No. 11-400

In the Supreme Court of the United States

STATE OF FLORIDA, ET AL.,
Petitioners,
v.
U.S. DEPT. OF HEALTH & HUMAN SVCS., ET AL.
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* TEXAS PUBLIC POLICY FOUNDATION AND 36 TEXAS STATE LEGISLATORS SUPPORTING PETITIONERS ON MEDICAID

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QUESTION PRESENTED

Whether the Medicaid expansion provisions of the Patient Protection and Affordable Care Act are impermissibly coercive of State governments.

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INTEREST OF *AMICI CURIAE*[1]

Title II of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "ACA")[2] contains Medicaid expansion provisions that will dramatically increase the fiscal burdens on States while drastically limiting their regulatory autonomy in providing healthcare. These burdens will fall disproportionately on Texas, where General Revenue Medicaid spending is projected to increase under the ACA by 48.7 percent in the first ten years, more than in any other State. Jagadeesh Gokhale, *The New Health Care Law's Effect on State Medicaid Spending*, April 6, 2011, at 6.[3]

The mission of the Texas Public Policy Foundation (TPPF) is to defend liberty, personal responsibility, free enterprise, and limited government in Texas and in the nation as a whole. Because these goals will be substantially

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[1] Pursuant to this Court's Rule 37.2(a), *amici* State that all parties have lodged blanket consents. Pursuant to Rule 37.6, *amici* State that no part of this brief was authored by any party's counsel, and that no person or entity other than *amici* funded its preparation or submission.

[2] Citations herein are to the "consolidated print" of the ACA, P.L. 111-148 as amended by P.L. 111-149.

[3] Available at http://www.cato. org/store/reports/new-health-care-laws-effect-State-medicaid-spending-study-five-most-populous-states.

undermined by the Medicaid expansion provisions of the ACA, TPPF has an interest in this Court's determination of the validity of those provisions, and urges this Court to invalidate those provisions under the United States Constitution.

The remaining *Amici Curiae* are members of the Texas House of Representatives seeking the invalidation of the Medicaid expansion provisions of the ACA in the hopes of remaining able to represent their constituents.

SUMMARY OF THE ARGUMENT

This case raises the most profound questions of federal-State relations since the New Deal constitutional settlement of the 1930s. That settlement held that the federal government could regulate first and foremost those matters that fell within a broad reading of the Commerce Clause. But it also recognized that the States were coordinate sovereigns that enjoy their independent place within the federal system.

That position has been recognized in recent years in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), both of which limit the ability of the federal government to dictate the actions of either the State legislature or the State executive. The level of federal intrusion into State activities was relatively modest in both cases. The first held that the federal government could not force the States to take title to

nuclear wastes. The second held that the federal government could not order State officials to conduct background checks on gun applicants. Yet both mandates were struck down for the threat they posed to the independent, sovereign status of the States.

That status is compromised to a far greater extent by Title II of the ACA, which combines the powers to tax and to spend to clobber States into submission. No matter what alternative they choose, there will be a substantial likelihood that the States shall be unable to comply with either of the two prongs of Title II and still be in a position to raise the revenues they need to discharge their essential police-power obligations. It is that Hobson's choice that requires the Court to strike down Title II of the ACA.

The first alternative given to the States is to continue to receive federal payments under the Medicaid program to cover their current obligations. But if they do so, they undertake at their own cost an extensive new set of obligations. Inter alia, they must set up an administrative apparatus capable of servicing the large population of low-income citizens under the program at State expense. The federal government has made no systematic effort to quantify the size of these financial obligations. Nor has it determined whether the States will be able to raise the revenues to discharge them while

maintaining the core functions reserved to them under our system of dual sovereignty.

The second alternative leads to equally impermissible results. It allows the States to opt out of the current Medicaid program, but it continues to impose on its citizens their current tax obligations to fund the nationwide system of Medicaid. The State that grasps this horn of the dilemma will know that its citizens will be heavily taxed for the benefit of citizens in other States. Those continuing tax burdens will in turn preclude any opting-out State from imposing the large tax increases it will need to maintain its current level of support for its Medicaid population, most of whom are subject to the individual mandate, while discharging its other obligations.

This massive frontal assault to State sovereignty thus makes Title II of the ACA more vulnerable to attack than the modest programs that were invalidated in *New York* and *Printz*. It also explains why this case is easily distinguishable from the two cases on which the government will rest its case here. The modest 5% of revenues withheld from federal highway programs in *South Dakota v. Dole*, 483 U.S. 203 (1987), for States that did not raise their drinking age to 21 was a mere pinprick in the side of State government. The federal tax on employers that this Court upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), posed no threat to State autonomy because it authorized each

State to establish its own unemployment-compensation programs, by refunding to any State that did so 90 percent of the federal tax it collected.

The key precedent of this Court for understanding the scope and limits of the spending power is still *United States v. Butler*, 297 U.S. 1 (1936). That case stands for the proposition that the power to tax and spend for the general welfare found in Article I, Sec. 8, cl. 1 does not allow the federal government to use its power to tax and spend as "the instrument for total subversion of the governmental powers reserved to the individual states." *Id.* at 75. The Congress may have the power under Article I, Section 8, Clause 1 to tax and to spend to "provide for the general Welfare of the United States," *id.* at 65, but it cannot use those two awesome powers in combination to undercut the ability of States to discharge their essential functions. To see why, note that the constitutional position would not change at all if the taking title obligation in *New York*, or the State police obligation in *Printz*, were attached to spending bills that forced the States to surrender billions of dollars if they did not assume these modest obligations. The federal government may not, within our system of federalism, "impose its policy preferences upon the States by placing conditions upon the return of revenues that were collected from the States' citizenry in the first place." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (1997) (Luttig, J., dissenting). Were a State to refuse

to comply with Congress's conditions, "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." *Jim C. v. United States*, 235 F.3d 1079, 1083 (2000) (Bowman, J., dissenting). The larger the amount of the funds conditioned, the less realistic the State's purported option of turning the funds down.

Nor can the federal government salvage its Medicaid program by resorting to the elusive distinction between "encouragement" and "coercion." The Court of Appeals admitted its inability to find some line between them. *Florida v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1264-66 (11th Cir. 2011). But wherever that precise line is drawn, any comprehensive scheme that makes it impossible for a State to preserve its fiscal independence no matter which horn of the dilemma it grasps has to be regarded as "coercive" under *Dole*. If the federal government wants to extend its welfare obligations to the extent proposed, let it do so through direct taxation and expenditures. It cannot leave the States in financial distress, whether or not they decide to participate under Title II. The all-too-forgiving rational basis standard cannot let Congress unilaterally dismantle the fundamental features of our federal system by the artful contrivances of the ACA.

The federal government's sledgehammer tactics illustrate anew how governments at all levels are all too willing to aggrandize powers in ways that undermine our constitutional order. Block the direct route of political abuse, and governments will look for novel ways to circumvent those restrictions. The spending power offers one dangerous strategy by which to circumvent the basic constitutional scheme. Absent a firm constitutional limit on Congress's ability to impose these same burdens through the spending power, all other efforts to constrain Congress and preserve Our Federalism would be for naught. A judicially enforceable outer limit on Congress's power to coerce States under the taxing and spending power is an irreducible constitutional imperative. If the ACA's heavy-handed expansion of Medicaid does not surpass that limit, no Act of Congress ever will.

ARGUMENT

I. Congress Cannot Use its Power to Tax and Spend to Subvert State Governments.

A. This Court's Spending and Taxing Decisions Recognize the Need to Preserve the Independence of State Governments.

Article I, Sec. 8 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general

Welfare of the United States." The existence of the spending power, however, does not nullify the limited nature of Congress's power generally. In *U.S. v. Butler*, 297 U.S. 1 (1936), the Court held unconstitutional certain taxes imposed on agricultural processing when the revenues collected were transferred to other farmers who agreed to reduce the acreage and crops under cultivation. The provision consciously imposed a federal cartel on agricultural production, which surely lay outside the powers of the United States before the transformative case of *Wickard v. Filburn,* 317 U.S. 111 (1942). Congress at that time could not restrict the acreage under production. Hence under the then regnant rule in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), it could not evade that restriction by substituting a tax for direct regulation. *Child Labor Tax Cases*, 259 U.S. 20 (1922). Accordingly, *Butler* observed that "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 I would become the instrument for total subversion of the governmental powers reserved to the individual states." 297 U.S. at 75. As *Butler* notes, even Hamilton and Story, both strong nationalists, "never suggested that any power granted by the Constitution could be used for the destruction of

local self-government in the states." *Id.* 297 U.S. at 77.

This logic remains impeccable today notwithstanding the broad expansion of the federal government under the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), and *Wickard*. So long as *United States v. Lopez*, 514 U.S. 549 (1995) places limits on the federal commerce power, conditional grants may not be used to work an end run around those limitations. As Justice O'Connor said in her dissent in *South Dakota v. Dole*, 483 U.S. 203, 216-17 (1987): "While *Butler's* authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power's breadth and its limitations remain sound."

Disregarding the nontextual limitations of *Butler* lets the federal government undermine State sovereignty by one simple strategy consistently applied. First, tax the citizens of any given State to raise money. Second offer to return that money to the State only if it lets federal preference override local ones on core matters of State policy. The Medicaid provisions of the ACA pose just that threat: any State that refuses to make extensive expenditures of its own revenues will watch helplessly as the tax revenues from its citizens are diverted to those states that comply with the conditions. Withdrawing from the federal program

leaves more revenues collected from its citizens for citizens of other states. Thus the Prisoner's Dilemma that forces all States to accept conditions that none of them want. This heavy-handed approach necessarily runs roughshod over the guarantees that the Tenth Amendment affords the States.

The risks of overreaching were evident enough in *New York v. United States,* 505 U.S. 144 (1992), where the Court struck down federal legislation that forced States to "take title" to unwanted nuclear waste products. The risks escalate exponentially when the entire system of State appropriations is put to a set of do-or-die choices by the ACA. As Justice O'Connor observed in *Garcia v. San Antonio Transportation Authority*, 469 U.S. 528, 588 (1984): "With the abandonment of *National League of Cities v. Usery*, 426 U.S. 833 (1976), all that stands between the remaining essentials of State sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." *Id.* at 588 (O'Connor, J., dissenting).

Her views moved out of dissent in *New York*, 505 U.S. at 144. Writing for the Court, Justice O'Connor struck down part of a federal law that required States either to take title to low-level radioactive waste generated within their borders, or else to regulate its disposal according to Congress's instruction. "In this provision," she wrote, "Congress has crossed the line distinguishing encouragement from coercion." *Id.* at 175. Congress could not force

states to choose between two alternatives neither of which Congress had the power to impose "as a free standing requirement." *Id.* "Accountability is . . . diminished when, due to federal coercion, elected State officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169. By definition any such "encouragement" diminishes a State government's responsiveness to local preferences in favor of national ones, regardless the degree.

The constitutional support of conditional federal grants grew still weaker in *Printz*, 521 U.S. at 898. Here, the Court struck down that part of the Brady Act that required State police to conduct background checks on prospective gun purchasers. The Court ruled that because the federal government cannot compel State governments to regulate, neither can it compel State officials in its executive branch to perform any particular function. *Id.* at 935. Justice Scalia, writing for the majority, rejected an balancing test as "inappropriate." "It is the *very principle* of separate State sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Id.* at 932 (emphasis in original, citations omitted).

Printz holds that if a federal law offends "the structural framework of dual sovereignty," *id.*, it is categorically unconstitutional. *Printz* revives the

core proposition that the federal and State governments may defend their independent operating powers under this nation's "structural framework of dual sovereignty." Justice Scalia hammered this point home by invoking the Necessary and Proper Clause as a *limitation* on the power of the federal government. *Id.* at 923-24. A law that violates the federal structure of the Constitution is not "proper" for carrying into execution any enumerated power, "and is thus, in the words of the Federalist, 'merely [an] ac[t] of usurpation' which 'deserves to be treated as such.'" Id. (alteration in original) (quoting The Federalist No. 33 (Alexander Hamilton). *Printz* teaches that all States must remain "independent and autonomous within their proper sphere of authority." *Id.* at 928. The ACA crosses that fixed and visible line.

Bond v. United States, 131 S. Ct. 2355 (2011), affirms that hard-edged view by giving citizens standing to challenge federal violations of State sovereignty. Justice Kennedy, writing for the majority, reiterated that "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Id.* at 2364 (quoting *New York*, 505 U.S. at 181). The partition of government authority into two units "protects the liberty of the individual from arbitrary power." *Id.* For the first time since the New Deal, the Court had finally and emphatically equated unbridled national majority rule with "arbitrary power." *Id.* If the "structural

framework of dual sovereignty" makes federalism an imperative bulwark against "arbitrary power," it does so whether the federal government overreaches through either its commerce or taxing power. Surely *New York* and *Printz* come out the same way even if each told the states to comply with its dictates on pain of losing all of its government funding for nuclear waste or gun control program.

More generally, if this Court holds that no conditional federal grant is coercive, then the only limits on the aggrandizement of federal power lies in the self-restraint of Congress—a commodity in very short supply. There is a close nexus between conditional grants and commandeering. What is needed is a clearer account of the permissible limits on government grants under *Butler* and *Dole*. In this inquiry, the one wrong answer is that the federal government can impose whatever limitations it chooses because the States must accept the bitter with the sweet. What is needed is some better metric to distinguish between permissible and impermissible conditions. Unless they are properly constrained, conditional grants pose a mortal threat to the diversity of responses that States can fashion for their own citizens.

B. The supposed distinction between the "denial of a gift" and the imposition of a "sanction" does not provide a suitable account of when the federal government can limit State powers to advance

federal purposes in ways that divert its citizens' tax dollars to other states.

The critical distinction between gifts and coercion has nothing to do with size of any attached condition, either in absolute or in relative terms. Rather, that distinction rests on whose resources are at risk when the condition is imposed. It is one thing for a person to withhold a gift of his own cash, property or services. After all, anyone can make a gift of his own money to another, either absolutely or on condition. Indeed to deny the possibility of a conditional gift (I will only make you a gift so long as you live in Texas) is to put all potential donors in an impossible all-or-nothing position. Similarly, the law recognizes the parallel distinction between a bargain and a sanction, for all bargains necessarily depend on mutually interacting conditions. Thus A may sell his property to B only on condition that he is paid $1,000 in cash first. If condition were regarded as illicit, commerce would grind to a halt.

The true distinction between gifts and sanctions thus rests on different grounds, namely, whether the property, service or cash of A was initially taken from B. It is not permissible for A to take B's car, only to demand $20,000, its market value, before it is returned. Those two steps of the transaction must be viewed as one, after which it now appears that B has been forced to pay A $20,000 just to end up where he began. But if A demands that B pay the cost that A incurred in order to care for B's straying

cattle, the condition is now legitimate because the amount of amends is limited to the cost of providing services to B. *See*, *Marshall v. Welwood*, 38 N.J.L. 339 (1876), for the application of these rules in connection with cattle trespass. The same insistence informs the law of unconstitutional conditions. The demand is no longer naked extortion because it is tied to the cost of providing legitimate services.

When that justification is missing, A's threat remains illicit even if he does not seek to extort all that he can from B. Reducing the monetary demand for the return of a stolen object does not turn coercion into a gift. If it did, then the thief's royal road to coercion is to moderate his cash demands to a fraction of full value in negotiating the return of stolen property to its true owner.

These distinctions have constitutional dimensions. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court recognized that it was appropriate to condition building permits on the willingness of the owner to compensate the State for the impact of its development. But it could not condition those permits on the willingness of the landowner, without justification, to rectify harms caused exclusively by other individuals. "Under the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the

government where the benefit sought has little or no relationship to the property." Id at 385.

Texas and other States that oppose the Medicaid expansion provisions of the ACA are required either to spend their own money for causes they think unwise or surrender tax dollars to citizens of other States. Neither falls into the class of justifiable conditions. It is precisely because the funds in question come from their own residents that the threat of losing *any* sum of money to other States is, categorically, a sanction. The vast size of these proposed transfers only compounds the damages from the underlying illicit conduct. It should be evident that residents of Texas may well want nothing to do with the State policy preferences of California or New York. Conditional federal funding should not allow the latter's preferences to supersede those of the citizens of Texas with respect to wealth generated by the citizens of that State in areas that are within the State's proper sphere of authority, *Printz*, 521 U.S. at 928. The residents of Texas can vote their own State legislators and representatives in Congress out of office. But they cannot vote the legislators and representatives of other States out of office. Strip states of the power of their own purse, and by indirection vest that power in the citizens of other states, and the American constitutional ideal of free, equal and independent State sovereigns is brought to an end.

In addition, using conditional federal grants also imposes an unnecessary uniformity in areas that are best left State regulatory discretion. The ACA necessarily undercuts the State autonomy needed to function effectively as the "laboratories" of democracy. *New State Ice Co, v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). All too often, it is not evident what solution works best in any given area. Experimentation and interstate competition offer the best road to discovery. This is especially true in health care, which is marked by a dizzying diversity of approaches. It is desirable in our constitutional law for a minority of States to pursue those policies that they think will generate competitive advantage over other States. *See*, e.g., Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 Annals 104, 109 (March 2001). Races to the top are good, even if races to the bottom are not.

Sorting out permissible from impermissible conditions involves the heavy overlap between public and private law set out above. Our Constitution is laced with terms like "freedom," "private property," and "contract," drawn from private law. Thus in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court wrote: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law—rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits."

Likewise, the term "coercion" appears nowhere in the Constitution. Yet it lies at the core of the debate over unconstitutional conditions.

The prudent thief gives the victim the familiar ultimatum: your money or your life. If the offer is accepted, the threatener escapes prosecution for murder and the victim escapes losing his life. Both sides therefore gain from the surrender of the money.

Yet these coercive deals pose profound threats to the social order. In the ordinary bargain, every person may walk away unless the other agrees to his demands, withholding property that he already owns. The workable and categorical distinction between my property and yours is what allows ordinary bargaining to take place. In contrast, in the common case of duress the victim is given a choice between two things, your money or your life, *both of which he is entitled to as of right*. The different distribution of property holdings separates the two cases.

The same situation arises in contract settings. Suppose that A gives his cloths to B for cleaning for $10. Once cleaned, B demands $15 before their return. For clothes worth more than $15, A will acquiesce for the short term gain. But if this threat works, A can never again entrust his cloths for

cleaning to the tailor. To preserve the operation of markets, the law lets A sue B for $5 even if he cannot forcibly grab back his clothes. Once again the forced choice between two entitlements marks the case as one of coercion, whether B demands a penny or a thousand dollars extra for the return of goods.

These well-settled contract principles teach how to impose meaningful limits on Congress's exercise of its spending power. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Necessarily, formal compliance with the rules of offer and acceptance does not create a binding contract if a contracting party uses its dominant economic position to extract unfair concessions that it could never obtain in a competitive market. The closeness between the private law of duress and the doctrine of unconstitutional conditions is made evident in *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942), where the question was whether, at the height of World War I, the United States government could set aside its shipbuilding contracts on grounds of duress because its trading partner Bethlehem occupied a dominant position in the shipbuilding industry. The Court rejected that claim, but the dissent of Justice Frankfurter perceptively addresses the relevant issues:

> Fraud and physical duress are not the only grounds upon which courts refuse to enforce

> contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other. . . . It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.

Id. at 326–27 (Frankfurter, J., dissenting) (internal quotations omitted). These principles apply with equal force, when the federal government holds all the high cards because of its the undisputed power to tax.

Bethlehem's account of voluntariness has constitutional dimensions. "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress's power to legislate under the spending power [. . .] rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17). These observations give workable form to the observation in *Dole* that a valid acceptance must be voluntary "not merely in theory but in fact." 483 U.S. at 211-12. State acceptance cannot be voluntary when the federal government abuses its admitted powers to

tax and spend. *Dole* seeks to isolate that point when action becomes "so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (citing *Steward Machine Co.*, 301 U.S. at 590). But the key question is not the size of the imposition but the justification for its use. The justification was wholly lacking when Congress sought to attach *any* condition on grants that allowed it to dictate how States regulated the consumption of intoxicating spirits, a subject denied to the federal government by the 21st Amendment.

That public justification is also missing for Title II of the ACA. In those cases, the conditions are not imposed to require restitution of benefits or compensation for harm inflicted. Rather Title II uses artifice to govern State expenditures of their own funds, an action which under *New* York *and Printz* Congress could not compel directly.

Given the weakness of its theoretical foundations it is no surprise that the cases following *Dole* cannot pinpoint "the point at which pressure turns into compulsion." *Id.* at 211 (quoting *Steward Mach. Co.* 301 U.S. at 590). Because *Dole* only asks whether a given condition weakens freedom of choice a little or a lot, it substitutes a distinction of degree when a distinction in kind is needed. *Dole* conflates different levels of coercion with an imaginary distinction between compulsion and encouragement.

This is a logical fallacy. If the penalty involved is miniscule, there is still a little pressure, and freedom of choice is lessened; if the penalty is enormous, the actor still has freedom to choose, notwithstanding the greater pressure. As with the victim and the robber, either there is coercion in both cases or there is coercion in neither. It is no wonder that there have been academic calls for the reconsideration of *Dole*. *See* Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195–96 (2001).

C. The Act's Medicaid Expansion Provisions Coercively Change the Conditions Attached to Medicaid Funds in Mid-Stream.

Replacing Medicaid matching funds would require raising states to raise their general revenues by an average of 38 percent. Edmund F. Haislmaier, *Quantifying Costs to States of Noncompliance with the PPACA's Medicaid Expansion* 4, Heritage Foundation (January 12, 2012). As argued above, justification not size matters. But even by looking solely at the latter, this program coerces each State to forego funding its programs on education, environment, and a thousand other areas to meet the insatiable demands of the federal tax collector. Let the government replicate this program in other areas of traditional State control, and soon federal mandates will fully govern the expenditure of all State revenues.

The power of these conditions, moreover, is compounded because federal government now threatens to pull the plug on an existing program in which the States have already heavily invested. Indeed, this bold stroke involves the same misuse of power found in the duress of goods case outlined *supra* at 19. This Court has suggested that the freedom to comply or not comply with federal conditions must "remain[] the prerogative of the States not merely in theory but in fact." *Dole*, 483 U.S. at 211-12. Midstream changes are inconsistent with the preservation of State prerogatives. Recall that in *Butler*, 297 U.S. at 1, the Court explained the coercive effect of the Agricultural Adjustment Act of 1933: "The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. […] This is coercion by economic pressure. The asserted power of choice is illusory." 279 U.S. at 70-71.

Notwithstanding the harrowing risks of imposing its Medicaid program, the federal government has never had to explain which, if any, of its many conditional spending programs would be jeopardized by applying the rules dealing with coercive conditions parallel to the common law rules on restraint of trade. *See*, *supra* at 27-28. We cannot envision which laws these might be. Since the risk of excessive invalidation is at a minimum, this Court should stop this Medicaid expansion before it

allows the federal government to start usurping the powers of the States on a routine basis.

Our Federalism cannot long endure if its sole protection lies in Congress's "underdeveloped capacity for self-restraint." *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting). The vital constitutional balance must not be circumvented by repeated and ill-considered invocations of the federal spending power. Let that State of affairs become the new status quo and all limits on Congress's power are at an end. Anything that Congress could not achieve directly could now be achieved indirectly by attaching onerous conditions on federal funds that it raises through the use of its taxing power.

The demise of Our Federalism carries with it ominous consequences for the vitality of the nation. Federalism ensures that "States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). That uncertainty is most definitely the norm in the provision of health care to the needy. The perils to vigorous State level innovation are still more dire for a spending program like Medicaid which is so massive that Congress and courts alike have come to recognize that "a complete withdrawal of the federal prop in the system … could seriously cripple a State's ability to function," *Harris v. McRae*, 448 U.S. 297, 309 n.12 (1980) (internal quotation marks omitted). The implications of this

vast imposition of federal control over traditional State activities are at best dimly understood. This Court should not let the Congress roll the dice in a single, ill-conceived experiment that will of necessity squash the multitude of intelligent experiments that routinely go on at the State level. It is not tenable for the Court to accept the federal government's naked assertion of unbounded power when its lawyers say, in ignorance of the historical traditions that have made this country great, that "Congress should be able to place any and all conditions it wants on the money it gives to the states," 648 F.3d 1267. Not if Our Federalism is to survive.

II. In Determining Which Conditions Constitute Coercion, Courts Should Be Guided by a Rule of Reason That is Widely Used in other Areas.

It is now possible to bring together the previous arguments into a single synthesis that guides the resolution of this case. It is widely understood that virtually all government appropriations are subject to conditions. It could hardly be otherwise. As noted above, the use of conditions imitates the results found with complex contracts in competitive markets where firms will only pay money for the goods and services that they desire, not just those goods and services that a vendor wishes to supply. Typically, the conditions will survive only if they work to increase the overall efficiency of the cooperative arrangements between two sides.

The one notable exception to this rule, hinted at in *Bethlehem Steel*, is for contracts in restraint of trade, which have long been condemned at common law. The basic outlines of that prohibition are found in *Mitchell v. Reynolds*, (1711) 24 Eng. Rep. 347 (Q.B.) 349; 1 P. Wms. 181, 186–87, which dealt with the ability of a buyer or an employee to engage in work in competition with his seller or employer once their relations are terminated. In this context, the general presumption—that the parties are free to strike whatever deal they chose for themselves—is displaced by a "rule of reason" under which courts examine any conditions that restrict the scope, time, and location the non-compete covenant. *See*, *e.g.*, *Jak Productions, Inc. v. Wiza*, 986 F.2d 1080, 1085 (7th Cir. 1994).

Two concerns drive the judicial oversight under this rule of reason, both of which inform the correct interpretation of *Dole*. The first is that some restrictions must be upheld if either business sales or employment contracts will work. No person will buy a business if he knows that his seller will go in competition with him the next day. Nor will any employer impart training and trade secrets to an employee who, upon quitting, could immediately compete with her the moment the employment is over.

Yet, by the same token, excessive restraints on any of the three dimensions of scope, time and geography could deprive consumers of the benefits

of a competitive market. *Mitchell*, 24 Eng. Rep. at 349-50. No per se rule of legality or illegality therefore works, just as no per se rule of legality is faithful to *Dole*. Faced with the need to draw intelligent lines, the rule of reason empowers courts seek the fine balance between excessive and insufficient restraints on trade. For a historical discussion, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960). To say that the rule of reason is unintelligible is to dismiss antitrust law as a futile gesture, which it is not. That same level of respect for the rule of reason is necessary to make the doctrine of unconstitutional conditions work.

The rules about contracts in restraint of trade, discussed in connection with *Bethlehem Steel*, 315 U.S. at 289, of necessity require a distinction between conditions that seek to lever the control over one market into the control of another. The standard government conditions that restrict work to the purposes of a grant pose no problem in this regard. National Science Foundation grants can limit the field of research undertaken by an investigator. A government grant for a new road could specify where it is to be built. Even under Medicaid, federal government conditions can stipulate that the moneys received should be spent on certain classes of patients or diseases. These routine conditions are utterly beyond challenge as unconstitutional.

In contrast, Title II's efforts to regulate State activities outside the scope of the moneys granted have rightly provoked intense objection from the States. Fully implemented, these conditions pose an intolerable risk to State solvency and to the capacity of the State to discharge its normal police power obligations. The long-standing judicial condemnation of contracts in restraint of trade carries over with full force to these conditions when incorporated into a government grant.

Congress surely acts without justification when it denies any noncomplying State all the Medicaid dollars needed to run their own programs, without reducing by a penny the tax burdens on its citizens. Stripped to its essentials, the only choice left to the States that cannot afford to lose a fortune in Medicaid payments is to assume huge new liabilities dictated to them by the federal government, which causes them to lose that same fortune in yet another way.

This power of the federal purse is awesome. The only constraint on the exercise of that federal power kicks in only when the cost of complying with these conditions exceeds the billions of Medicaid dollars that the federal government can deny any individual States. No one yet knows whether Title II reaches that dangerous level. But what is known is that these onerous conditions have become wholly intolerable because the Medicaid provisions of Title II are linked to the individual mandate that Title I

imposes on virtually all citizens. Without a Medicaid program in place, States will be put in the impossible position of having their neediest citizens lack the funds needed to comply with the federal mandate, thereby subjecting States with additional fiscal burdens.

III. *Dole* Has Failed to Offer States Any Protection from Federal Coercion.

A. None of the Four General Restrictions on the Spending Power Articulated in *Dole* Offer Any Protection from Coercive Grants.

The need for this rule of reason analysis becomes clear by an examination of the supposed limitations on the federal conditional spending power. The Court in *Dole* observed, "The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases." *Dole*, 483 U.S. at 207. The Court listed four: (1) the exercise of the spending power must be in pursuit of "the general welfare"; (2) the conditions must be unambiguously stated; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions cannot require the States to do something that is otherwise unconstitutional. *Id.* at 207-08.

None of these limits offer effective protection for State sovereignty.

First, in applying the "general welfare" prong, it is a mistake under *Butler* for federal courts to "defer substantially" to the judgment of Congress. Broad deference is inappropriate so long as Courts are charged with confining the federal government to its appropriate role. A high level of deference leads to the untenable position that these structural restraints are not judicially enforceable at all. *Id.* at 207 n.2. Behind the façade of *Dole* hides the federalism doctrine of *Garcia*.

Second, the restriction that conditions be unambiguously stated is orthogonal to the structural issues involved here. It merely sets a standard for statutory drafting. It does not advance any theory of justifiable conditions.

Third, requiring each condition bear a reasonable relation to the federal interest in a national project or program, has the potential for real teeth, as suggested by Justice Sandra Day O'Connor's dissent in *Dole*. It surely justifies all conditions that are use to constrain harms or to require offsets for benefits conferred. It is that last point that legitimates those conditions on how the states may spend the money supplied in a particular federal grant (which O'Connor thought permissible) and conditions that demand a State adopt a regulatory scheme contrary to its own interests (which Justice O'Connor thought impermissible). *Id.* at 216. The federal demand in *Dole* that states regulate the drinking age has

nothing to do with the expenditure of federal highway funds.

Fourth, the bar against requiring states to do anything that is otherwise unconstitutional, is logically of no help because here there is no question of the validity of State policies; the challenge is rather the validity of the federal conditions that Congress creates for the purpose of shaping State policies.

B. The Ostensible Distinctions Between Gifts and Coercion, or Encouragement and Coercion are Conceptually Untenable

Other attempts to resuscitate *Dole* also fail. Thus *Dole*'s reliance on *Steward Machine* for the proposition that conditions may not pass "the point at which pressure turns into compulsion," 483 U.S. at 211 (1987) (quoting *Steward Mach. Co.*, 301 U.S. at 590), flounders precisely because *Steward* pays no attention to the distinction between the size of the condition and the threat it poses to Our Federalism. Instead, Justice Cardozo sought to draw this distinction: "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible." 301 U.S. at 589–90.

Yet any purported similarity between motive or temptation and coercion is not the issue. What matters is the potential justification for the conditions imposed. By that test, the outcome in *Steward* is perfectly defensible without any deeper philosophical speculations. The key element in *Steward* was that the State imposed a tax to fund unemployment programs for individual citizens of that State. But it was prepared to return to each State 90 percent of the revenues collected so long as the State set up a similar program of its own. It is instructive to note that Justice Cardozo did not seek to overturn *Butler,* but scrupulously distinguished it on the ground that the expansion of the commerce power in *Jones v. Laughlin Steel* had knocked the props out from under *Butler*'s narrower reading of the Commerce Clause. *Steward's* return of the money to any State on setting up its unemployment program was not accompanied by any demand that these funds be spent on collateral purposes. Quite the contrary, the program minimized the cross-State transfer payments that make Title II the ACA a threat to the stability of the overall federal system.

C. Subsequent Readings of *Dole* in the Lower Courts Have Mistakenly Rendered the Doctrine of Unconstitutional Conditions a Dead Letter.

Amici are unable to find a single federal court of appeals case applying *Dole* that wasn't on appeal from the trial court's final judgment on either

motion to dismiss or summary judgment. In other words, *Dole* has never led to a factual inquiry into the question whether the penalties involved in a conditional grant program "pass the point at which pressure turns into compulsion." 483 U.S. at 211. *Dole* stands for the proposition that the difference between encouragement and coercion is a matter of a degree. But the logical fallacy of that proposition is so profound that, apparently, no federal court has even tried to devise a standard for divining whether or where the line between encouragement and compulsion has been crossed.

In the decision below, the Eleventh Circuit acknowledged the internal difficulties of *Dole*. It wrote that this Court's coercion doctrine "is an amorphous one, honest in theory but complicated in application. But this does not mean that we can cast aside our duty to apply it; indeed, it is a mystery to us why so many of our sister circuits have done so." *Florida*, 648 F.3d at 1266. But it should come as no mystery why so many federal courts have "cast aside" their duty to apply *Dole;* it is virtually impossible to apply honestly or even coherently. For example, in *Pace v. Bogalusa City Sc. Bd.*, 403 F.3d 272 (11th Cir. 2005) Judge Bolusa asked, "If not now, and on this showing, when, on what showing, will federal grants be deemed unconstitutionally coercive?") (Bolusa, J., dissenting) (internal quotations omitted).

Because *Dole* wrongly turns on a question of degree, the decision cannot help determine where to draw the line. Since some conditions are obviously good, *Dole's* progeny have taken the easy way out by gutting the doctrine on appeal from either motions to dismiss or from summary judgment in the trial court. In no case has any district court ordered a full trial even when there were genuine disputes over matters of material fact on the question of whether the burden of the condition were too great. Those cases cannot be true to *Dole's* larger purpose, if all challenges to particular legislation were resolved in favor of the federal government as a matter of law *every time*, even when with material facts in dispute.

For example, just two years after *Dole* the Ninth Circuit rejected a coercion challenge against a federal law that conditioned 95 percent of federal highways funds on the states' acceptance of a national speed limit, in terms that seemed to reject *Dole* outright:

> [C]an a sovereign State which is always free to increase its tax revenues ever be coerced by the withholding of federal funds -- or is the State merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a State's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and State governments.

Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989). Other cases have taken the same line. Thus in, *California v. United States.*, 104 F.3d 1086 (9th Cir. 1997), the Court opined that "to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record." Similarly in *Koslow v. Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002) the Third Circuit held that the states' power to tax makes them "more than capable of preventing undue coercion through economic encouragement."

In short, despite its promising rhetoric, the federal courts have unambiguously tossed aside *Dole*'s coercion doctrine. Walking in the footsteps of *Garcia*, they have left the structural framework of federalism at the mercy of the federal taxing and spending power. In so doing, they have also ditched the doctrine of unconstitutional conditions. *See*, *Skinner*, 884 F.2d at 448; and *Okla. v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981). Such an outcome may have been unsurprising before *New York* and *Printz*, but those cases teach us that the structural framework of dual sovereignty is a judicially enforceable imperative of our Constitution.

D. The Lower Court Decisions In the Instant Case Have Misconstrued the Lessons of *Dole.*

In the trial court below, Judge Roger Vinson upheld the Medicaid provisions. 780 F. Supp. 2d 1256 (N.D. Fla. 2011). He confirmed the results

noted above that that no federal court has ever found coercion in any case, no matter how onerous the conditions: "every single federal Court of Appeals called upon to consider the issue has rejected the coercion theory as a viable claim." *Id.* at 1268. Once the size of the conditions no longer mattered, Judge Vinson found it easy to ignore the many factual questions left unanswered on "on economic assumptions, estimates, and projections many years out." *Id.* at 1267. In light of the failure of federal courts to develop any applicable coercion standard, he concluded the government was entitled to judgment as a matter of law. *Id.* at 1269. His candid opinion was tantamount to admitting that *Dole* has no teeth at all, no matter how egregious the behavior of the federal government. Any inquiry as to when government actions "pass the point at which pressure turns into compulsion" no longer matters in either in theory or in fact. *See Dole*, 483 U.S. at 211-12.

The Eleventh Circuit affirmed that the proposition that Judge Vinson was right to decide the case without looking at its facts. Its own confession of intellectual impotence first acknowledged the duty to apply *Dole*, only to confess inability to do so:

> To say that the coercion doctrine is not viable or does not exist is to ignore Supreme Court precedent, an exercise this Court will not do . . . . If 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.

648 F.3d at 1266–67 (emphasis added).

Nonetheless, *each* of the reasons advanced by the Court of Appeals fails to negate the powerful case against Title II of the ACA.

The first reason developed by the Eleventh Circuit to salvage Title II states that "the Medicaid-participating states were warned from the beginning of the Medicaid program that Congress reserved the right to make changes to the program." *Id.* at 1267. But surely those warnings are of no consequence in this particular case, because at no point did they give the States any extra flexibility to escape the clutches of Title II of the ACA. The thief may give a warning that he will kill if his requests are not honored, but that choice itself, as Justice Holmes noted in *Union Pacific Railroad Co. v. Public Service Comm'n of Missouri*, 248 U.S. 67, 70 (1918), is evidence of the use of duress, not its negation. If they accept the grant, they are hit with onerous new obligations. If they reject the grant, their citizens still pay taxes into the federal treasury that work to the exclusive benefit of citizens of other States. In an ordinary contract situation, a power to alter or amend an established program is never regarded as a license for a party to change the rules of the game

in whatever fashion it sees fit. No amount of notice renders a coercive choice any less coercive.

Second, the Eleventh Circuit underestimated the perils to the States when it claimed that "the federal government will bear nearly all of the costs associated with the expansion." 648 F.3d at 1267. That passage rings false because, if the burdens were as light as the Eleventh Circuit suggested, why such strong opposition from such a large number of States? Worse still, the point is factually incorrect. It ignores the heavy costs associated with new enrollees, the expanded costs of existing enrollees, and the large administrative costs needed to put the program into place.

Third, the Eleventh Circuit notes that the States have "plenty of notice"—four years in fact, from the time of signing—to decide whether to participate in the program. 648 F.3d at 1268. But this point just repeats in different guise the mistake in the Eleventh Circuit's first point. There is plenty of time, but nothing that can be done during that interval to escape the crushing burden under Title II.

Fourth, the Eleventh Circuit notes that "while the State plaintiffs vociferously argue that states who choose not to participate in the expansion will lose all of their Medicaid funding, nothing in the Medicaid Act states that this is a foregone conclusion. Indeed, the Medicaid Act provides HHS

with the discretion to withhold all or merely a portion of funding from a noncompliant State." 648 F.3d at 1268. But the discretion conferred on HHS makes matters worse. It may be used to favor one State at the expense of another in ways that accentuate the wealth transfer among States.

In short, the Eleventh Circuit has fired blanks. Owing to the lack of a persuasive justification for the conditions imposed, "the point of coercion is automatically passed," *College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 687 (1999), when Congress premises a comprehensive regulatory scheme on the understanding that States have no choice but to participate. "In such circumstances, if in no others, inducement or persuasion" necessarily goes "beyond the bounds of power." *Steward Machine*, 301 U.S. at 591. Congress knew this well, for at no point did it even think of a fallback position for states that did not want to join the program.

CONCLUSION

For the foregoing reasons, this Court should rule that the Medicaid expansion provisions of the ACA are impermissibly coercive of State governments, and strike them down.

Respectfully submitted,

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APPENDIX

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APPENDIX A

A total of thirty-six Members of the Texas House of Representatives have joined this brief as *amici curiae*. They are:

Rep. Jimmie Don Aycock, 54th district

Rep. Dennis H. Bonnen, 25th district

Rep. Cindy Burkett, 101st district

Rep. Angie Chen Button, 112th district

Rep. William A. Callegari, 132nd district

Rep. Warren Chisum, 88th district

Rep. Brandon Creighton, 16th district

Rep. Drew Darby, 72nd district

Rep. John E. Davis, 129th district

Rep. Joe Driver, 113th district

Rep. Rob Eissler, 15th district

Rep. Gary Elkins, 135th district

Rep. Dan Flynn, 2nd district

Rep. Richard L. Hardcastle, 68th district

Rep. Patricia F. Harless, 126th district

Rep. Linda Harper-Brown, 105th district

Rep. Jim L. Jackson, 115th district

Rep. James L. Keffer, 60th district

Rep. Tim Kleinschmidt, 17th district

Rep. George Lavender, 1st district

Rep. Ken Legler, 144th district

Rep. Tryon D. Lewis, 81st district

Rep. Sid Miller, 59th district

Rep. Jim Murphy, 133rd district

Rep. Ken Paxton, 70th district

Rep. Charles Perry, 83rd district

Rep. Jim Pitts, 10th district

Rep. Connie Scott, 34th district

Rep. Ralph Sheffield, 55th district

Rep. Todd Smith, 92nd district

Rep. Wayne Smith, 128th district

Rep. Larry Taylor, 24th district

Rep. Raul Torres, 33rd district

Rep. Paul D. Workman, 47th district

Rep. William Zedler, 96th district

Rep. John Zerwas, 28th district