No. 11-400

IN THE

Supreme Court of the United States

STATES OF FLORIDA, *et al*.
Petitioners,

v.

UNITED STATES DEPT. OF HHS, *et al*.
Respondents.

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

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION AND THE SOCIAL SECURITY INSTITUTE IN SUPPORT OF PETITIONERS ON MEDICAID

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INTEREST OF THE *AMICI*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson;

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the *amici* made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

The Social Security Institute is a 501(c)(4), non-profit foundation dedicated to reform of the nation's entitlement programs.

This case is of interest to the Amici because we seek to ensure that the Constitutional limits to federal power are fully recognized and enforced. That includes on this issue in particular the Constitutional framework for federalism.

STATEMENT OF THE CASE

Medicaid has been a joint federal/state partnership since its inception in 1965, with each state free to decide whether and when to participate. The federal government has paid for 50% to 83% of total program costs in each state, depending on a statutory formula calculating the federal contribution by state.

Until the passage in 2010 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, (hereafter the "ACA"), the states each enjoyed substantial discretion to decide Medicaid eligibility and scope and duration of coverage. *Alexander v. Choate,* 469 U.S. 287, 303 (1985). That was consistent with state sovereignty and the Constitutional framework of federalism.

At the core of the ACA is the individual mandate, requiring every citizen to obtain health insurance coverage with the benefits and provisions specified by the federal government. The means provided under the ACA for lower income individuals and families to obtain that required coverage is through transformation of the Medicaid program.

Under the ACA, the federal government now imposes Medicaid on the states as a federally defined program to meet the requirements of the individual mandate as specified by the federal government, for the entire below age 65 population with incomes under 138% of the poverty line. That includes mandatory coverage for the first time for all non-elderly childless adults within the income limits. The states consequently no longer have substantial discretion to determine eligibility and scope and duration of coverage for the program within their respective jurisdictions.

The result will be to increase Medicaid enrollment by 24 million additional beneficiaries by 2015,[2] covering nearly 100 million Americans by 2021 according to CBO.[3] That will impose at least another $20 billion to $42 billion in additional costs on the states by the end of the decade, even counting all the

[2] Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, Estimated Financial Effects of the Patient Protection and Affordable Care Act, as Amended, April 22, 2010, p. 6, Table 2.

[3] Congressional Budget Office, The Budget and Economic Outlook: Fiscal Years 2011 to 2021, January, 2011, p. 62.

federal financing for Medicaid.[4] That does not count the cost of the 18% of the uninsured who are eligible for but not enrolled in Medicaid, who will have to enroll to comply with the individual mandate.[5]

The ACA also imposed an entirely new, inestimable, mandatory obligation on the states, inflicting on the states the responsibility for providing the care and services under Medicaid themselves. ACA, Section 2304. The states are consequently exposed to liability for care demanded beyond what doctors and hospitals are willing to provide. Given the extremely low fees Medicaid pays to doctors and hospitals, that liability is in the twilight zone at least, and potentially out of this world.

The ACA imposes all these new terms on Medicaid as a condition of continued state participation in Medicaid at all. That threatens the states with the loss of all federal Medicaid funds unless they buckle to all of the ACA's new, mandatory expansions of state obligations under Medicaid. Those federal Medicaid funds currently account for more than 40% of all federal funds granted to the states, and 7% of

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[4] Douglas Elmendorf, Congressional Budget Office, Letter to the Honorable Nancy Pelosi, March 20, 2010, Table 2; Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid Coverage & Spending in Health Reform: National and State-by-State Results for Adults at or Below 133% FPL* 23 (May 2010).

[5] Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 12 (Dec. 2008).

all federal spending, amounting to more than $276 billion in 2011 alone.[6] Even before passage of the ACA, federal and state spending on Medicaid on average amounted to 20% of state total annual budgets.[7]

In Plaintiff Florida, for example, paying the same Medicaid benefits as before the ACA in 2010 without federal funds would have consumed almost two-thirds of Florida's tax revenues for the year. As for the federal claim that Florida could just raise its own taxes to pay those benefits if it doesn't want to comply with the ACA's mandates, the federal government already collects more than $100 billion per year in federal taxes from Florida residents, leaving little or no capacity for further tax increases. Mem. Supp. Pltfs.' Motion Summ. J. 33 [R.E. 493].

But that is not all that the ACA threatens if states do not concede to the ACA's demands. Section 602(a)(3) imposes as a condition of federal funding under Temporary Assistance for Needy Families (TANF) that children served by that program "are eligible for medical assistance under the State [Medicaid] plan."

Indeed, the ACA is designed on the assumption that states will have no real option other than to participate in Medicaid, and kowtow to all of the ACA's impositions. The ACA's individual mandate applies to Medicaid-eligible individuals. But the

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[6] Henry J. Kaiser Found., *Federal and State Share of Medicaid Spending, FY2009* (2010); The President's Budget for Fiscal Year 2012, Historical Tables, Table 8.5.

[7] Nat. Ass'n of State Budget Officers, *2008 State Expenditure Report* (Fall 2009), Table 5.

ACA carefully provides no means for the nation's neediest to obtain the required insurance and comply with the mandate other than through participation in Medicaid.

The ACA does provide for extensive new benefits for the purchase of health insurance for those making up to $88,000 a year to start (4 times the poverty level), climbing to over $100,000 after a few years.[8] But those suffering in poverty, the majority of those eligible for Medicaid, are expressly excluded from these new benefits. Clearly, the ACA is built on the assumption that states have no real choice to provide for these neediest other than through participation in Medicaid.

Soon after passage of the ACA, 25 states joined in this suit asking for a declaratory judgment that the ACA is unconstitutional, in part on the grounds that the ACA's mandatory expansion of Medicaid is unconstitutionally coercive, infringing on state sovereignty and the Constitution's framework of federalism. The District Court denied the federal government's motion to dismiss the Medicaid claim because "If the Supreme Court meant what it said in *Dole* and *Steward Machine*…there is a line somewhere between mere pressure and impermissible coercion." Pet. App. 463a.

But the District Court ultimately granted summary judgment to the federal defendants on the states' coercion claim, on the view that current

[8] Douglas Holtz-Eakin and Cameron Smith, Labor Markets and Health Care Reform: New Results, American Action Forum, May, 2010

precedent was insufficient to invalidate spending legislation on these grounds. The court held that "unless and until [this Court] revisit[s] and reconsider[s] its Spending Clause cases….the states have very little recourse to remaining the very junior partner in the [state-federal] partnership." Pet. App. 287a-88a. That is a shortcoming this Court can remedy on this appeal.

The Eleventh Circuit affirmed this ruling. While recognizing that "[t]o say that the coercion doctrine is not viable or does not exist is to ignore Supreme Court precedent," the court also invited further definition from this Court, saying, "[i]f the government is correct that Congress *should* be able to place any and all conditions it wants on the money it gives to the states, then the Supreme Court must be the one to say it." Pet. App. 59a-60a.

SUMMARY OF ARGUMENT

Under our Constitutional framework of federalism, the states are sovereign entities with their own Constitutionally protected powers which the federal government cannot transgress. Consequently, the federal government does not hold the constitutional power simply to order the states to implement federal policies.

The Founders adopted this policy of federalism and sovereignty of the states in the Constitution as an essential check and balance on the power of the federal government, to preserve liberty.

Moreover, this Court has long recognized under the Coercion Doctrine that just as Congress has no enumerated power to order states to implement federal policies, it may not use its Spending Power to achieve the same result indirectly. As this Court said in *New York v. United States,* 505 U.S. 144 (1992), the touchstone of "permissible method[s] of encouraging a State to conform to federal policy choices" is that "the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. Congress violates state sovereignty and the Constitutional framework of federalism when it "issu[es] an unavoidable command" rather than "offering the States a legitimate choice." *Id.* at 185.

That is why this Court held in *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), that an exercise of the spending power would violate the Constitution if it were "so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211. (quoting *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937).

Consequently, the Constitutional test under the Coercion Doctrine is whether, as a practical matter, the programs the Congress adopts leave the states with a true choice regarding their own policies, or whether the states are effectively coerced into following federal commands. Given the enormous taxes and spending of the modern welfare state, this Coercion Doctrine is now essential to maintaining state sovereignty and the Constitutional framework of federalism.

This Doctrine is particularly relevant to conditions on federal aid, as the ACA imposes on Medicaid. Do the conditions as a practical matter leave the states with a true choice regarding whether to accept the aid, or not? In other words, has Congress made an offer the states could not refuse? That is the question that must be decided by this case.

The undisputed facts of this case plainly show that as a practical matter the states no longer retain the true choice of whether to comply with the mandatory requirements that the ACA imposes on Medicaid. Medicaid accounts for 40% of all federal funds granted to the states, and 7% of *all* federal spending, amounting to $276 billion in fiscal year 2011 alone. This Medicaid spending accounts for 20% of state budgets on average, with 50% to 83% financed by federal assistance.

There is no conceivable way that states retain a practical choice to forego such federal Medicaid financing. Yet, states must comply with the entire transformation that the ACA imposes on state Medicaid programs, or lose all of this funding for their current Medicaid programs. Congress, in fact, carefully designed the ACA fully expecting that states retain no realistic choice of opting out of Medicaid.

Consequently, the ACA's Medicaid expansion unconstitutionally violates the Coercion Doctrine, transgressing state sovereignty and the Constitutional framework of federalism.

ARGUMENT

I. IN THE MODERN WELFARE STATE, THE COERCION DOCTRINE IS ESSENTIAL TO MAINTAINING STATE SOVEREIGNTY WITHIN THE CONSTITUTIONAL FRAMEWORK OF FEDERALISM.

Under the Constitution's framework of federalism, the states are not mere subdepartments of the federal government. The states are sovereign entities with their own Constitutionally protected powers which the federal government cannot transgress. Consequently, the federal government does not hold the constitutional power simply to order the states to implement federal policies.

Just last year, this Court reiterated in *Bond v. United States,* 131 S. Ct. 2355, 2366 (2011) that, "Impermissible interference with state sovereignty is not within the enumerated powers of the National Government." The Court added, "our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Id.* at 2364. That is because, "the preservation of the States, and the maintenance of their governments, are as much within the design and core of the Constitution as the preservation of the Union and the maintenance of the National Government." *Texas v. White,* 74 U.S. 700, 725 (1868).

In *New York*, this Court recognized, "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate" to carry out federal policies. Similarly, this Court recognized in *Printz v. United States,* 521 U.S. 898, 925 (1997) that "the Federal government may not compel the states to implement, by legislation or executive action, federal regulatory programs." The Court added, "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." Id. at 928.

The Founders adopted the policy of federalism and sovereignty of the states in the Constitution as an essential check and balance on the power of the federal government, to preserve liberty. As this Court recognized in *Bond*, the states must "remain independent and autonomous within their proper sphere of authority," because such "federalism secures the freedom of the individual." 131 S. Ct. at 2364. Similarly, this Court in *Gregory v. Ashcroft,* 501 U.S. 452, 459 (1991) recognized, "In the tension between federal and state power lies the promise of liberty."

As Justice Kennedy summarized concurring in *United States v. Lopez,* 514 U.S. 549 (1995),

> "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of government has tipped the scales too far."

Justice O'Connor similarly recognized in *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 581 (1985)(dissenting),

> "If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal government's compliance with its duty to respect the legitimate interests of the States."

This policy, indeed, is embodied in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Moreover, this Court has long recognized under the Coercion Doctrine that just as Congress has no enumerated power to order states to implement federal policies, it may not use its Spending Power to achieve the same result indirectly. This Court said in *New York*, "Our cases have identified a variety of methods, *short of outright coercion*, by which Congress may urge a state to adopt a legislative program consistent with federal interests." 505 U.S. at 166. The touchstone of "permissible method[s] of encouraging a State to conform to federal policy choices" is that "the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. This Court added in *New York* that Congress violates state sovereignty and the Constitutional framework of federalism when it "issu[es] an unavoidable command" rather than

"offering the States a legitimate choice." 505 U.S. at 185.

This Court has analogized the principle to Contract Law. The Court said in *Pennhurst State Sch. & Hosp. v. Holderman*, 451 U.S. 1, 17 (1981), "legislation enacted pursuant to the spending power is much in the nature of a contract." The Court elaborated in *Barnes v. Goldman*, 536 U.S. 181, 186, (2002) "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power…rests on whether the [recipient] *voluntarily* and knowingly accepts the terms of the 'contract.'" *See also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291 (2006). As this Court further explained in *Dole*, to be valid such acceptance must be voluntary "not merely in theory but in fact."

That is why this Court held in *Dole* that an exercise of the spending power would violate the Constitution if it were "so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211. (quoting *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937). *See also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666 (1999); *Sabri v. United States,* 541 U.S. 600 (2004). The Court similarly recognized in *United States v. Butler*, 297 U.S. 1, 71 (1936), "The power to confer or withhold unlimited benefits is the power to coerce or destroy." The Court similarly noted in *Frost and Frost Trucking Company Co. v. R.R. Comm'n,* 271 U.S. 583, 593 (1926), that without such an effective coercion limit on the spending power, then

> "constitutional guarantees, so carefully safeguarded against direct assault, [would be] open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion."

Justice Kennedy recognized as well in *Davis v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 654-55 (1999)(dissenting), that without such a limit, the spending power "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal government to set policy in the most sensitive areas of traditional state concern, areas which would otherwise be outside its reach."

Consequently, the Constitutional test under the Coercion Doctrine is whether, as a practical matter, the programs the Congress adopts leave the states with a true choice regarding their own policies, or whether the states are effectively coerced into following federal commands. Given the enormous taxes and spending of the modern welfare state, this Coercion Doctrine is now essential to maintaining state sovereignty and the Constitutional framework of federalism.

This Coercion Doctrine is particularly relevant to conditions on federal aid, as the ACA imposes on Medicaid. Do the conditions as a practical matter leave the states with a true choice regarding whether to accept the aid, or not? In other words, has Congress made an offer the states could not refuse?

That is the question that must be decided by this case.

Otherwise, as this Court explained in *Butler*, 297 U.S. at 75 (1936),

> "If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the states."

II. THE ACA'S MANDATORY TRANSFORMATION OF MEDICAID UNCONSTITUTIONALLY VIOLATES THE COERCION DOCTRINE.

The undisputed facts of this case plainly show that as a practical matter the states no longer retain the true choice of whether to comply with the mandatory requirements that the ACA imposes on Medicaid. As discussed above, Medicaid accounts for 40% of all federal funds granted to the states, and 7% of *all* federal spending, amounting to $276 billion in fiscal year 2011 alone.[9] This Medicaid spending accounts for 20% of state budgets on average, with 50% to 83% financed by federal assistance.[10]

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[9] Henry J. Kaiser Found., *Federal and State Share of Medicaid Spending, FY2009* (2010); The President's Budget for Fiscal Year 2012, Historical Tables, Table 8.5.

[10] Nat. Ass'n of State Budget Officers, *2008 State Expenditure Report* (Fall 2009), Table 5.

There is no conceivable way that states retain a practical choice to forego such federal Medicaid financing. Yet, states must comply with the entire transformation that the ACA imposes on state Medicaid programs, or lose all of this funding for their current Medicaid programs.

The ACA Medicaid requirements are even more coercive because the ACA imposes the individual mandate on the poor and needy, but provides no means for them to comply with it other than Medicaid. Consequently, unless the states kowtow to the ACA's federal dictates on Medicaid, they must either untenably bear the entire financial burden of helping the poor comply with the law, or untenably leave them with no means of doing so.

As a practical matter, states do not retain the choice of foregoing federal Medicaid assistance, and raising their own taxes to finance essential Medicaid health care for the poor and needy. For example, in the state of Florida, financing their pre-ACA Medicaid program out of the state's own funds alone would consume two-thirds of the state's tax revenues. Mem. Supp. Pltfs.' Motion Summ. J. 33 [R.E. 493].

Moreover, the individual mandate would still apply to the state's poor and needy. Helping them comply with the additional costs of that would raise the state's financing burden still further. This would be further exacerbated because 18% of the uninsured

are currently eligible for Medicaid but not enrolled.[11] But to comply with the individual mandate, all of these individuals would have to enroll.

The federal government already imposes more than $110 billion per year in federal taxes on Florida residents, more than three times the entire state tax burden of $32 billion. Mem. Supp. Pltfs.' Motion Summ. J. 33 [R.E. 493]; Kaiser Found., *Medicaid Spending, FY2009;* Fed'n of Tax Adm'rs, *2009 State Tax Revenue*. That leaves little or no capacity for the state to raise its taxes further to pick up the Medicaid burden without federal funds. To attempt that, all of those federal tax payments from Florida taxpayers would go to finance Medicaid health benefits for the poor and needy of other states, with none coming back for the poor and needy of their own state. That is not a tenable choice for the state. See *Jim C. v. United States,* 235 F.3d 1079, 1083 (8th Cir. 2000)(If a state were to refuse to comply with the conditions on federal funding, "federal taxpayers in [that state] would be deprived of the benefits of a return from the federal government to the state of a significant amount of the federal tax monies collected [from that state].")(Bowman, J. dissenting).

Yet, the ACA deliberately and punitively adds to the coercion by making federal funding for the TANF program contingent on continued state participation in Medicaid as well. ACA, Section 602(a)(3).

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[11] Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 12 (Dec. 2008).

Historically, for prior expansions of Medicaid, Congress avoided this coercion problem by providing new funding for the expansion contingent on states agreeing to the expansion. But Congress did not threaten to take away the pre-existing funding for Medicaid unless states agreed to the expansion.

Congress expressly designed the ACA, however, knowing that states had no realistic alternative except to kowtow to the Congressional Medicaid policies adopted in the Act, precisely because Congress did threaten to take away all pre-existing funding for the entire program unless the states did so. That is why it applied the individual mandate to the poor and neediest with no provision to finance it for them except Medicaid. It knew that the states as a practical matter faced no realistic option to withdraw from Medicaid.

That is also why Congress adopted a new health benefits program to help families purchase the mandated insurance coverage with incomes up to $88,000 a year to start, climbing to over $100,000 a year in short order, but expressly excluded the poor from such subsidies. It knew that the poor would be covered by Medicaid in every state, because the states again as a practical matter retained no realistic option to withdraw from Medicaid.

Indeed, where Congress knew that the poor might not be covered by Medicaid, it expressly provided for eligibility for the new health benefits program. ACA Section 1401(a) carefully provides for such benefits for those who are "not eligible for the Medicaid program…by reason of [their] alien status." But note

that no analogous eligibility was provided for the poor in states that might opt out of Medicaid, which again shows Congress itself recognizing that the states retained no realistic ability to opt out. Indeed, Congress no longer even maintains any legal mechanism or procedure by which a state may opt out of Medicaid.

Note also that when Congress knew that the states did retain a realistic ability to opt out of a provsion of the ACA, it provided a fallback provision in that case. The Act specifically provides that when a state chooses to forego the federal funding for setting up a health insurance Exchange for the state, and refuses to do so, the federal government is authorized to set up the Exchange for the state. But the ACA includes no alternative provision for states that might opt out of Medicaid and its federal funding, again recognizing that as a practical matter states retain no realistic option for doing so.

Consequently, for all of the foregoing reasons, this is not a close case. If the ACA does not violate the Coercion Doctrine of *Dole* and *Steward Machine*, no Act of Congress ever will. For the ACA in this case, for the reasons discussed above, "the point of coercion is automatically passed." *Florida Prepaid,* 527 U.S. at 687.

The facts of *Dole* and *Steward Machine* further demonstrate that conclusion. *Steward Machine* involved a federal tax deduction of up to 90% for a federal unemployment tax if a state adopted its own tax to fund an unemployment compensation program satisfying federal requirements. That case was

brought by a private employer alleging that the state had been coerced into adopting its tax. But the state opposed the employer's suit, contending that the deduction allowed it a realistic choice of setting up its own program. That was the decisive factor in the court finding no coercion of the state in that case. In sharp contrast, in the present suit, half the states have joined to argue that the ACA does coerce them into acceding to federally imposed policies, with no realistic alternative.

Dole considered the federal provision conditioning 5% of federal highway funding on states establishing a minimum drinking age of 21. The Court found that a "relatively mild encouragement" that was not coercive. 483 U.S. at 211. That contrasts sharply with the federal threat in the present case to withhold all federal Medicaid funding entirely, nearly half of all federal funding for states, more than 1000 times in many states what was at issue in *Dole*. That is more than sufficient to pass the "point at which pressure turns into compulsion," *Steward Machine*, 301 U.S. at 591.

This case is much more like the federal provision found unconstitutional in *New York*, which ordered states to regulate radioactive waste as dictated by Congress, or assume full liability for waste generated within their borders. Similarly, in the present case, the federal government orders states either to run their Medicaid programs as dictated by Congress, or assume full responsibility for medical assistance to the needy within their borders. Consequently, as in *New York*, "Congress has crossed the line

distinguishing encouragement from coercion." 505 U.S. at 175.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the summary judgment for Respondents on the Medicaid coercion issue, and hold the ACA's Medicaid expansion unconstitutional, finding the ACA invalid in its entirety as a result.

Respectfully submitted,

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No. 10-9646 & No. 10-9647

EVAN MILLER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,
v.
STATE OF ARKANSAS,
Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on January 17, 2012, three (3) copies of the BRIEF OF *AMICI CURIAE* J. LAWRENCE ABER, MARC S. ATKINS, CAMILLA P. BENBOW, MARY M. BRABECK, JANE C. CONOLEY, KENNETH A. DODGE, MICHELLE FINE, ADRIANA GALVÁN, MARGO GARDNER, CHARLES F. GEIER, FRANCES E. JENSEN, JACQUELINE MATTIS, PEDRO NOGUERA, BRUCE D. PERRY, AND VINCENT SCHMITHORST IN SUPPORT OF PETITIONERS in the above-captioned case was served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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Sworn to and subscribed before me this 17th day of January, 2012.

CHRISTOPHER R. DORSEY
NOTARY PUBLIC
District of Columbia

My commission expires June 14, 2013.

No. 10-9646 & No. 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER,
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On Writs of Certiorari to the Alabama Court of Criminal Appeals & Arkansas Supreme Court

BRIEF OF *AMICI CURIAE* J. LAWRENCE ABER, MARC S. ATKINS, CAMILLA P. BENBOW, MARY M. BRABECK, JANE C. CONOLEY, KENNETH A. DODGE, MICHELLE FINE, ADRIANA GALVÁN, MARGO GARDNER, CHARLES F. GEIER, FRANCES E. JENSEN, JACQUELINE MATTIS, PEDRO NOGUERA, BRUCE D. PERRY, AND VINCENT SCHMITHORST IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,758 words, excluding the parts of the document that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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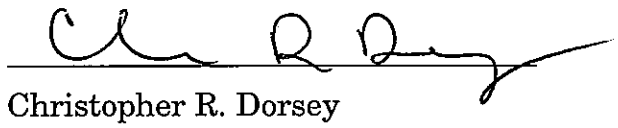

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