



March, 2012

**The Health Reform Law's Medicaid Expansion:
A Guide to the Supreme Court Arguments**

In the coming weeks, the U.S. Supreme Court will consider the constitutionality of the Affordable Care Act's (ACA) Medicaid expansion. This provision requires states that choose to participate in the Medicaid program to cover nearly all non-disabled adults under age 65 with household incomes at or below 133% of the federal poverty level (FPL) as of January, 2014.¹ While many observers anticipated that the Court would agree to decide the constitutionality of the ACA's individual mandate,² the Court's decision to also rule on the Medicaid expansion was not widely expected, as the only federal appeals court to consider the issue upheld the provision. A ruling on the Medicaid expansion could have far-reaching impacts on the present and future contours of the Medicaid program, the people it is scheduled to serve, and Congress's power to attach conditions to the federal funds it provides to states. This policy brief provides a short background on the ACA's Medicaid expansion, explains the lawsuit pending at the Supreme Court, summarizes the legal and policy arguments that are being made, and highlights potential outcomes of the Court's decision.

Background

The Medicaid Program

The ACA increases access to affordable health insurance in part by expanding eligibility for Medicaid benefits. Medicaid provides health insurance coverage to people with low incomes and is jointly funded by the federal and state governments. The Medicaid program is voluntary for states: states are not required to participate, but all states currently do. If a state chooses to participate in Medicaid, there are a number of options that it can elect, but it must follow certain federal rules.³

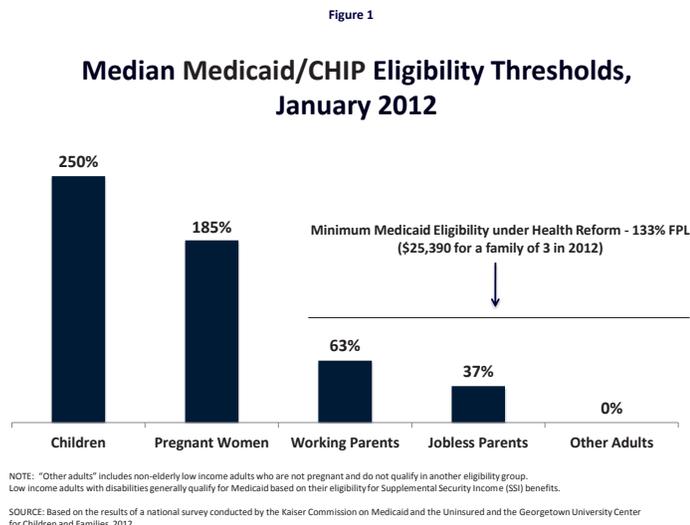
One of the federal requirements (i.e. conditions that Congress has placed on the states' receipt of federal Medicaid funds) concerns the groups of people who must be covered by a state's Medicaid program. The original statute established mandatory coverage requirements, which have been expanded by Congress several times since the program's 1965 enactment. The current law mandates coverage for the following principal eligibility groups: pregnant women and children under age 6 with family incomes at or below 133% FPL (\$14,856 per year for an individual and \$30,657 per year for a family of four in 2012), children ages 6 through 18 with family incomes at or below 100% FPL, parents and caretaker relatives who meet the financial eligibility requirements for the former AFDC (cash assistance) program, and elderly and disabled individuals who qualify for Supplemental Security Income benefits based on low income and resources.

The federal government guarantees matching funds to states for the costs of furnishing Medicaid covered services to eligible individuals.⁴ The share paid by the federal government, known as the federal medical assistance percentage (FMAP), is calculated annually based on a state's average per capita income, relative to the national average. States with lower average per capita incomes have

higher FMAPs. For 2012, the FMAP varies across states from a floor of 50 percent to a high of 74.73 percent.

The ACA’s Medicaid Expansion

The ACA further expands the Medicaid program’s mandatory coverage groups by requiring that participating states cover nearly all non-disabled adults under age 65 with household incomes at or below 133% FPL beginning in January, 2014. This expansion mirrors the prior expansions for pregnant women and children in that it describes a category of people for whom coverage is required (all low income non-elderly adults, rather than the categories previously identified such as parents, pregnant women, and adults with disabilities) and sets minimum financial eligibility levels. While some states have opted to expand coverage to adults at higher incomes, many states currently do not cover adults without dependent children at all and cover parents only at much lower income levels than the ACA’s minimum, as illustrated in Figure 1.⁵



What makes the ACA’s Medicaid expansion different from prior expansions is the federal government’s funding. The ACA provides that the federal government will not cover its normal share, but rather 100% of the states’ costs of the coverage expansion from 2014 through 2016, gradually decreasing to 90% in 2020 and thereafter. According to the Congressional Budget Office (CBO), by 2019, the ACA’s Medicaid expansion will cover an estimated 16 million uninsured, low-income Americans who would otherwise remain uninsured.⁶

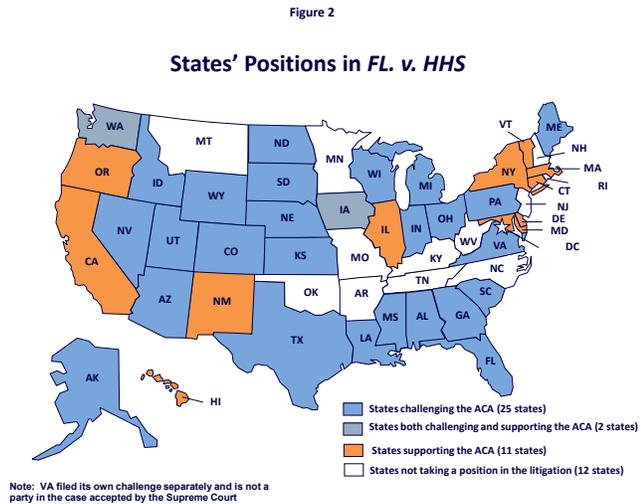
The ACA does not change the existing provisions in the federal Medicaid Act that grant authority to the Secretary of the Department of Health and Human Services (HHS) to withhold all or part of a state’s federal matching funds if she determines that the state is out of compliance with federal requirements.⁷ This remedy for noncompliance, which can be imposed only after notice and the opportunity for a hearing and is subject to judicial review, is rarely invoked. The Secretary has the discretion to withhold a state’s entire federal Medicaid grant or only the portion of the federal grant related to the state’s noncompliance. The Secretary never has withheld a state’s entire Medicaid grant as a penalty for noncompliance with federal requirements.

The Lawsuit Challenging the ACA’s Medicaid Expansion

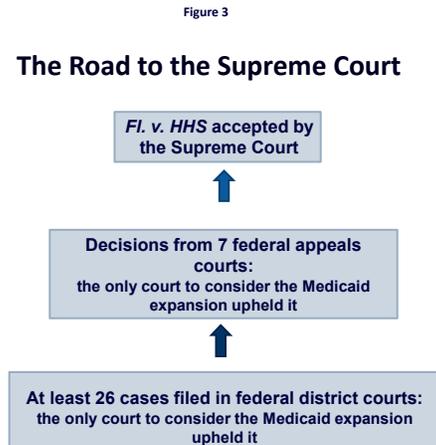
On March 23, 2010, the day that President Obama signed the ACA, the state of Florida filed a lawsuit in federal district court challenging the Medicaid expansion, among other provisions of the law. Florida is joined by 25 other states: Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa,

Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.⁸ These states are suing the U.S. Department of Health and Human Services (HHS), the federal agency charged with implementing and administering the Medicaid expansion. The case is known as *Florida v. HHS*.⁹

Another group of 13 states, including California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Vermont, and Washington, filed an *amicus* (“friend of the court”) brief supporting the Medicaid expansion in the Supreme Court. Two states, Iowa and Washington, are on both sides of the case in the Supreme Court, as their governors and attorneys general have taken opposite positions. Figure 2 illustrates the states’ positions in the Supreme Court litigation.



Although at least 25 other cases challenging various aspects of the ACA have been filed in federal district courts around the country since the ACA’s enactment,¹⁰ the Florida case is the only one that contends that the ACA’s Medicaid expansion is unconstitutionally coercive of states. In the Florida case, both courts that considered the Medicaid expansion, the Florida federal district court and the 11th Circuit Court of Appeals, upheld it. The case’s path to the Supreme Court is illustrated in Figure 3.¹¹



Congress’s Spending Clause Power to Place Conditions on Grants of Federal Money to States

The challenge to the constitutionality of the ACA’s Medicaid expansion raises fundamental questions about the proper balance of power between the federal government and the states. It is commonly accepted that, under the Constitution, the federal government has certain specific powers, and when Congress acts within its powers, its laws are supreme. All powers that are not specifically

enumerated in the Constitution as belonging to the federal government are reserved for the states, pursuant to the 10th Amendment. Because the Constitution does not give Congress a specific “police power” to protect the public’s health, safety and welfare, that power is therefore reserved to the states. If Congress oversteps by enacting a law that exceeds its powers, the Supreme Court has authority to declare the law invalid and ensure that Congress acts within the scope of the Constitution.

The Spending Clause

Congress’s enumerated powers include what is referred to as the spending power.¹² It is found in Article I, Section 8 of the U.S. Constitution, which in pertinent part provides that “Congress shall have Power . . . [to] provide for the common Defense and general Welfare of the United States.”

The Supreme Court has long recognized that Congress may attach conditions on the receipt of federal funds that it disburses under its spending power. Such conditions have allowed Congress to achieve certain policy objectives that it could not attain by legislating directly through its enumerated powers and that can be viewed as extending into areas traditionally encompassed by the states’ police powers.

However, the Court “has generally interpreted congressional power under the Spending Clause expansively, even when that legislation arguably intrudes on state sovereignty,” presumably because unlike the “imbalance in bargaining power such as can occur between individuals and the government. . . states have traditionally been considered by courts to be [sovereign governments and therefore] relatively resistant to such coercion.”¹³

The Test for Determining the Constitutionality of Spending Clause Conditions

In the 1987 case of *South Dakota v. Dole*,¹⁴ the key case establishing the modern framework for determining the constitutionality of conditions placed on federal spending clause legislation, Congress provided that five percent of a state’s federal highway funds would be withheld if a state did not set its minimum drinking age at 21. The Supreme Court upheld Congress’s power to fix the terms on which it disburses federal money to states, so long as the condition satisfies four factors: it must be (1) related to the general welfare, (2) stated unambiguously, (3) clearly related to the program’s purpose, and (4) not otherwise unconstitutional. The Court found that the five percent funding withhold in *Dole* was directly related to safe interstate travel, one of the main purposes for which federal highway funds are spent. These criteria are summarized in Figure 4.

Figure 4

Existing Guidance from the Supreme Court on Congress’s Spending Power

<p><u>Current Test for Courts to Determine Whether a Condition on Federal Funds is Constitutional:</u></p> <p>Is the condition:</p> <ol style="list-style-type: none"> 1. Related to the general welfare? 2. Stated unambiguously? 3. Clearly related to the program’s purpose? 4. Not otherwise unconstitutional? <p>If so, the condition is a constitutional exercise of Congress’ spending power.</p>	<p><i>Non-binding dicta:</i></p> <p><i>There possibly could be a future case in which a financial inducement offered by Congress could pass the point at which permissible pressure becomes unconstitutional coercion.</i></p>
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SOURCE: *South Dakota v. Dole*, 483 U.S. 203 (1987).

The Court noted as an aside (known as “*dicta*”) that there possibly could be a future case in which a financial inducement offered by Congress could pass the point at which permissible pressure on states to legislate according to Congress’s policy objectives crosses the line and becomes unconstitutional coercion. The Court first made this observation in a 1937 case, *Steward Machine Co. v. Davis*, which upheld Congress’s authority to enact federal unemployment tax provisions as part of the New Deal.¹⁵ While the *Dole* court repeated *Steward Machine’s* observation about the future possibility of coercion, at the same time, neither the *Steward Machine* nor the *Dole* courts reached that conclusion.

Despite this passing reference in two cases, the Supreme Court never has invalidated a condition on federal funding as unconstitutionally coercive of states and has not set out any standards for how to make this determination. Similarly, no other court has done so. According to the Congressional Research Service, federal appeals courts have noted that “coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party,” and the “cursory statements. . . [that] mark the extent of the Supreme Court’s discussion of a coercion theory” make it “unclear, suspect, and [with] little precedent to support its application.”¹⁶ Thus, a decision to strike down the ACA’s Medicaid expansion as unconstitutionally coercive of states would be a fundamental change in existing law.

The 11th Circuit Court of Appeals Decision on the ACA’s Medicaid Expansion

The 11th Circuit Court of Appeals found that the ACA’s Medicaid expansion is not unconstitutionally coercive of the states. Instead, the 11th Circuit decided that states have a real choice about whether to participate in the Medicaid program and that the ACA’s Medicaid expansion is a legitimate exercise of Congress’s spending clause power to impose conditions on its grants to states. The 11th Circuit cited several reasons for its conclusion that, based on the application of existing law as stated by the Supreme Court in *Dole*, the ACA’s Medicaid expansion is not coercive:

- Congress has reserved the right to amend the Medicaid program since its original enactment and has enacted additional conditions over the intervening years with which participating states must comply at risk of losing federal funding.
- The federal government will bear nearly all costs associated with providing coverage for the low income adults eligible through the ACA’s Medicaid expansion, thus minimizing the costs on states.
- Because the Medicaid expansion does not take effect until January 1, 2014, Congress effectively gave the states nearly four years’ notice of the new requirement so they could decide whether to continue in the program.
- Medicaid remains voluntary: states always can exit the program and can use their powers to tax and spend to create their own alternative programs if they do not like Congress’s terms.

- States will not necessarily be at risk of losing all their federal Medicaid funds if they do not comply with the Medicaid expansion; rather, the federal government retains the discretion to withhold merely a portion of a state’s matching funds for noncompliance.

The State Petitioners’ Arguments Against the Medicaid Expansion

The states challenging the Medicaid expansion argue that additional limits are needed on Congress’s spending clause power to place conditions on federal grants to states beyond the existing factors set out by the Supreme Court in *Dole*.¹⁷ They contend that Congress may not coerce the states to adopt policies of Congress’s choice through spending clause conditions when Congress lacks power to force states to do so directly. While acknowledging that Congress’s power to regulate the states by imposing conditions on grants under the spending clause is broader than under its constitutionally enumerated powers, the state petitioners argue that the Supreme Court should impose and enforce limits on Congress’s spending power so that it does not subvert the states. The state petitioners argue that the Court should apply the coercion doctrine to protect state sovereignty and restore the appropriate balance of power between Congress and the states.

Citing the non-binding *dicta* about the possibility that some financial inducements offered by Congress might be coercive, the state petitioners assert that the ACA’s Medicaid expansion has transformed the very nature of the program from voluntary to mandatory. The state petitioners assert that the size of the Medicaid program has caused states to become dependent upon this federal funding, leaving them with no real choice but to comply with new terms imposed by Congress that, they allege, are significantly altered. In the state petitioners’ view, Medicaid has become an offer that the states cannot refuse.¹⁸ They argue that the ACA’s Medicaid expansion is unprecedented because Congress never before has mandated what they characterize as an across-the-board financial eligibility floor for Medicaid. When determining whether spending clause legislation is coercive, they urge the Court to consider the amount of money states stand to lose if they reject Congress’s terms, not the amount of money that states stand to lose if they accept.¹⁹ Finally, the state petitioners argue that the Medicaid expansion is not severable from the rest of the ACA, and therefore, the entire ACA should be struck down.

The Federal Government’s Arguments in Favor of the Medicaid Expansion

The federal government, represented by the Solicitor General, argues that the ACA’s Medicaid expansion is an appropriate exercise of Congress’s power to set the terms on which it will disburse federal funds.²⁰ The federal government acknowledges that Congress’s spending power is constrained by the four factors described in *Dole*, but otherwise includes broad authority to attach conditions to federal grants to further Congress’s policy objectives, which the Supreme Court has long recognized. The federal government argues that Congress did not violate the *Dole* factors in enacting the ACA’s Medicaid expansion. It also points out that no court ever has accepted the argument that a condition placed by Congress on federal grants to states is unconstitutionally coercive.

According to the federal government, the ACA’s Medicaid expansion, like other eligibility standards for federal programs, concerns the core definition of how Congress wants federal money to

be spent. They argue that courts therefore should defer to Congress's conditions and continue to assume that states have the ability to accept or reject Congress's offer of funds. In making the decision about whether to accept federal funds, they assert that states cannot pick and choose among the conditions that Congress sets out. The federal government maintains that the very purpose of a Congressional condition on federal funding is to encourage states to act in a certain manner, and it is very difficult for courts to determine bright lines about what constitutes unconstitutional coercion. Instead, in the federal government's view, determining whether a particular federal program is coercive would improperly make courts the arbiters of conflicting judgments about matters of state policy and revenues and state assessments about the acceptability of various conditions. The federal government points out that the fact that a choice is politically difficult does not make it unconstitutional.

The federal government also asserts that the federal Medicaid statute always has contained mandatory coverage requirements for participating states; that Congress previously has required states to cover new categories of people (including categories such as pregnant women and children that carry uniform income eligibility requirements); and that Congress has conditioned a state's willingness to do so on the state's continued participation in the Medicaid program as a whole and not on access to incremental increased funding. Also, they maintain that the growth of the Medicaid program is attributable to the states' continued voluntary participation and especially their decisions to provide coverage for optional eligibility categories and services, which accounts for 60% of total Medicaid spending.²¹

The State Amici's Arguments in Favor of the Medicaid Expansion

The 13 states that filed a Supreme Court *amicus* brief supporting the Medicaid expansion agree with the state petitioners challenging the Medicaid expansion that a coercion doctrine is necessary to protect state sovereignty in instances where Congress oversteps the constitutional boundaries of its powers.²² Nevertheless, the states supporting the Medicaid expansion argue that the ACA is not coercive and instead is a valid exercise of Congress's spending clause power. They agree with the federal government's position that the ACA's Medicaid expansion does not strong-arm the states. Instead, they argue that the ACA has not changed the fundamental nature of Medicaid as a voluntary program with federal core requirements set by Congress within which states have flexibility to create their own programs. They also argue that the ACA's Medicaid expansion can be applied in a way that does not violate the Constitution because the ACA does not disturb Congress's previous grant of discretion to the Secretary to determine an appropriate response to state noncompliance with federal conditions by withholding all or only a portion of a state's federal funds.

Table 1 summarizes the major arguments about the constitutionality of the ACA's Medicaid expansion advanced by the state petitioners, the federal government, and the state *amici*.

**Table 1:
Summary of Arguments About the Constitutionality of the ACA’s Medicaid Expansion
in the Supreme Court**

Issue	Position of States Challenging the ACA	Position of Federal Government	Position of States Supporting the ACA
What is the proper scope of Congress’s power in relation to the states under the Spending Clause?	Additional limits are needed on Congress’s power to place conditions on federal grants to states.	Limits on Congress’s spending power already exist (4 factors described in <i>South Dakota v. Dole</i>).	Same position as federal government.
Have the <i>Dole</i> factors been satisfied in this case?	The <i>Dole</i> factors are irrelevant because Congress, through the ACA’s Medicaid expansion, is coercing the states to adopt the legislative and policy choices preferred by Congress.	Yes. None of the 4 <i>Dole</i> factors are violated in this case.	Same position as federal government.
Is there a coercion doctrine?	Yes. It is necessary to protect state sovereignty and the appropriate balance of power between Congress and the states.	No. A court never has accepted the argument that a condition placed by Congress on federal grants to states is unconstitutionally coercive.	Same position as states challenging the ACA.
Does the coercion doctrine apply in this case?	Yes. States have become dependent on federal Medicaid funds and have no real choice but to accept the ACA’s significantly altered terms imposed by Congress on existing funding. The ACA’s Medicaid expansion is unprecedented because Congress never before has mandated an across-the-board financial eligibility floor for Medicaid. Also, the ACA contains no alternatives for health insurance for people with low incomes. Courts should consider how much a state stands to lose if it rejects Congress’s terms, not how much a state stands to lose if it accepts.	No. States have the ability to choose whether to accept Congress’s conditions. The choice may be politically difficult, but it is still a choice. The federal Medicaid statute always has contained mandatory coverage requirements for participating states, and Congress has expanded the mandatory provisions before, including setting national financial eligibility standards. The growth in the Medicaid program is the result of states’ continued voluntary participation, and especially states’ decisions to cover optional eligibility categories and services.	No. Congress has not overstepped its authority or strong-armed the states in enacting the ACA’s Medicaid expansion. The ACA does not change the fundamental nature of the Medicaid program and is capable of being applied in a constitutional manner because the Secretary retains discretion to determine an appropriate response to state noncompliance by withholding some or all federal funds
If found unconstitutional, is the Medicaid expansion severable from the rest of the ACA?	No. The entire ACA must be struck down along with the Medicaid expansion.	Yes. The Court should not consider severability of the Medicaid expansion, but if it does reach the issue, the Social Security Act’s severability clause should result only in an injunction against the Medicaid expansion as applied to the non-consenting states.	Not addressed.

Potential Outcomes

If the Supreme Court decides that the ACA's Medicaid expansion is constitutional, it will take effect in 2014, unless Congress acts to postpone or repeal it.²³ If the Court decides that the ACA's Medicaid expansion is unconstitutional, the 16 million uninsured low-income adults estimated by the CBO who would otherwise qualify for coverage through the Medicaid expansion will in all likelihood remain uninsured, unless Congress enacts an alternative coverage program.²⁴ In addition, if the Medicaid expansion is struck down, the ACA's enhanced federal matching funds for states to expand coverage to the newly eligible population will not be available; instead any coverage expansion that a state elects would be reimbursed at the state's regular Medicaid matching rate.

Presumably, the Court would not strike down the ACA's Medicaid state plan option, currently in effect, that allows states to elect to cover non-disabled adults in the Medicaid expansion population prior to January 1, 2014 (presently elected by Connecticut, Minnesota, and the District of Columbia), since the state petitioners do not challenge that provision. However, the state plan option expires on January 1, 2014.²⁵ Consequently, after that date, coverage of this population would be available to states only through § 1115 Medicaid demonstration waivers, which are entered into at state option with federal approval.²⁶

While the Court agreed to decide whether the ACA's individual mandate is severable from the rest of the law if the mandate is found unconstitutional, it did not specifically agree to determine whether the Medicaid expansion is severable. Thus, what the Court would do if it strikes down the Medicaid expansion is entirely a matter of speculation. If the Court does consider the severability of the Medicaid expansion, it will ask whether the rest of the law can function independently of the Medicaid expansion provision, and whether Congress would have enacted the ACA's other provisions without the Medicaid expansion.

Under existing principles of severability and judicial restraint, courts traditionally have invalidated only the provision of the statute that was determined to be unconstitutional, not the entire law. Applying this line of reasoning, the Court would allow the remainder of the ACA to survive, striking only the Medicaid expansion provision.²⁷ If the Court considers the severability of the Medicaid expansion and decides that it is not severable from the rest of the law, the Court would invalidate the entire ACA.

Conclusion

The legal arguments for and against the constitutionality of the ACA's Medicaid expansion center on the appropriate balance of power between Congress and the states. The case also raises the question about the proper role of the courts in policing that balance: should courts actively impose and enforce limits on Congress's ability to place conditions on federal funds because such limits are needed to protect state sovereignty? Or, should courts defer to the conditions that Congress places on federal spending because these are political questions properly resolved by the legislature and not the courts? It is undisputed, however, that the ACA's Medicaid expansion impacts a significant number of people: according to the CBO, the ACA's Medicaid expansion offers health insurance coverage to an estimated

16 million low-income adults who, without the Medicaid expansion, will remain uninsured. Consequently, while overshadowed by the Court’s consideration of issues related to the ACA’s individual mandate, the Court’s decision on the ACA’s Medicaid expansion is an important area to watch.

This policy brief was prepared by MaryBeth Musumeci of the Kaiser Family Foundation’s Commission on Medicaid and the Uninsured.

Endnotes:

¹ See Social Security Act § 1902(a)(10)(A)(i)(VIII) codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

² For information about other aspects of the Supreme Court health reform case, see Kaiser Family Foundation, *A Guide to the Supreme Court’s Review of the 2010 Health Care Reform Law* (Jan. 2012), available at <http://www.kff.org/healthreform/upload/8270-2.pdf>.

³ For more information about the Medicaid program’s required and optional elements, see Kaiser Commission on Medicaid and the Uninsured, *Federal Core Requirements and State Options in Medicaid: Current Policies and Key Issues* (April 2011), available at <http://www.kff.org/medicaid/upload/8174.pdf>.

⁴ See generally Kaiser Commission on Medicaid and the Uninsured, *A Mid-Year State Medicaid Budget Update for FY 2012 and A Look Forward to FY 2013* (Feb. 2012), available at <http://www.kff.org/medicaid/upload/8277.pdf>.

⁵ See also Kaiser Commission on Medicaid and the Uninsured and Georgetown University Center for Children and Families, *Performing Under Pressure: Annual Findings of a 50-State Survey of Eligibility, Enrollment, Renewal and Cost-Sharing Policies in Medicaid and CHIP, 2011-2012* (Jan. 2012), available at <http://www.kff.org/medicaid/upload/8272.pdf>.

⁶ Letter from Douglas Elmendorf, Director, Cong. Budget Office to Hon. Nancy Pelosi, Speaker, U.S. House of Reps. (March 20, 2010), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf>.

⁷ 42 U.S.C. § 1396c.

⁸ Separately, Virginia filed its own challenge to the ACA; that case was dismissed by the Fourth Circuit Court of Appeals for lack of jurisdiction, and Virginia’s petition for *certiorari*, asking the Supreme Court to accept its case, is currently pending. The Virginia case, however, does not allege that the ACA’s Medicaid expansion is unconstitutionally coercive.

⁹ Supr. Ct. No. 11-400. Many of the briefs are available at <http://aca-litigation.wikispaces.com/File+Room>. The Supreme Court docket listing all the filings in the case is available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-400.htm>. There will be a total of 27 briefs focusing on the constitutionality of the Medicaid expansion for the Court to consider. Three briefs will be filed by the parties to the lawsuit: the opening brief by the state petitioners, the federal government’s answering brief, and the state petitioners’ reply brief. In addition, there are 8 *amicus* briefs filed in support of the state petitioners’ challenge to the Medicaid expansion, and 16 *amicus* briefs filed in support of the federal government’s defense of the Medicaid expansion. *Amicus* briefs are filed by organizations or individuals who are not parties to the lawsuit. They amplify arguments made by one of the parties in the case to help inform the court’s decision.

¹⁰ See National Health Law Program, *Health Reform Litigation Case Scheduling* (updated Jan. 4, 2012), available at <http://healthlaw.org/images/stories/anti-reform%20timeline%201-03-12.pdf>.

¹¹ For a timeline depicting key dates in the progression of the case, see Kaiser Family Foundation, *A Guide to the Supreme Court’s Review of the 2010 Health Care Reform Law* (Jan. 2012), available at <http://www.kff.org/healthreform/upload/8270-2.pdf>.

¹² Two of Congress’s other enumerated powers, its ability to regulate interstate commerce and to levy taxes, are at issue in the Court’s consideration of the ACA’s individual mandate.

¹³ Kenneth R. Thomas, Congressional Research Service, *Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: Florida v. Department of Health and Human Services* at 6 (Feb. 21, 2012) (concluding that coercion analysis requires an “evaluation of both the ‘proportionality’ of the grant condition (comparing the burden imposed by the grant condition against the burden of the federal benefit being withdrawn) and the ‘relatedness’ (how direct is the relationship between the grant condition and the federal interest)” in addition to “evaluating the level of economic benefit which the federal government is threatening to withhold”); *see also* I. Glenn Cohen and James F. Blumstein, “The Constitutionality of the ACA’s Medicaid-Expansion Mandate,” *The New England Journal of Medicine* (Jan. 12, 2012) (recognizing that Congress’s spending power is broad).

¹⁴ 483 U.S. 203 (1987).

¹⁵ 301 U.S. 548 (1937) (finding federal law properly enacted to encourage states “to contribute [their] fair share to the solution” of the national problem of unemployment).

¹⁶ Kenneth R. Thomas, Congressional Research Service, *Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: Florida v. Department of Health and Human Services* at 6 (Feb. 21, 2012) at 13, fn. 82, 84 (citing *Nevada v. Skinner*, 884 F.2d 445, 448-49 (9th Cir. 1989); *Kansas v. U.S.*, 214 F.3d 1196, 1201-02 (10th Cir. 2000)).

¹⁷ The petitioner states’ Supreme Court opening brief on the Medicaid expansion is available at <http://aca-litigation.wikispaces.com/file/view/States+brief+as+petitioner+%28Medicaid%29.pdf>.

¹⁸ According to the state petitioners, the “hallmarks of coercion” are (1) Congress’s expressed understanding that states have no alternative but to comply with the program’s new terms (evident from its extension of the law’s minimum coverage provision even to the poorest Americans while simultaneously failing to provide them an alternative means of coverage other than Medicaid, such as subsidies for coverage through state health insurance exchanges); (2) the massive size of Medicaid as the single largest federal grant-in-aid program to states; and (3) Congress’s decision to condition the entire funding stream on the states’ acceptance of the ACA’s new conditions.

¹⁹ The state petitioners point out that Medicaid is the single largest federal grant-in-aid program, the source of 40% of all federal funds provided to states. In 2009, most states received well over \$1 billion in federal Medicaid funds and nearly one-third received more than \$5 billion. By contrast, only about 5% of all federal programs distributed \$1 billion nationwide in 2009. The state petitioners also argue that federal Medicaid funds are actually tax dollars paid by state residents and that states could not raise state taxes enough to fund their own alternative programs because their residents’ federal tax burden will not decrease if states opt out of Medicaid; instead the federal tax dollars paid by that state’s residents would go to fund Medicaid programs in other states. The state petitioners analogize the choice presented to states as equivalent to that offered by a pickpocket who takes a wallet and gives the true owner the ‘option’ of agreeing to certain conditions to get the wallet back or having it given to a stranger.

²⁰ The federal government’s Supreme Court brief on the Medicaid expansion is available at <http://aca-litigation.wikispaces.com/file/view/U.S.+brief+%2811-400+Medicaid%29.pdf>.

²¹ The federal government also argues that Congress expressly reserved the right to amend the Medicaid program, and states have no right to claim that the program must continue on the same terms; that the ACA’s Medicaid expansion provides far greater federal financial assistance to states than prior expansions, initially covering 100% of the state expansion costs and gradually decreasing to 90%; and that the CBO’s projected increase in state Medicaid spending from 2010 to 2019 is less than 1% above projected state spending without the ACA in the same period, the largest projected increase in state Medicaid spending for this period is less than 2% over the baseline, and aggregate state spending from 2010 to 2019 will be \$100 billion lower under the ACA than under prior law due to cost-saving measures contained in the ACA. Also, the federal government points out that the CBO’s estimate of 16 million people who will gain Medicaid coverage under the ACA expansion includes some people who are presently eligible but not enrolled and for whom states therefore already are liable to cover.

²² The states’ Supreme Court *amicus* brief is available at <http://aca-litigation.wikispaces.com/file/view/Oregon+et+al.+amicus+%2811-400+Medicaid%29.pdf>.

²³ This is true regardless of whether the Court invalidates the ACA’s individual mandate, assuming that the Court goes on to affirm the 11th Circuit’s ruling that the individual mandate is severable from the rest of the ACA.

²⁴ A Supreme Court decision to strike down the Medicaid eligibility expansion would likely result in a change in the Congressional Budget Office's Medicaid baseline. CBO's most recent Medicaid baseline, published in January 2012, projects that federal Medicaid spending will rise from \$281 billion in FY 2013 to \$330 billion in FY 2014, \$370 billion in FY 2015, and \$407 billion in FY 2016, rising to \$605 billion in FY 2022. These increases reflect not just enrollment growth and medical inflation in program under current eligibility rules, but also the costs (initially at 100% federal expense, then phasing down to 90% federal by 2020) of expanding eligibility to all non-disabled adults under 65 within incomes under 133% of the poverty level beginning in January 2014. CBO, *The Budget and Economic Outlook: Fiscal Years 2012 to 2022* (January 2012), p.57, http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-31-2012_Outlook.pdf. Because the current option for states to cover this population (at their regular federal matching rate) expires on January 1, 2014, CBO would likely conclude that the invalidation of the ACA requirement that states cover this population after that date results in no federal spending on this population. Over the ten-year baseline, federal Medicaid outlays would probably drop by an amount of more than \$600 billion (See Table 3 of the February 18, 2011 CBO estimate of H.R. 2, which estimated that repealing the ACA would reduce federal Medicaid and CHIP outlays by \$674 billion over the FY 2012-2020 period, <http://www.cbo.gov/publication/22027>; the current 10-year baseline includes an additional year of full implementation). If CBO does lower its Medicaid baseline, and if Congress were to decide to extend health insurance coverage to these adults in some other manner, the costs of such a coverage restoration would have to be offset.

²⁵ See Social Security Act § 1902(k)(2), codified at 42 U.S.C. § 1396a(k)(2).

²⁶ See Kaiser Commission on Medicaid and the Uninsured, *Expanding Medicaid to Low-Income Childless Adults Under Health Reform: Key Lessons from State Experiences* (July 2010), available at <http://www.kff.org/medicaid/upload/8087.pdf>.

²⁷ However, if the Court decides that the Medicaid expansion is severable, it also could strike the Medicaid expansion and other provisions of the ACA. The particular provisions of the ACA that would be at risk remain an open question. Another possibility, the likelihood of which also is unclear, is for the Court to decide that both the Medicaid expansion and the individual mandate are unconstitutional. In that case, the ACA would lack two major provisions to expand access to affordable health insurance. If the Medicaid expansion is struck down and the individual mandate is upheld, cost-sharing subsidies through the health insurance exchanges will be available only for people with incomes at or above 100% FPL.

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