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Florida v. HHS - Amicus Brief of State Legislators

Elizabeth B. Wydra

Nos. 11-11021-HH & 11-11067-HH

IN THE

United States Court of Appeals for the Eleventh Circuit

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,

Defendants-Appellants/Cross-Appellees,

v.

STATE OF FLORIDA,
by and through ATTORNEY GENERAL PAM BONDI, ET AL.,

Plaintiffs-Appellees/Cross-Appellants,

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF OF *AMICI CURIAE* STATE LEGISLATORS IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT REGARDING CONSENT TO FILE

Appellants and Appellees have consented to the filing of the State Legislators' brief *amici curiae*.

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INTEREST OF THE AMICI CURIAE

Amici Curiae, a group of 154 State Legislators from 26 States, believe that the Patient Protection and Affordable Care Act ("the Act") is constitutional and are working hard in their States to implement the Act in a timely, efficient, and effective manner. They have a substantial interest in having this matter resolved expeditiously and in favor of the constitutionality of the Act.

Among the *Amici* State Legislators are legislators from 15 of the States represented by the Plaintiffs. These legislators have a particular interest in this case in order to represent their constituents and many other residents and State leaders in the Plaintiffs' respective States who disagree with Plaintiffs' legal arguments and support health care reform. All of the *Amici* State Legislators have an interest in presenting their view of the federalism issues in this case, given that the Plaintiffs have purported to represent the interests of the States generally in this lawsuit.

As State leaders themselves, *Amici* State Legislators have a strong interest in the manner in which the interests of their States and the rights of the States in general are represented in this lawsuit. *Ami-*

ci State Legislators believe that the Act respects constitutional principles of federalism and benefits the States and their citizens.

STATEMENT OF THE ISSUES

Whether the district court erred in holding that the minimum coverage provision of the Patient Protection and Affordable Care Act is not a valid exercise of Congress' powers under the Commerce Clause and the Necessary and Proper Clause?

SUMMARY OF ARGUMENT

In granting summary judgment below, Judge Vinson prefaced his decision with the following description of this litigation:

> [T]his case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. *It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.*

Florida v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-00091-RV, Jan. 31, 2011, at 1-2 (emphasis added). The court below correctly identified the crucial constitutional issue in the case, but declared the Act unconstitutional based on a fundamentally flawed vision of the constitutional role of our federal government and its partnership with the

States—a vision that contradicts the original meaning of our Founding charter.

The idea that the federal government does not have the power to address a national problem such as the health care crisis has no basis in the Constitution's text and history. The Father of our Nation, George Washington, and the other delegates to the Constitutional Convention shared a conviction that the Constitution must establish a national government of sufficient, substantial power. In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966).

Tasked with translating the principle of Resolution VI into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tri-

bes." U.S. CONST. art I, § 8, cl. 3. While the concept of "commerce" in this Clause has always encompassed economic activity or trade, the original meaning of "commerce" in the Constitution carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005). As Chief Justice John Marshall explained, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). Thus, the lower court's vision of a Commerce Clause power strictly curtailed by a requirement of self-initiated economic activity cannot be squared with the Clause's original meaning.

The lower court's interpretation of the Necessary and Proper Clause is similarly unsupported by constitutional text and history. Far from the cramped vision of the Clause used by the court below, the grant of power to "make all Laws which shall be necessary and proper for carrying into execution" constitutionally granted powers was intended to be sweeping. U.S. CONST. art. I, §8, cl. 18. As Alexander Hamilton explained to President Washington, "[t]he means by which

national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means." THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel, ed. 2008) (Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791). As recognized by our first President, the rest of the Framers, and the Supreme Court from the Founding to the present, the Necessary and Proper Clause grants Congress the power to use means outside the enumerated list of Article I powers to achieve the federal ends contemplated in the Constitution.

The Affordable Care Act falls within Congress's constitutionally-granted powers, and, just as important, it does not infringe upon any other constitutionally guaranteed rights. There is no constitutionally protected right to freeload that is infringed by the individual responsibility aspect of the minimum coverage provision.

Nor does the Act's expansion of Medicaid tread upon state sovereignty. Health care reform was imperative for Americans, as well as

for their State and local governments. The ever-rising costs of and limited access to insurance coverage and health care have severely stressed the budgets of State governments and American families, and literally resulted in tens of thousands of deaths each year. While the Plaintiffs claim that the Act's Medicaid-related provisions are unconstitutional under the Ninth and Tenth Amendments, this argument is fundamentally flawed in light of the fact that States continue to have the option to opt out of Medicaid altogether. The Constitution allows the federal government to condition federal funds and programs in a certain way, allowing States to choose whether to participate and accept those conditions, or not. It is well-established that "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The Plaintiffs' Medicaid claims appear to seek a judicial "do-over" on the Act, trying to get this Court to craft a health care reform law that is more to the Plaintiffs' liking. *See, e.g.*, Pls.' Mem. Supp. Summ. J. 26 (praising the Medicaid program of the 1960s and 1970s as "the hallmark of cooperative federalism" but objecting to the "new" Medicaid

standards). That is an effort that belongs in the political arena, not the courts.

Under a faithful reading of the Constitution, the Affordable Care Act is a valid exercise of Congress's power to address issues of national concern, and respects principles of federalism.

ARGUMENT

I. The Framers Wrote The Constitution To Give The Federal Government Legislative Power To Address National Concerns, While Preserving The States' Ability To Act In Matters That Do Not Require A National Response.

Our Constitution was drafted in 1787 "in Order to form a more perfect Union"—both more perfect than the British tyranny against which the founding generation had revolted and more perfect than the flawed Articles of Confederation under which Americans had lived for a decade since declaring independence. The result was a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative poli-

cy solutions reflecting the diversity of America's people, places, and ideas.

By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for nearly a decade under the dysfunctional Articles of Confederation. The Articles of Confederation, adopted in 1777 and ratified in 1781, established a confederacy built merely on a "firm league of friendship" between thirteen independent states. ARTICLES OF CONFEDERATION (1781), art. III. There was only a single branch of national government, the Congress, which was made up of state delegations. *Id.* art. V. Under the Articles, Congress had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it had no express power to make laws that would be binding in the states' courts and no general power to establish national courts, and it could raise money only by making requests to the states.

This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War. In the midst of several American wartime setbacks, Washington lamented that, "unless Congress speaks with a more deci-

sive tone; unless they are vested with powers by the several States competent to the great purposes of War . . . our Cause is lost." 18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780).

Washington favored strong federal power not just in military matters, but also in other areas of national concern. Shortly after the Revolutionary War was won, Washington wrote to Alexander Hamilton stating plainly that "[n]o man in the United States is, or can be more deeply impressed with the necessity of a reform in our present Confederation than myself." *Id.* at 505 (Letter to Alexander Hamilton, March 31, 1783). Washington explained that, "unless Congress have powers competent to all *general* purposes, that the distresses we have encountered, the expences we have incurred, and the blood we have spilt in the course of an Eight years war, will avail us nothing." *Id.* at 490 (Letter to Alexander Hamilton, March 4, 1783) (emphasis in original). *See also id.* at 519 (Circular to State Governments, June 8, 1783) ("[I]t is indispensible to the happiness of the individual States, that there should be lodged somewhere, a Supreme Power to regulate and govern the general

concerns of the Confederated Republic, without which the Union cannot be of long duration.").

After securing independence, the Founders turned their focus on creating a new, better form of government with a sufficiently strong federal power.[1] In considering how to grant such power to the national government, the delegates to the Constitutional Convention adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). The delegates then

[1] Indeed, it is indicative of the shift from revolution to statecraft that the Constitution's first Article gives Congress the power to impose a broad range of "Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8, cl. 1. "Thus, only a decade after they revolted against imperial taxes, Americans were being asked to authorize a sweeping regime of continental taxes, with the decisive difference that these new taxes would be decided on by public servants chosen by the American people themselves—taxation *with* representation." AKHIL REED AMAR, AMERICA'S CONSTITUTION, at 107. Suggestions that the legitimate complaints of the "Boston Tea Party" in 1775 animated the Founders during the Constitutional Convention in 1787 are thus deeply flawed. *E.g.*, *Florida v. U.S. Dep't of Health & Human Servs.,* No. 3:10-cv-00091-RV, Jan. 31, 2011, at 42.

passed Resolution VI on to the Committee of Detail, which was responsible for drafting the enumerated powers of Congress in Article I, to transform this general principle into an enumerated list of powers in the Constitution.

As constitutional scholar Jack Balkin explains, Resolution VI established a structural constitutional principle with "its focus on state competencies and the general interests of the Union." Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 10 (2010). Translating this principle into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, regulate interstate commerce and tax and spend to "provide for the . . . general Welfare of the United States." U.S. CONST. art I, § 8, cl. 1. These enumerated powers were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 424 (Jonathan Elliot ed., 2d ed. 1836) (hereinafter ELLIOT'S DEBATES) (Statement of James Wilson).

The enumeration of powers was not intended to displace the general principle of Resolution VI that Congress should have the general ability to legislate in matters of national concern. As James Wilson, a member of the Committee of Detail who was also "America's leading lawyer and one of only six men to have signed both the Declaration of Independence and the Constitution,"[2] explained:

> [T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, *an enumeration of particular instances, in which the application of the principle ought to take place,* has been attempted with much industry and care.

2 ELLIOT'S DEBATES 424-25 (emphasis added). The drafters of the Constitution thus made clear that in each enumerated instance in Article I—whether regulating "commerce" or levying taxes—the understanding was that Congress would exercise the enumerated power while applying the general principle that Congress has power to regulate in cases of national concern.[3] This list of enumerated powers was not an attempt

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[2] AMAR, AMERICA'S CONSTITUTION, 7.

[3] Some scholars have suggested that the Committee of Detail rejected Resolution VI or that the Convention repudiated it because the precise

to limit the federal government for its own sake, but rather "[t]he list of enumerated powers was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are federal by nature." Balkin, *Commerce*, 12.

A. The Framers Included The Commerce Clause In The Constitution To Allow The Federal Government To Legislate Affairs Among The Several States That Require A Federal Response.

Congress's power to "regulate Commerce … among the several States," U.S. CONST. art. I, § 8, cl. 3., "is closely linked to the general structural purpose of Congress's enumerated powers as articulated by the Framers: to give Congress power to legislate in all cases where states are separately incompetent or where the interest of the nation might be undermined by unilateral or conflicting state action." Balkin, *Commerce*, at 6.

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language of the Resolution was not written into the Constitution. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004). But after the delegates passed Resolution VI, the Committee of Detail had no power to reject it, and, as Wilson's comments make clear, the Committee embraced the Resolution's principle and attempted to implement it in Article I. *See* Balkin, *Commerce*, 10-11.

While commerce has always encompassed economic activity or trade, the original meaning of "commerce" in the Constitution carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." AMAR, AMERICA'S CONSTITUTION, 107. As explained by Chief Justice John Marshall in *Gibbons v. Ogden*, "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse." 22 U.S. (9 Wheat.) 1, 194 (1824). *See* Balkin, *Commerce*, at 21 ("When people like George Washington, John Marshall, and Joseph Story use the words 'commerce' and 'intercourse' interchangeably, perhaps we should listen to them.").

Only if "commerce" is read in light of this broader definition does the Commerce Clause effectuate the Framers' direction that Congress should have authority to legislate in all matters that raise a federal concern. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131-32. Reading interstate and international "commerce" broadly in the Commerce Clause fits with "the framers' general goals by enabling Congress to regulate . . . interactions that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise

compromise the interests of sister states." AMAR, AMERICA'S CONSTITUTION, at 107.

While the meaning of commerce in the Constitution was intended to be broad, the text of the Commerce Clause places significant limits on federal regulation to preserve state autonomy: Congress can only act if a given problem genuinely spills across state or national lines. As Chief Justice Marshall explained in *Gibbons*, the Commerce Clause uses the word "among" to mean "intermingled with" and that "commerce among the States" means "commerce which concerns more States than one." 22 U.S. (9 Wheat.) at 194. If commerce within a single state has external effects on other states or on the Nation as a whole then it falls under Congress's constitutional regulatory authority; if commerce is "completely internal" to a state, then Congress has no power to regulate. *Id.* The "among" requirement of the Commerce Clause thus allows Congress to regulate interactions or affairs among the several states, including matters "that are mingled among the states or affect more than one state, because they cross state borders, because they produce collective action problems among the states, or because they involve activity in one state that has spillover effects in other states."

Balkin, *Commerce*, at 23. *See also United States v. Lopez*, 514 U.S. 549 (1995). In other words, the Commerce Clause contains an important limiting principle—but it is derived more from the word "among" than from an improperly narrow reading of "commerce."

Reading the Commerce Clause with the broad understanding of "commerce" as "intercourse," and the limitation that such "intercourse" must be truly federal in nature in that it affects national interests or involves a matter that states cannot effectively address on their own, connects the text of the Clause to the principle in Resolution VI that animated the drafting of Congress's enumerated powers in Article I. As Chief Justice Marshall explained in interpreting the Commerce Clause:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Gibbons, 22 U.S. (9 Wheat.) at 195.

Looking at Congress's Commerce Clause power based on the text and history of the Constitution, Congress's power to enact the minimum

coverage provision is clear. Even if, like the lower court, this Court conceived of the decision to remain uninsured as a non-economic matter, this would be irrelevant: under the original meaning of the Commerce Clause, the real question is whether such a decision raises federal concerns by, for example, causing spillover effects, which may themselves be economic in nature, creating a problem for more than a single state. *See* Balkin, *Commerce*, at 44; U.S. Br. at 46-49. In addition, the minimum coverage provision addresses collective action problems in the States: there is the distinct possibility that "[p]eople with health problems will have incentives to move to a state where they cannot be turned down, raising health care costs for everyone, while insurers will prefer to do business in states where they can avoid more expensive patients with pre-existing conditions, and younger and healthier people may leave for jurisdictions where they can avoid paying for health insurance." Balkin, *Commerce*, at 46. The provision falls squarely within Congress's ability to regulate "commerce" "for the general interests of the Union," and also in those instances in "which the States are separately incompetent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32.

B. Under The Text And Original Meaning Of The Necessary And Proper Clause, Congress Has Broad Latitude To Employ Legislative Means Naturally Related To The Lawful Objects Or Ends Of The Federal Government.

As discussed above, the drafters of the Constitution were mindful of Resolution VI's general principle—that Congress should have the ability to respond to matters of national concern—in wording federal enumerated powers broadly. In the Federalist Papers, Alexander Hamilton exhorted the nation that

> we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity.... Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a *capacity* to provide for future exigencies as they may happen....

THE FEDERALIST PAPERS No. 34, at 203 (emphasis in original).

Perhaps nowhere in the Constitution is the goal to provide Congress with discretion to address federal matters more manifest than in the Necessary and Proper Clause, which gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ...." U.S. Const. art. I, § 8, cl. 18. As Hamilton explained to President Washington, "[t]he whole turn of the [Necessary and Proper Clause] indicates that it was the intent of the

Convention, by that clause, to give a liberal latitude to the exercise of the specified powers." THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel, ed. 2008) (Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791). Hamilton described the broad discretion given to Congress under the Necessary and Proper Clause as follows: "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution; it may safely be deemed to come within the compass of the national authority." *Id.* President Washington agreed with Hamilton's exegesis of the constitutional powers of the federal government, approving the bill to establish a national bank and hailing Hamilton's vision of federal power. 8 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 359 (Letter to David Humphreys, July 20, 1791).

The Supreme Court, from the Founding-era to the present, has also agreed with Hamilton's view of federal power under the Necessary and Proper Clause. Chief Justice Marshall explained in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), that Congress should be

shown significant deference regarding what laws it considers to be appropriate in carrying out its constitutional duties. In language very similar to Hamilton's, the Court in *McCulloch* explained, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) at 421. As the Supreme Court has long held, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Comstock,* 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418, 421).

Thus, while this Court can and should uphold the minimum coverage provision as a constitutional exercise of Congress's Commerce Clause authority, it could also uphold the provision as a law that is "necessary and proper for carrying into execution"[4] Congress's power to regulate commerce among the several States. The Act is designed to

[4] U.S. CONST. art. I, § 8.

make health care coverage affordable to all Americans and to prohibit certain insurance practices, such as the denial of coverage to individuals with pre-existing conditions. *See* Br. of U.S. at 13-15. Among many other reasons, if Americans can go uninsured until they get sick and then impose these costs on those who already have health insurance policies, the ban on pre-existing conditions will be prohibitively expensive and the cost of insurance will increase across the board. *Id.* at 28-32. Congress determined that the minimum coverage provision was the appropriate means of regulating the health care and insurance markets.

The court below appears to have read the Necessary and Proper Clause to allow only those means of execution that are absolutely indispensable to the power being executed. But this interpretation of the Clause was soundly rejected more than two hundred years ago. *McCulloch,* 17 U.S. (4 Wheat.) at 406, 408 (explaining that the Constitution's framers did not intend to impede the exercise of enumerated powers "by withholding a choice of means," noting that, unlike the Articles of Confederation, the Constitution does not "require[] that everything granted shall be expressly and minutely described"). As Hamilton wrote to President Washington, the idea that the Clause allows only means of

execution that are so necessary that without them "the grant of the power *would be nugatory*," is so potentially detrimental to constitutional government that "[i]t is essential to the *being* of the National Government that so erroneous a conception of the word *necessary*, shou'd be exploded." Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791 (emphasis in original). "Necessary" in the Clause "means no more than *needful, requisite, incidental, useful*, or *conducive* to" the enumerated grant of power. *Id.* (emphasis in original). *See also Comstock*, 130 S. Ct. at 1956 (holding that the Necessary and Proper Clause affords Congress the power to use any "means that is rationally related to the implementation of a constitutionally enumerated power").

* * *

To be sure, the powers of the federal government under our Constitution are not unlimited. As the Tenth Amendment affirms, the Constitution establishes a central government of enumerated powers, and the States play a vital role in our federalist system. But the powers our charter *does* grant to the federal government are broad and substan-

tial.[5] And, since the Founding, the American people have amended the Constitution to ensure that Congress has all the tools it needs to address national problems and protect the constitutional rights of all Americans. *E.g.*, U.S. CONST. amends. XIII, XIV, XV, XVI, XIX.

II. The Affordable Care Act Respects The Federal-State Partnership On Health Care And Preserves Constitutional Federalism.

In addition to challenging the minimum coverage provision, Plaintiffs are cross-appealing the rejection by the District Court of claims challenging the Act's expansion of Medicaid. These claims are of the kitchen sink variety—alleging coercion, commandeering and violations of the Spending Clause, the Ninth and Tenth Amendment—and should be rejected for the simple reasons that Medicaid is an entirely voluntary program and the Act is an example of cooperative federalism at its best.

As discussed above, the federal system in the United States is founded on a Constitution that gives broad power to the federal government to act when a national solution is necessary or preferable,

[5] See Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791 (discussing "the variety and extent of public exigencies, a far greater proportion of which, and of a far more critical kind, are objects of National than of State—administration").

while preserving the role of State and local governments to create policy responsive to local needs and customs. States historically have been leaders in policy innovations that better protect their citizens, resources, and environment. *See* Exec. Order on Federalism No. 13132, 64 Fed. Reg. 43255, § 2(e) (Aug. 4, 1999) ("States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.") The States have a long history of leadership on health care reform—indeed, the Act incorporated the valuable lessons learned from the experience of health care reform practices by our State and local governments, and preserves the role of our States as laboratories of democracy, for example, by giving States considerable policy flexibility.

There is no basis in the Constitution for Plaintiffs' claims that the Act "violates the constitutional principles of federalism and dual sovereignty on which this Nation was founded." Am. Compl. ¶ 86. To the contrary, the Act addresses an issue of dire national importance, while allowing States room to innovate and shape aspects of health care reform to reflect the needs and preferences of their communities, for example, on whether and how to establish insurance exchanges. *See* ACA

§ 1321, 42 U.S.C. 18041; ACA § 1331, 18051; ACA § 1332, 18052. This allows for the diversity and innovation that is the hallmark of the States. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that, under our federalism, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

The benefits of national health care reform for States and their citizens will be substantial, in part because the size of the problem with health care is so great. Despite the fact that Americans spent an estimated 2.5 trillion dollars on health care in 2009, more than 45 million Americans do not have health insurance. Pub. L. No. 111-148, §§ 1501(a)(2)(B), 10106(a), 124 Stat. 119, 907 (2010); *see also* CONG. BUDGET OFFICE, 2008 KEY ISSUES IN ANALYZING MAJOR HEALTH PROPOSALS 11 (Dec. 2008); CONG. BUDGET OFFICE, THE LONG-TERM BUDGET OUTLOOK 21-22 (June 2009). Individuals and families face disastrous personal and financial consequences when they find themselves with serious medical problems and no insurance. *See* Pub. L. No. 111-148, §§ 1501(a)(2)(G), 10106(a) (noting that 62% of all personal bankruptcies

are precipitated in part by medical expenses); Institute of Medicine, AMERICA'S UNINSURED CRISIS: CONSEQUENCES FOR HEALTH AND HEALTH CARE 58, 78-79, 80 (2009) (observing that uninsured people have a higher likelihood of being hospitalized and of dying prematurely, and of experiencing greater limitations on their quality of life when compared to insured people). In addition, when the uninsured receive medical assistance, the uncompensated health care costs, which were $43 billion in 2008, are borne by federal, State and local governments, as well as by those who pay for insurance and health care providers. Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a).

The Act will help address these serious problems. The number of uninsured Americans will drop by approximately 32 million by 2019, and the average insurance premium paid by individuals and families in the individual and small-group markets will be reduced. Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to the Hon. Nancy Pelosi, Speaker, U.S. House of Representatives 9 (March 20, 2010); CONG. BUDGET OFFICE, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 23-25 (Nov. 30, 2009). This substantial number of newly covered individuals is

achieved in large part by the Act's requirement that the States expand Medicaid to all non-elderly individuals with incomes up to 133 percent of the poverty line, or about $29,000 for a family of four.

Plaintiffs allege that the Act's Medicaid-related provisions violate constitutional principles of federalism because they amount to "coercion and commandeering." Am. Compl. ¶¶ 83-86. This claim fails because the States cannot be "coerced" into doing anything with respect to Medicaid—Medicaid is a voluntary federal-State partnership, which the States could opt out of if their leaders and citizens so desired, avoiding the Act's new requirements for expanded Medicaid coverage. Recognizing that Medicaid is a valued program that provides crucial access to care for millions of the Plaintiffs' constituents, however, the Plaintiffs attempt a novel argument that tries to keep what they like about the program, including substantial federal funding, while avoiding the Act's new requirements, which they oppose. *See* Am. Compl. ¶ 66. This claim presents neither a claim of coercion nor of commandeering and should be rejected.

Medicaid is "a cooperative federal-state program through which the Federal Government provides financial assistance to States so that

they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). It is, and always has been, a voluntary program for the States. *Id.* Medicaid enables States to receive a significant amount of federal aid in exchange for the States' establishing public health insurance programs for the poor, subject to minimum federal requirements, *e.g.*, 42 U.S.C. § 1396(a)(10)(A)(I) (requiring the States to extend medical coverage to "categorically needy" individuals). Congress expressly reserved the right to amend Medicaid, 42 U.S.C. § 1304, and has done so many times. *E.g.*, Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) (requiring participating States to extend Medicaid to recipients of Supplemental Security Income); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989) (requiring States to expand Medicaid coverage to pregnant women and children under six-years-old, subject to certain income limits). States do not have to participate in Medicaid at all; Arizona did not join Medicaid until 1982. *See* Management of Arizona Medicaid Waiver: Hearings before the Subcomm. on Health & the Environment of the House Comm. on Energy & Commerce, 98th Cong., 2d Sess. 222 (1984).

Starting on January 1, 2014, the Act will expand Medicaid eligibility to individuals under 65 with incomes below 133% of the poverty line, expanding coverage to millions of people who could otherwise not afford health insurance. To ease the burden on the States, the federal government will assume 100% of the Medicaid costs of covering newly eligible individuals for the first three years; federal support will phase down slightly over the following several years, so that for 2020 and all subsequent years, the federal government will be responsible for 90% of the costs of covering these individuals. JANUARY ANGELES & MATTHEW BROADUS, FEDERAL GOVERNMENT WILL PICK UP NEARLY ALL COSTS OF HEALTH REFORM'S MEDICAID EXPANSION 3 (Center on Budget and Policy Priorities, April 20, 2010). The States' share of the cost of the Medicaid expansion will be approximately $20 billion. This represents just a 1.25% increase over the $1.6 trillion that States were projected to spend on Medicaid, for fewer people, over the same time frame, in the absence of health care reform. *Id.* at 4. At the same time, the Congressional Budget Office estimates that the Medicaid changes will result in $434 billion in extra Medicaid and Children's Health Insurance Program money flowing to the States between 2010 and 2019. Expanding health

care coverage will also substantially lower the cost to States for uncompensated care. *See* Council of Economic Advisors, *The Impact of Health Insurance Reform on State and Local Governments* (Sept. 15, 2009). *Amici* State Legislators believe this represents a good deal for their constituents and their States.

Plaintiffs appear to argue that this is *too* good a deal: one that they can't refuse. But it has been true for several decades, at least, that while "State participation in Medicaid is entirely voluntary, [] it is in a state's interest to participate since otherwise the state and its localities would, as a practical matter, have to provide many of the same services without the financial assistance of the federal government." Elizabeth Anderson, *Administering Health Care: Lessons from the Health Care Financing Administration's Waiver Policy-Making*, 10 J.L. & POL. 215, 220 (1994).

The Supreme Court has made clear that the temptation to accept federal funds does not amount to coercion. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987). The Constitution allows the federal government to condition federal funds and programs in a certain way, allowing States to choose whether to participate and accept those conditions, or

not. It is well-established that "Congress may attach conditions on the receipt of federal funds." *Id.* at 206. When the Supreme Court validated the Social Security Act, for example, it recognized that to hold that "motive or temptation [on the part of a State to comply with a condition attached to a federal appropriation grant] is equivalent to coercion is to plunge the law in endless difficulty." *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

Congress's spending power enables it to condition the disbursement of federal funds on States' meeting particular criteria. This extends to conditions that require States to fund programs or otherwise spend state funds for particular purposes. *See King v. Smith*, 392 U.S. 309 (1968) (upholding statute that conditioned federal matching funds on certain State actions, including the expenditure of State funds, because, if Alabama wanted to continue receiving the federal funds, it had to abide by the conditions). If the State finds the conditions too onerous, it may simply refuse the federal funds. *See Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143-44 (1947).

Similarly, the voluntary nature of Medicaid renders the Plaintiffs' "commandeering" claim regarding the Act's expansion of Medicaid cov-

erage to over 16 million more low-income adults and children groundless. The Supreme Court's "anti-commandeering" jurisprudence holds that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992). But again, the States are not compelled to enact or administer the Medicaid expansion required by the Act—they can opt out of Medicaid altogether. Losing federally-funded Medicaid would surely be a bitter pill to swallow for Plaintiffs and their constituents, but Congress may constitutionally "hold out incentives to the states as a method of influencing a state's policy choices." *New York*, 505 U.S. at 166; *see also id.* at 167 ("Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.") So long as Congress merely "encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *Id.* at 168.

Indeed, while Plaintiffs dramatically suggest that opting out of Medicaid could have "severe consequences for poor Americans" similar

to those that resulted from another "health-related event," Hurricane Katrina, Pls.' Mem. Supp. S. J. at 36 n.34, other State leaders (even some who also represent States of the Plaintiffs) have expressed their support for rejecting the Affordable Care Act's Medicaid expansion and withdrawing from the program. *E.g.*, Althea Fung, *Texas Considers Opting Out of Medicaid*, NATIONAL JOURNAL, Nov. 15, 2010; Emily Ramshaw & Marilyn Serafini, *Battle Lines Drawn Over Medicaid in Texas*, N.Y. TIMES, Nov. 16, 2010 (noting that "the idea of dropping out of Medicaid is on the table in Texas and roughly a dozen other states, including Alabama, Mississippi, Washington and Wyoming"). This may not be a wise policy choice, but it is a *possible* choice—and one that demonstrates that States are not impermissibly "coerced" into remaining in the Medicaid program.

The decision State leaders face is clear: whether to take steps to implement the Act's expansion of Medicaid and work in partnership with the federal government to provide better health care for State residents, or to opt out of Medicaid altogether. Either of these choices is possible (although *Amici* State Legislators believe the first path is better for their States and their constituents). Congress established Medi-

caid in Title XIX of the Social Security Act of 1965; the States then had the option whether to jointly fund the program with the federal government, or not. Here, Congress has voted to expand Medicaid to help reduce the number of uninsured people by 32 million in the next ten years; States can again determine whether to continue working with the federal government in the Medicaid partnership, or not. In either case, the elected federal officials and the elected State leaders will be accountable for their choices. The Plaintiffs seek to avoid that accountability by asking the Court to invalidate the new conditions placed on Medicaid funds while retaining the existing, popular portions of the program. Such an argument does not properly raise a claim of unconstitutional "commandeering" or "coercion" and should be rejected.

Amici State Legislators support the steps toward effective health care reform undertaken in the Affordable Care Act and believe that the Act is fully constitutional. As State leaders who have taken an oath to be faithful to the U.S. Constitution and who are actively working to implement and prepare for various requirements of the Act, *Amici* respectfully urge the Court to uphold the constitutionality of the Act. Congress has the power to regulate the nearly 20 percent of the U.S. economy

that is the health care industry, and, when faced with a national health care crisis where millions are uninsured and cannot afford decent health care, is empowered to act to reform the health care industry. Far from offending constitutional principles of federalism, the Act reflects how the federal and state governments can work together to protect their citizens and resources.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that, if the Court finds the Plaintiffs have standing, the Court uphold the constitutionality of the Affordable Care Act and reject Plaintiffs' claims on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief of *amici curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Century Schoolbook font.

Executed this 7th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by causing paper copies to be delivered to the Court by Federal Express.

I also hereby certify that I caused the brief to be served on all parties by mailing a copy of the brief via Federal Express on the following counsel:

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