeering principle.

Under PPACA, the other half of newly-covered insureds (non-Medicaid) are to receive medical insurance through newly-enacted state-based exchanges. The purchase of such insurance is mandated. Persons with incomes in the 100%-400% of poverty range receive federal subsidies.

Strikingly, persons with incomes under 100% of poverty do not qualify for federal subsidy on these exchanges. This is telling, coming as it does in major legislation designed to achieve "near-universal" coverage of the uninsured. See Florida Brief at 6. This omission is a clear demonstration that the expanded

Medicaid coverage is not contemplated as a voluntary choice by states -- free to choose whether or not to act affirmatively to participate in Medicaid.

The expanded Medicaid-coverage mandate is part of the very architecture of PPACA.

There is no federal contemplation that states have a realistic choice to exit Medicaid, thereby leaving uncovered the poorest and most vulnerable of a state's residents (who had previously been covered), while the near-poor receive newly-enacted federal subsidies. Leveraging of an already-existing relationship is the name of the PPACA enterprise, with states treated as cash cows offsetting what would otherwise be federal obligations to achieve PPACA's access objectives.

Leveraging existing contractual relationships is built-in to the DNA of PPACA; the very structure of PPACA would be unthinkable to the architects of PPACA if real choice of exit from Medicaid existed, since that would mean no federal subsidy for those with incomes under 100% of poverty while those with incomes in the 100%-400% of poverty range would receive federal subsidy on the state-based exchanges. Such an outcome would be utterly irrational.

This is not a news flash. The point is expressly conceded in proposed regulations to implement the subsidies (the "premium tax credit") on the exchanges. The IRS matter-of-factly notes that "[t]axpayers with household incomes below 100 percent" of poverty "are not eligible for the premium tax credit **because** they are eligible to receive assistance through Medicaid." Internal Revenue Service, Health Insurance Premium Tax Credit Notice of Proposed Rulemaking, 76 Fed.

Reg. 50931, at 50934 (August 17, 2011)(emphasis supplied). A clearer acknowledgment of the understanding that states cannot and are not contemplated to opt out is hard to imagine.

To summarize: PPACA is a form of contract modification, using leverage coercively from an already-existing relationship to add more onerous terms and conditions to that pre-existing relationship. State non-compliance cannot be achieved by inaction – *e.g.*, by not applying for funds at the contract formation stage. State non-compliance with PPACA requires states to act affirmatively to undo an existing and ongoing relationship. Notice to states at PPACA's contract-modification stage does not protect states' autonomy interests in making an informed choice to determine whether or not to enter the Medicaid contract at the outset. States are only provided notice of the opportunity to act affirmatively to exit the traditional Medicaid program; that does not substitute for a requirement that state decisionmaking be unambiguously informed at the time states determine to accept the terms and conditions of Medicaid at the contract-formation stage.

III. The Constitutional Framework of Federalism: Anti-commandeering, Clear Notice, and Coercion

Federal power is limited in two ways: (i) lack of a source of authority (as in the challenge to PPACA's Individual Mandate) or (ii) violation of an affirmative limitation on federal power. The federal government "exercises its conferred powers" -- here its spending power – "subject to the limitations contained in the Constitution." New York, 505 U.S. at 156.

Pennhurst, as reaffirmed by South Dakota v. Dole, 483 U.S. at 207, gave effect to states' reserved constitutional authority not to exercise their sovereign powers by adopting a "clear notice" rule that protects state decisionmaking autonomy and integrity. These two related, constitutionally-based principles – anti-commandeering and clear notice – are at the heart of the limitations on federal spending power in this case.

PPACA's expanded Medicaid mandate (i) violates Pennhurst's clear-notice rule – an affirmative limitation on federal power – and is (ii) unconstitutionally coercive in violation of the anti-commandeering doctrine.

A. Anti-commandeering and Coercion

One constitutional limitation on federal power is that the federal government "may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce'" a federal program. Id. at 161 (internal cite omitted). The decision to enter into a federal cooperative federalism program like Medicaid is a constitutionally-protected state choice. It can be encouraged by financial incentives, but it may not be coerced, id. 166-67, as that would violate an attribute of state sovereignty. Printz, 521 U.S. at 928.

Pennhurst, 451 U.S. at 17, observed that the very "legitimacy" of federal spending-power programs turns on states' authority to decide whether to participate or not. This recognizes the anti-commandeering principle, which was embraced in the spending-power context before it was refined in the regulatory context.

The limit against "coercion" in federal-spending cases indicates that anti-commandeering has a functional dimension in conditional-spending cases that is a counterpart to its more formalistic sibling in the regulatory context.

Anti-commandeering principles protect state sovereignty interests against the "compelled exercise of… sovereign powers." FERC v. Mississippi, 456 U.S. 742, 769 (1982). Such sovereign powers include "promulgat[ing] and enforc[ing] laws and regulations." Id. at 762. Since states cannot be compelled to exercise their sovereign powers, they retain the sovereign right to inaction without adverse consequences as compared with the status quo. A right not to be compelled to act is a protected right not to act. *See* New York, 505 U.S. at 175 (states' right of inaction regarding federally-imposed take-title provision is constitutionally protected against coercion under anti-commandeering principle).

This paradigm works well in the spending-power context as applied to contract formation. A state's refusal to sign-up for a federal spending program is consistent with state sovereign interests in non-action. A state, fully informed in advance of the conditions attached to a federal program, can make a choice: Participate, enjoy the benefits of the program, and endure the costs; or not participate with no adverse effects as compared to the status quo ante.

Contract modification is an altogether different circumstance. States already have an ongoing, pre-existing contractual relationship with the federal government. Contract law dictates careful scrutiny of contract modifications because of the risk of

excessive/predatory leveraging, opportunistic behavior that can threaten to undermine the basis of the initial contract and, in the context of federalism, undermine states' sovereign interests in non-action without adverse consequences.

B. The Clear-Notice Doctrine

The Pennhurst "clear notice" principle is also of constitutional dimension. It assures that, when states agree to enter into a federal-state contract by participating in a cooperative federalism program like Medicaid, they are acting "voluntarily" and with "knowing acceptance" of the terms of the "contract," 451 U.S. at 17, exercising an "informed choice" that safeguards them from being surprised by imposition of "postacceptance or 'retroactive' conditions." Id. at 25.

The clear-notice rule has both positive and negative characteristics.

Positively, it protects the integrity of state decisionmaking by guaranteeing that states have full and unambiguous disclosure of what is expected of them, of what burdens they are undertaking, at the relevant time in the decisionmaking process – before they embark on the slippery slope by committing to participation in a cooperative federalism program.

Negatively, it is a rule against *ex post* blind-siding, against "surprising participating states with postacceptance or 'retroactive' conditions." Id. As a matter of federalism, Pennhurst's clear-notice doctrine protects states against federal bait-and-switch tactics – after-the-fact imposition of conditions on federal spending programs. Conditions in effect at the time of

a grant – not subsequently enacted rules – apply so as to spare states from unclear obligations assumed at the time that states choose to participate in a cooperative federalism program.

Pennhurst's clear-notice rule must be understood in the context of the attribute of state sovereignty embodied by the anti-commandeering principle.

The clear-notice rule is constitutionally-derived in character, protecting states' constitutional ability, under anti-commandeering principles, to refrain from participating in cooperative federalism programs. The clear-notice rule protects a state's autonomy to determine, voluntarily and knowingly, whether or not to agree to receive financial benefits in exchange for relinquishing its sovereign power to resist mandatory imposition of federal authority. The clear-notice rule is analogous to other constitutional doctrines – *e.g.*, freedom of association (NAACP v. Alabama, 357 U.S. 449 (1958)), criminal-defendant warnings (Dickerson v. United States, 530 U.S. 428 (2000)), campaign spending (Citizens United v. FEC, 130 S. Ct. 876 (2010)), or state sovereign immunity (Alden v. Maine, 527 U.S. 706 (1999)) – that have developed to protect underlying constitutional principles. See Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965)(characterizing these as "peripheral" rights, distinct from now-discredited "penumbral" rights, which evolve from but are distinct and freestanding from the underlying constitutional norms).

The essence of Pennhurst's clear-notice rule is that notice is given in advance – allowing states and their decisionmakers to make informed choices about accepting conditions on federal funding that states

cannot otherwise be compelled to accept. A recipient of federal funding must be "*on notice* that, by accepting federal funding, it exposes itself" to the condition-on-spending at issue. Barnes, 536 U.S. at 187(emphasis in original).

The issue is viewed "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." Does the federal program provide "clear notice" regarding the scope of a state's obligations? Would the state and its officials "clearly understand" the conditions that attach to a state's decision to enter into a cooperative federalism contract? Arlington, 548 U.S. at 298.

Through advance notice to state decisionmakers at contract formation, the clear-notice rule protects a state's constitutionally-derived authority to make "an informed choice," Pennhurst, 451 U.S. at 25, when it chooses to enter into a federal-state contract and accepts federal funding. The federal government may not "surpris[e] participating States with postacceptance or 'retroactive' conditions." Id. The clear-notice rule protects a state's right not to enter into or "implement" Medicaid – *i.e.*, not to form a federal-state contract. Printz, 521 U.S. at 925; New York, 505 U.S. at 176.

The clear-notice rule is not satisfied when states are lured into a federal—state relationship on one set of expectations and then informed that, through contract modification, the fiscal implications of remaining in the program have been substantially and unforeseeably ratcheted up. Providing states with notice of their right of "exit" from an ongoing

relationship that has already been formed – mandating affirmative enactment of state legislation to exit the federal-state program – is not a substitute for enabling states to "exercise their choice" of entering into a federal-state contract "cognizant of the consequences of their participation," Pennhurst, 451 U.S. at 17, and thereby "knowingly undertak[ing]" an obligation based on an "informed choice." Id. at 25.

IV. Structural Characteristics of Cooperative Federalism Programs Require the Clear-Notice Rule to Apply at the Contract-Formation Stage

A. Benefits to States

Federal-state matching programs provide benefits to states.

Federal funding enhances programmatic choices/options for states – benefits and resources that transcend what states can afford on their own. There is also a "bitter-with-the-sweet" dimension: States must accept federal terms and conditions attached to receipt of federal funds. The clear-notice rule is designed to safeguard and inform the constitutionally-protected state decisionmaking process of determining whether to enter the federal-state program (contract formation) – fully understanding in advance the bitter as well as the sweet.

B. Risks to States and the Federal Government

Risks also arise from cooperative federalism programs. Political accountability is displaced.

Because of Medicaid's automatic federal matching feature, state decisionmaking drives the federal budget when states expand program expenditures (which are matched with federal dollars). Once states enter a service-benefit program like Medicaid and become locked-in, the federal government can use its intense leverage (at contract modification) to drive state budgets by mandatorily increasing states' expenditures. This is the PPACA scenario and strategy. See generally Blumstein & Sloan, at 136-49; David Freeman Engstrom, Drawing Lines Between *Chevron* and *Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State, 82 TEX. L. REV. 1197, 1239-52 (2004).

1. Political Moral Hazard

The very design of federal matching programs provides "a powerful incentive for States to expand their Medicaid programs, possibly at the expense of programs that might have a higher state or local priority, but which would have to be funded entirely by state or local funds and therefore get 'crowded out.'" Blumstein & Sloan, at 139. Through a form of fiscal novocaine, federal matching anesthetizes political constraints that restrain growth of state spending/benefits programs, creating a form of political "moral hazard" that "encourag[es] states to adopt and finance programs… that are 'worth' (depending on the applicable matching rate) $.17-$.50 on the dollar to the politically accountable decisionmaking entity – the state." Id. at 139-40 & n.45. It is "economically and politically rational to spend state funds that, were the state paying the full bill, might not comport with state priorities." Id. at 140.

Sometimes, a good deal may be good but unaffordable. Consider whether to accept a gift from Bill Gates – a $30+ million home with 25,000+ square feet – on condition that the recipient pay property taxes, insurance, and general upkeep expenses. Sounds like a good deal, but it may be unaffordable because of the fiscal "co-pay."

The clear-notice rule protects the integrity of a state's political process. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." Alden v. Maine, 527 U.S. at 751. Excessive federal leverage over states may distort a state's political process by disadvantaging other potential claimants on state resources and may even threaten states' financial integrity, creating "staggering burdens" on them and giving the federal government "leverage" over the states that is "not contemplated by our constitutional design." Id. at 750 (discussing abrogation of states' sovereign immunity).

Requiring that state decisionmakers know unambiguously and in advance what fiscal consequences stem from assuming an obligation in a cooperative federalism program protects state autonomy by assuring informed decisionmaking. By analogy to procedural due process, notice/disclosure must come "at a meaningful time and in a meaningful manner." Fuentes, 407 U.S. at 80 (internal cite omitted). To fulfill that goal, notice/disclosure must come at the strategic time – when states decide to participate in a cooperative federalism program, knowingly and voluntarily accepting its conditions. That time is at the contract-formation stage.

2. Lock-in

The leveraging from federal matching creates a strong incentive for program expenditure expansion. This creates political dependence – a "political addiction" that locks-in cooperative federalism programs and makes cutbacks painful. "To save a state-generated Medicaid dollar, a state must reduce program expenditures by anywhere from two to six dollars (depending on the federal matching formula for a given state)." Blumstein & Sloan, at 142.[9]

The lock-in phenomenon – the fishing vessel out at sea – is exacerbated by (i) state investments in administrative infrastructure, which build in costs and generate reliance[10] and (ii) the nurturance of political

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[9] Political moral hazard has much in common with the problem of slippery-slope decisionmaking. A slippery slope is a situation "where decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose." Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026, 1030 (2003). To be effective, the clear-notice duty in the context of cooperative federalism programs must attach prior to a state's "decision A" – *i.e.*, at contract formation -- not at its "decision B" (whether to opt out of substantial and unforeseeable mid-stream contract modifications).

[10] The kind of state reliance that accrues from ongoing participation in cooperative federalism programs is analogous to the life-choice reliance regarding abortion described in Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992)(plurality): "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the

constituencies – beneficiaries and providers – that resist program cutbacks or elimination.[11] Engstrom, 82 TEX. L. REV. at 1243-44. This threat of lock-in and the impact of reliance suggest that federal imposition of additional substantial, unforeseeable, and onerous conditions provides excessive/predatory leveraging. Id.

In contract terms, deference to the use of contract modification of an ongoing contractual relationship is unwarranted, unlike deference shown at the contract-formation stage. If "lock-in effects are substantial," then the federal government can "enter into broad agreements with states, wait for lock-in, and then…

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economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Reliance can stem from decisions that are based on a certain set of expectations that influence how people "order[] their thinking and living." This explains that states' decisionmaking processes are affected differently by a decision to participate in a federal-state program (contract formation) and a decision to act affirmatively to exit from that program in the face of the imposition of additional fiscal conditions (contract modification as under PPACA). Analogy of state autonomy interests, such as the anti-commandeering principle, to similar individual-oriented rights is appropriate. For example, in College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999), the Court rejected a claim of implied waiver of a state's sovereign immunity, noting that "'[c]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights" (internal cite omitted). The analogy to waiver of individual constitutional rights was explicit: "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." Id.

[11] Support for provider infrastructure is an important goal of Medicare and Medicaid. Fischer v. U.S., 529 U.S. 667, 679-80 (2000).

extract more onerous conditions than could have been imposed at the moment the deal was struck." Id. at 1244.

The Pennhurst clear-notice rule protects states from these coercive federal leveraging strategies. It enables states to make their "choice [not to participate in a federal-state spending program] knowingly, cognizant of the consequences of their participation." 451 U.S. at 17. The states' choice to participate must be an "informed choice" that provides "clear notice" of what is expected, not "surprising participating States with postacceptance or 'retroactive' conditions." Id. at 25. States must be "*on notice*," Barnes, 536 U.S. at 187(emphasis in original), of what is expected of them when they agree to participate in a federal spending program, with the relevant perspective that of a state official "engaged in the process of deciding" whether to enter into a federal-state contract with its attendant conditions. Arlington, 548 U.S. at 296. To achieve these goals, the clear-notice obligation must apply at the contract-formation, not the contract-modification, stage.[12]

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[12] The implications of earlier decisions in influencing subsequent decisions are recognized in the literature of "path dependence." *Cf.* Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 IOWA L. REV. 601 (2001). In order to make informed choices, states must be clearly informed at the initial decisionmaking stage (contract formation) not when a subsequent, substantial and unforeseeable change of conditions is made (contract modification).

V. Application of Analysis and Remedy

A. Coercion

The lower courts have had a hard time applying the functional anti-commandeering principle of coercion in the conditional spending context. The reason is they have misperceived the nature of the inquiry.

A common view of coercion is process-focused – a police officer beating a confession from a criminal defendant. That process-focused model does not transfer easily to the context of conditional spending.

But there is a different model that does apply –"choice-set" coercion.

Lee v. Weisman, 505 U.S. 577, 594-96 (1992), an Establishment Clause case, exemplifies "choice-set" coercion. A student objected to a religious message at her graduation, claiming it to be coercive. The government defended on the ground that attendance at graduation was voluntary; no coercion existed because the student could stay home without penalty.

This Court disagreed, holding that government could not force a choice between voluntary non-attendance at graduation so as to avoid a religious message and "forfeiture" of the intangible benefits from attending graduation; *accord*, Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 312 (2000)(same regarding choice not to attend high school football games or be subject to religious message).

Here, the context is contract modification, not contract formation. The opportunity for excessive,

predatory leverage exists, and exists regarding PPACA.

States cannot retain their sovereign right of non-action. To avoid the expanded Medicaid obligations of PPACA, a state must act affirmatively – to opt out of Medicaid entirely. That action forces states to undo an existing contract when it is the federal government that has in effect undone that contract by modifying its terms in ways that were unforeseeable when entered into. Exercise of a state's right of non-action breeds fiscal disaster, as states must provide Medicaid to beneficiaries entirely at state expense and without federal matching funds.

Moreover, PPACA makes this state choice politically poisonous by linking the new conditions to retention of pre-existing contractual benefits and, by not subsidizing persons with incomes below 100% of poverty while newly subsidizing persons with incomes in the 100%-400% of poverty range, forcing an odious choice that cannot exist at contract formation.

Because of the structure of the program adopted by the federal government, and the federal government's foisting off on states the political accountability for a choice not of the states' making, this type of choice improperly impairs states' decisionmaking autonomy.

As the federal government has admitted, 76 Fed. Reg. at 50934, the very architecture of PPACA, which is designed to achieve near-universal medical insurance coverage, contemplates that states have no choice but to embrace Medicaid 2.0: "Taxpayers with household incomes below 100 perrcent" of poverty "are not eligible for the premium tax credit" provided to

persons with incomes in the 100%-400% range "because they are eligible to receive assistance through Medicaid." That is not happenstance but part of the very design or DNA of PPACA.

At contract modification, this is exactly the type of excessive, predatory leveraging that contract doctrine guards against (recall the fishing vessel case) and that is impermissibly coercive.

Alternatively, states can act to accept the new Medicaid terms, but that decision is hardly the type of dcisionmaking context that the spending-power cases contemplate – wherein states face no adverse consequences compared to the status quo from a decision not to participate.

The states' decision to accept PPACA's new terms at contract modification puts states in a position of having been blind-sided with conditions that they did not and could not anticipate at contract formation – suffering precisely the kind of bait-and-switch after-the-fact blind-siding that Pennhurst guards against. 451 U.S. at 25 ("Congress' power to legislate under the spending power … does not include surprising participating States with posacceptance or 'retroactive' conditions").

B. The Clear-Notice Principle and Contract Modification

The federal-state Medicaid contract was formed when states agreed to participate in the program. Given the substantial fiscal impact on states and unforeseeable nature of PPACA's modifications, the

Pennhurst clear-notice obligation must attach at contract formation, not contract modification.

The ongoing nature of the Medicaid relationship contemplates contract interpretation. The relational nature of the contract means that some ambiguity must be tolerated. That does not conflict with Pennhurst's clear-notice principle. Kentucky, 470 U.S. at 669.

But federal interpretation of ambiguity must be within the framework of the terms/conditions of the contract at the contract-formation stage. Post-acceptance federal interpretations of terms and conditions are constrained by the "legal requirements in place" at the contract-formation stage. Id. at 670.

Reasonable implied terms of the original contract are acceptable as binding, Barnes, 536 U.S. at 188, but states' "obligations generally should be determined by reference to the law in effect when the grants were made." Bennett v. New Jersey, 470 U.S. 632, 638 (1985). Subsequently enacted legislative amendments "do not affect obligations under previously made grants." Id. at 637. The terms at contract formation govern.

Not all contract modifications in ongoing, relational contracts are problematic, but modifications such as PPACA that rely on excessive/predatory leveraging are. See Muris, 65 MINN. L. REV. at 538 (The issue is "whether the modification was extorted").

The critical objective of Pennhurst's clear-notice rule is to safeguard states' ability to enter into federal-state spending programs knowingly and voluntarily so

as to protect their autonomy and the integrity of their political process. When additional substantial, unforeseeable, expensive, and mandatory conditions/obligations are imposed mid-stream via contract modification, states' constitutionally-protected interests are at stake. States' ability to exit a contractual relationship at the time of contract modification is hardly to be equated with the sovereign interests protected by Pennhurst's clear-notice rule – to be put on notice in advance of the financial and political consequences of voluntarily agreeing to accept federal funding.

To accommodate the contract-law principle and, as a practical matter, a limiting principle should apply to the overall proposition that the Pennhurst clear-notice rule applies at the contract-formation stage of an ongoing, cooperative federalism program. Whatever reasonable limiting principles that are established will be satisfied by the federal leveraging action reflected in PPACA.

While subsequent cases will have to draw the lines, I propose the following standard to govern PPACA and similar ongoing cooperative federalism programs: Providing clear notice of substantial, mandatory changes to Medicaid, as effected by PPACA, does not satisfy the federal government's clear-notice obligation when those modifications (i) are substantial and unforeseeable at the sign-up stage, (ii) have a significant fiscal impact on state-administered programs, and (iii) comprise a substantial component of a state's overall budget (as Medicaid does). *Cf.* Cohen & Blumstein.

States cannot be bound by PPACA's expanded Medicaid mandate because the federal government failed to satisfy Pennhurst's clear-notice rule when states signed-up for Medicaid (at the contract-formation stage). PPACA's changes to Medicaid are substantial, were unforeseeable at contract formation, and occur at contract modification. They have a significant fiscal impact on the already-existing Medicaid program, and Medicaid comprises a substantial component of a state's overall budget. Under the circumstances, a substantial modification of the Medicaid contract (as embodied in PPACA) cannot be used as an end-run around the federal government's obligation to provide states with clear and timely notice of what participation in Medicaid entails budgetarily.

C. What the Federal Government Must Do

The federal government has sovereign interests in not maintaining a program it wishes to terminate. If the federal government wishes to discontinue traditional Medicaid in favor of a new flavor (PPACA's New Medicaid), it can do that. But it must achieve that goal by re-creating a contract-formation situation and providing states with a clear, unambiguous statement of their financial obligations if they choose to participate in New Medicaid.

One option would treat PPACA's new conditions as contract formation, allowing states to opt in or not, fully informed in advance, without adverse consequences as compared to the status quo ante. That would decouple New Medicaid from traditional Medicaid, allowing states to retain their participation in the ongoing contractual relationship.

If the federal government chooses to require states either to accept or reject New Medicaid entirely – and to disallow states to continue their participation in traditional Medicaid – the federal government can do that. But it must shoulder the political burden and accept the political accountability for that action – for precluding states from their continued participation in traditional Medicaid. *Cf*. Printz, 521 U.S. at 930 (noting accountability problem when states "are… put in the position of taking the blame" for burdensome federal actions). The federal government must terminate traditional Medicaid and its legal infrastructure, not put the onus on states to act affirmatively to exit Medicaid in the face of contract modification.

States need not opt out of or exit traditional Medicaid since it would no longer exist by federal action. That would re-create a contract-formation situation. The federal government would be required at the contract-formation stage to state clearly the conditions of state participation in New Medicaid. States could then determine knowingly and voluntarily whether or not to participate in New Medicaid. They could opt in to New Medicaid, being on notice in advance of the fiscal consequences and making a fully informed choice, for which they would be accountable politically.

This approach aligns political accountability, an objective of the anti-commandeering principle, New York, 505 U.S. at 168-69, and protects states' autonomy against excessive/predatory federal strategic leveraging via contract modification. There is federal responsibility for terminating traditional Medicaid, for withdrawing states' ability to retain benefits under

their traditional Medicaid programs, and for creating New Medicaid with its attendant opportunities and obligations. Correspondingly, there is state responsibility for determining, voluntarily and knowingly, whether or not to accept the bitter-with-the-sweet of New Medicaid, on notice, in advance and with a clear understanding of what is at stake.

State inaction would result in non-acceptance of New Medicaid at the contract-formation stage (and without consequences compared to the status quo). States would not be forced to act in order to exit an existing, ongoing program because of a substantial program modification at the contract-modification stage.

The result is that PPACA's expanded Medicaid mandate cannot bind states in its present form.

CONCLUSION

For the foregoing reasons, the Court of Appeals decision regarding PPACA's expanded Medicaid mandate should be reversed.

Respectfully submitted,

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James F. Blumstein serves as University Professor of Constitutional Law and Health Law and Policy at Vanderbilt Law School and Vanderbilt University Medical School and as Director of the Vanderbilt Health Policy Center. He also serves as Adjunct Professor of Health Law at Dartmouth Medical School and, in 2010-11, served as inaugural Scholar-in-Residence at the Robert Wood Johnson Health Policy Center at Meharry Medical College. He serves on the National Advisory Board of the Robert Wood Johnson Health Policy Center at Meharry Medical College.

Professor Blumstein has served as Visiting Associate Professor of Law and Policy Sciences at Duke Law School and the Duke Institute for Policy Sciences and Public Affairs, and John M. Olin Visiting Professor of Law at the University of Pennsylvania Law School. He has been an active teacher and scholar in the field of health law and policy and co-editor with Clark C. Havighurst and Troyen A. Brennan of HEALTH CARE LAW AND POLICY (2d ed. 1998 and 2007 Supp. Foundation Press). Professor Blumstein is an elected member of the Institute of Medicine of the National Academy of Sciences and has served as Chair of the Section of Law, Medicine, and Health Care of the Association of American Law Schools.

In 1990, Professor Blumstein was nominated by President George H. W. Bush (R) to serve as Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget. During 2004-07, Professor Blumstein served as retained counsel to Tennessee Governor

Philip N. Bredesen (D) during Governor Bredesen's TennCare reform initiative. TennCare is Tennessee's Medicaid demonstration program. At the invitation of the Tennessee Court of Appeals, Professor Blumstein served as *amicus curiae* in a then-pending TennCare matter. Tennessee *ex rel*. Pope v. Xantus Healthplan, 2000 Tenn. App. LEXIS 319, at *5, n.2.

In this brief, Professor Blumstein speaks for himself, not for any of his institutional affiliations.