1   IN THE SUPREME COURT OF THE UNITED STATES

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3   FLORIDA, ET AL.   :

4   Petitioners   :   No. 11-400

5   v.   :

6   DEPARTMENT OF HEALTH AND   :

7   HUMAN SERVICES, ET AL.,   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, March 28, 2012

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 1:00 p.m.

15   APPEARANCES:

16   PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

17   Petitioners.

18   DONALD B. VERRILLI, JR., ESQ., Solicitor General,

19   Department of Justice, Washington, D.C.; on behalf of

20   Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (1:00 p.m.)

3   CHIEF JUSTICE ROBERTS: We will continue

4   argument this afternoon in Case 11-400,

5   Florida v. Department of Health and Human Services.

6   Mr. Clement.

7   ORAL ARGUMENT OF PAUL D. CLEMENT

8   ON BEHALF OF THE PETITIONER

9   MR. CLEMENT: Mr. Chief Justice, and may it

10   please the Court:

11   The constitutionality of the Act's massive

12   expansion of Medicaid depends on the answer to two

13   related questions. First, is the expansion coercive?

14   And, second, does that coercion matter?

15   JUSTICE KAGAN: Mr. Clement, can I ask you

16   just a matter of clarification? Would you be making the

17   same argument if, instead of the Federal Government

18   picking up 90 percent of the cost, the Federal

19   Government picked up 100 percent of the cost?

20   MR. CLEMENT: Justice Kagan, if everything

21   else in the statute remained the same, I would be making

22   the exact same argument.

23   JUSTICE KAGAN: The exact same argument. So

24   that really reduces to the question of why is a big gift

25   from the Federal Government a matter of coercion? In

3

1   other words, the Federal Government is here saying, we

2   are giving you a boatload of money. There are no --

3   there's no matching funds requirement, there are no

4   extraneous conditions attached to it, it's just a

5   boatload of federal money for you to take and spend on

6   poor people's healthcare. It doesn't sound coercive to

7   me, I have to tell you.

8   MR. CLEMENT: Well, Justice Kagan, let me --

9   I mean, I eventually want to make the point where, even

10   if you had a stand-alone program that just gave

11   100 percent, again, 100 percent boatload, nothing but

12   boatload, why there would still be a problem.

13   JUSTICE KAGAN: Yes. I mean, you do make

14   that argument in your brief, just a stand-alone program,

15   a boatload of money, no extraneous conditions, no

16   matching funds, is coercive?

17   MR. CLEMENT: It is. But before I make that

18   point, can I simply say that you built into your

19   question the idea that there are no conditions. And, of

20   course, when you first asked, it was what about the same

21   program with 100 percent matching on the newly eligible

22   mandatory individuals, which is how the statute refers

23   to them, and that would have a very big condition.

24   And the very big condition is that the

25   States, in order to get that new money, they would have

1   to agree not only to the new conditions, but the

2   government here is -- the Congress is leveraging their

3   entire prior participation in the program --

4   JUSTICE KAGAN: Well, let me give you a

5   hypothetical, Mr. Clement.

6   MR. CLEMENT: Sure.

7   JUSTICE KAGAN: Now, suppose I'm an

8   employer, and I see somebody I really like, and I want

9   to hire that person. And I say, I'm going to give you

10   $10 million a year to come work for me. And the person

11   says, well, I -- you know, I've never been offered

12   anywhere approaching $10 million a year. Of course, I'm

13   going to say yes to that.

14   Now we would both be agreed that that's not

15   coercive, right?

16   MR. CLEMENT: Well, I guess I would want to

17   know where the money came from. And if the money came

18   from --

19   JUSTICE KAGAN: Wow. Wow. I'm offering you

20   $10 million a year to come work for me, and you are

21   saying that this is anything but a great choice?

22   MR. CLEMENT: Sure, if I told you, actually,

23   it came from my own bank account. And that's what's

24   really going on here, in part. And that's why it's not

25   --

1   JUSTICE KAGAN: But, Mr. Clement --

2   MR. CLEMENT: -- simply a matter of

3   saying --

4   JUSTICE KAGAN: Mr. Clement, can that

5   possibly be? When a taxpayer pays taxes to the Federal

6   Government, the person is acting as a citizen of the

7   United States. When a taxpayer pays taxes to New York,

8   a person is acting as a citizen of New York. And New

9   York could no more tell the Federal Government what to

10   do with the Federal Government's money than the Federal

11   Government can tell New York what to do with the moneys

12   that New York is collecting.

13   MR. CLEMENT: Right. And if New York and

14   the United States figured out a way to tax individuals

15   at greater than 100 percent of their income, then maybe

16   you could just say it's two separate sovereigns, two

17   separate taxes; but, we all know that in the real world,

18   that to the extent the Federal Government continues to

19   increase taxes, that decreases the ability of the States

20   to tax their own citizenry, and it's a real tradeoff.

21   JUSTICE SOTOMAYOR: Is that a limit on the

22   Federal Government's power to tax?

23   MR. CLEMENT: What's that?

24   JUSTICE SOTOMAYOR: Are you suggesting that

25   at a certain point, the States would have a claim

6

1   against the Federal Government raising their taxes

2   because somehow the States will feel coerced to lower

3   their tax rate?

4   MR. CLEMENT: No, Justice Sotomayor, I'm

5   not. What I'm suggesting is that it's not simply the

6   case that you can say, well, it's free money, so we

7   don't even have to ask whether the program's coercive.

8   JUSTICE SOTOMAYOR: Now, counsel, what

9   percentage does it become coercive? Meaning, as I look

10   at the figures I've seen from amici, there are some

11   states for whom the percentage of Medicaid funding to

12   their budget is close to 40 percent, but there are

13   others that are less than 10 percent.

14   And you say, across the board this is

15   coercive because no state, even at 10 percent, can give

16   it up. What's the percentage of big gift that the

17   federal government can give? Because what you're saying

18   to me is, for a bankrupt state, there's no gift the

19   federal government could give them ever, because it can

20   only give them money without conditions.

21   No matter how poorly the state is run, no

22   matter how much the federal government doesn't want to

23   subsidize abortions or doesn't want to subsidize some

24   other state obligation, the federal government can't

25   give them 100 percent of their needs.

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1   MR. CLEMENT: And, Justice Sotomayor, I'm

2   really saying the opposite, which is not that every gift

3   is coercive, no matter what the amount, no matter how

4   small. I'm saying essentially the opposite, which is

5   there has to be some limit. There has to be some limit

6   on coercion.

7   And the reason is quite simple, because this

8   Court's entire spending power jurisprudence is premised

9   on the notion that spending power is different, and that

10   Congress can do things pursuant to the spending power

11   that it can't do pursuant to its other enumerated powers

12   precisely because the programs are voluntary. And if

13   you relax that assumption that the programs are

14   voluntary, and you are saying they are coercion, then

15   you can't have the spending power jurisprudence --

16   JUSTICE SOTOMAYOR: What makes them

17   coercive; that the state doesn't want to face its voters

18   and say, instead of taking 10, 20, 30, 40 percent of the

19   government's offer of our budget and paying for it

20   ourselves and giving up money for some other function?

21   That's what makes it coercive --

22   MR. CLEMENT: Well --

23   JUSTICE SOTOMAYOR: -- that the state is

24   unwilling to say that?

25   MR. CLEMENT: Maybe I can talk about what

 1   makes it coercive by talking about the actual statute at

 2   issue here and focusing on what I think are the three

 3   hallmarks of this statute that make it uniquely

 4   coercive.

 5   One of them is the fact that this statute is

 6   tied to the decidedly nonvoluntary individual mandate.

 7   And that makes this unique, but it makes it significant,

 8   I think.

 9   I will continue. I thought you had a

10   question. I'm sorry.

11   The second factor, of course, is the fact

12   that Congress here made a distinct and conscious

13   decision to tie the state's willingness to accept these

14   new funds, not just to the new funds but to their entire

15   participation in the statute, even though the coverage

16   for these newly eligible individuals is segregated from

17   the rest of the program. And this is section 2001A3 at

18   page 23A of the appendix to the blue brief.

19   JUSTICE GINSBURG: Isn't that true of every

20   Medicaid increase? That each time -- I mean, and this

21   started quite many years ago, and Congress has added

22   more people and given more benefits -- and every time,

23   the condition is, if you want the Medicaid program, this

24   is the program, take it or leave it.

25   MR. CLEMENT: No, Justice Ginsburg, this is

1   distinct in two different directions. One is, in some

2   of the prior expansions of the program, but not all,

3   Congress has made covering newly eligible individuals

4   totally voluntary. If the states wants to cover the

5   newly eligible individuals, they will get the money;

6   but, if they don't, they don't risk any of their

7   existing participation programs.

8   The 1972 program was a paradigm of that. It

9   created this 209(b) option for states to participate.

10 This court talked about it in the Gray Panthers case.

11   There were other expansions that have taken

12 place, such as the 1984 expansions, where they didn't

13 give states that option; but, here's the second

14 dimension in which this is distinct, which is, here,

15 Congress has created a separate part of the program for

16 the newly eligible mandatory individuals. That's what

17 they called them.

18   And those individuals are treated separately

19 from the rest of the program going forward forever.

20 They are going to be reimbursed at a different rate from

21 everybody who's covered under the preexisting program.

22   Now, in light of that separation by Congress

23 itself of the newly eligible individuals from the rest

24 of the program, it's very hard to understand Congress's

25 decision to say, look if you don't want to cover these

1   newly eligible individuals, you don't just not get the

2   new money, you don't get any of the money under the --

3   JUSTICE BREYER: Where does it say that?

4   I'm sorry, where does it say that?

5   MR. CLEMENT: It says -- well, it -- where

6   does it say what, Justice Breyer?

7   JUSTICE BREYER: What you just said. You

8   said, Congress said, if you don't take the new money to

9   cover the new individuals, you don't get any of the old

10   money that covers the old individuals. That's what I

11   heard you say.

12   MR. CLEMENT: Right.

13   JUSTICE BREYER: And where does it say that?

14   MR. CLEMENT: It says it -- there's two

15   places where it says it.

16   JUSTICE BREYER: Yeah, where?

17   MR. CLEMENT: The 2001A3 makes it part of my

18   brief.

19   JUSTICE BREYER: Where is it in your brief?

20   MR. CLEMENT: That's at page 23 A --

21   JUSTICE BREYER: In the blue brief?

22   MR. CLEMENT: Blue brief.

23   JUSTICE BREYER: 23A. Okay. Thank you.

24   MR. CLEMENT: And this makes not the point

25   about the funding cutoff. This makes the point just

11

1   that these newly eligible individuals are really treated

2   separately forevermore.

3   JUSTICE BREYER: I want the part about the

4   funding cutoff.

5   MR. CLEMENT: Right. And there,

6   Justice Breyer --

7   JUSTICE BREYER: And that cite section is

8   what?

9   MR. CLEMENT: I don't have that with me --

10   JUSTICE BREYER: Well, I have it in front of

11   me.

12   MR. CLEMENT: Great. Perfect. Thank you.

13   JUSTICE BREYER: And I will tell you what I

14   have, what I have in front of me, what it says.

15   MR. CLEMENT: Right.

16   JUSTICE BREYER: And it's been in the

17   statute since 1965.

18   MR. CLEMENT: Exactly.

19   JUSTICE BREYER: And the cite I have is

20   42 U.S.C. Section 1396(c). So are we talking about the

21   same thing?

22   MR. CLEMENT: If that's the -- if that is

23   the provision that gives the secretary --

24   JUSTICE BREYER: Yeah, okay.

25   MR. CLEMENT: -- among other things --

1   JUSTICE BREYER: And here's what it says at

2   the end.

3   MR. CLEMENT: -- the authority to cut off

4   all participation in the program, yes.

5   JUSTICE BREYER: It says, "The secretary

6   shall notify the state agency" -- this is if they don't

7   comply -- "that further payments will not be made to the

8   state or, in his discretion, that payments will be

9   limited to categories under or parts of the state plan

10   not affected by such failure, which it repeats until the

11   secretary is satisfied that he shall limit payments to

12   categories under or parts of the state plan not affected

13   by such failure."

14   So, reading that in your favor, I read that

15   to say, it's up to the secretary whether, should a state

16   refuse to fund the new people, the secretary will cut

17   off funding for the new people, as it's obvious the

18   state doesn't want it, and whether the secretary can go

19   further. I also should think -- I could not find one

20   case where the secretary ever did go further, but I also

21   would think that the secretary could not go further

22   where going further would be an unreasonable thing to

23   do, since government action is governed by the

24   Administrative Procedure Act, since it's governed by the

25   general principle, it must always be reasonable.

1   So I want to know where this idea came from

2   that should state X say, "I don't want the new money,"

3   that the secretary would or could cut off the old money?

4   MR. CLEMENT: And, Justice Breyer, here's

5   where it comes from, which is from the very beginning of

6   this litigation, we've pointed out that what's coercive

7   is not the absolute guarantee that the secretary could

8   cut off every penny, but the fact that she could.

9   JUSTICE BREYER: All right. Now, let me

10   relieve you of that concern, and tell me whether I have.

11   That a basic principle of administrative law, indeed,

12   all law, is that the government must act reasonably.

13   And should a secretary cut off more money than the

14   secretary could show was justified by being causally

15   related to the state's refusal to take the new money,

16   you would march into court with your clients and say,

17   "Judge, the secretary here is acting unreasonably, and I

18   believe there is implicit in this statute, as there is

19   explicit in the ADA, that any such cut-off decision must

20   be reasonable."

21   Now, does that relieve you of your fear?

22   MR. CLEMENT: It doesn't for this reason,

23   Justice --

24   JUSTICE BREYER: I didn't think it would.

25   MR. CLEMENT: Well, but here's the reason.

14

 1   Here's the reason, Justice Breyer, it doesn't.

 2   One is, I mean, I don't know the opinion to

 3   cite for that proposition.

 4   Second is, we have been making in this

 5   litigation since the very beginning this basic point,

 6   the government has had opportunities at every level of

 7   this system, and I suppose they will have an opportunity

 8   today to say, "fear not, States, if you don't want to

 9   take the new conditions, all you will lose is the new

10   money."

11   JUSTICE BREYER: And I said -- I said

12   because it could be, you know, given the complexity of

13   the act, that there is some money that would be saved in

14   the program if the States take the new money, and if

15   they don't take the new money there is money that is

16   being spent that wouldn't otherwise be spent. There

17   could be some pile like that.

18   It might be that the secretary could show it

19   was reasonable to take that money away from the states,

20   too.

21   JUSTICE SCALIA: Mr. Clement --

22   JUSTICE BREYER: But my point is, you have

23   to show reasonableness before you can act.

24   JUSTICE SCALIA: -- do you agree -- do you

25   agree that the government has to act reasonably? Do we

15

1   strike down unreasonable statutes? My God!

2   MR. CLEMENT: And, Justice Scalia, I mean --

3   JUSTICE SCALIA: The executive has to act

4   reasonably, that's certain, in implementing a statute;

5   but, if the statute says, in so many words, that the

6   secretary can strike the whole -- funding for the whole

7   program, that's the law, unreasonable or not, isn't it?

8   MR. CLEMENT: That's the way I would read

9   the law, Your Honor.

10   JUSTICE BREYER: Yeah, but I have a

11   number -- all right.

12   MR. CLEMENT: And if I could just add one

13   thing just to the discussion is the point that, you

14   know, this is not all hypothetical. I mean, in -- there

15   was a record in the district court, and there is an

16   Exhibit 33 to our motion to summary judgment. It is not

17   in the joint appendix. We can lodge it with the Court

18   if you'd like. But it's a letter in the record in this

19   litigation, and it's a letter from the secretary to

20   Arizona, when Arizona floated the idea that it would

21   like to withdraw from the CHIP program, which is a

22   relatively small part of the whole program.

23   And what Arizona was told by the secretary

24   is that if you withdraw from the CHIP program, you risk

25   losing $7.8 billion, the entirety of your Medicaid

1   participation. So this is not something that we've

2   conjured up --

3   JUSTICE BREYER: All right.

4   JUSTICE KAGAN: Mr. Clement --

5   JUSTICE BREYER: To make you feel a little

6   better, I want to pursue this for one more minute.

7   There are cases, and many, of which

8   Justice Scalia knows as well, which uses the Holly Hill,

9   uses the same word as this statute: In the Secretary's

10   discretion. And in those cases, this Court has said,

11   that doesn't mean the Secretary can do anything that he

12   or she wants; but, rather, they are limited to what is

13   not arbitrary, capricious, and abuse of discretion, in

14   interpreting statutes, in applying those statutes, et

15   cetera.

16   End of my argument; end of my question.

17   Respond as you wish.

18   (Laughter.)

19   MR. CLEMENT: Well, Justice Breyer, I'm not

20   sure that the Court's federalism jurisprudence should

21   force States to defend on how a lower court reads Holy

22   Hill. I think that, really, right here, what we know to

23   an absolute certainty is that this Secretary -- this

24   statute gives the Secretary the right to remove all of

25   the State's funding under these programs.

1   And think about what that is, just --

2   JUSTICE SOTOMAYOR: Mr. Clement, do you

3   think that the Federal Government couldn't, if it chose,

4   Congress, say, the system doesn't work. We are just

5   simply going to rehaul it. It's not consistent with

6   how -- what we want to accomplish. We're just going to

7   do away with the system and start a new health care plan

8   of some sort. And, States, you can take the new plan,

9   you can leave them. We are going to give out 20 percent

10   less, maybe 20 percent more, depending on what Congress

11   chooses.

12   Can Congress do that? Does it have to

13   continue the old system because that is what the States

14   are relying upon, and it's coercive now to give them a

15   new system?

16   MR. CLEMENT: Justice Sotomayor, we are not

17   saying we have a vested right to participate in the

18   Medicaid program as it exists now. So, if Congress

19   wanted to scrap the current system and have a new one,

20   I'm not going to tell you that there is no possibility

21   of a coercion challenge to it; but, I'm not going to

22   say that it --

23   JUSTICE SOTOMAYOR: That's what I -- I want

24   to know how I draw the line, meaning --

25   MR. CLEMENT: Well, can --

 1   JUSTICE SOTOMAYOR: -- I think the usual

 2   definition of coercion is, I don't have a choice. I'm

 3   not sure what -- why it's not a choice for the States.

 4   They may not pay for something else. If they don't take

 5   Medicaid, and they want to keep the same level of

 6   coverage, they may have to make cuts in their budget to

 7   other services they provide. That's a political choice

 8   of whether they choose to do that or not.

 9   But when have we defined the right or

10   limited the right of government not to spend money in

11   the ways that it thinks appropriate?

12   MR. CLEMENT: Well, Justice Sotomayor,

13   before -- I mean, I will try to answer that question,

14   too. But the first part of the question was, you know,

15   what if Congress just tried to scrap this and start over

16   again with a new program?

17   Here's why this is fundamentally different

18   and why it's fundamentally more coercive, because

19   Congress is not saying, we want to scrap this program.

20   They don't have a single complaint, really, with the way

21   that States are providing services to the visually

22   impaired and the disabled under pre-existing Medicaid.

23   And that's why it's particularly questionable why they

24   are saying that if you don't take our new money, subject

25   to the new conditions, we are going to take all of the

                                  19

1   money you have previously gotten, that you have been

2   dependent on for 45 years, and you are using right now

3   to serve the visually impaired and the disabled --

4   JUSTICE GINSBURG: Mr. Clement, may I -- may

5   I ask you -- question another line.

6   You represent, what, 26 States?

7   MR. CLEMENT: That's right,

8   Justice Ginsburg.

9   JUSTICE GINSBURG: And we are also told that

10   there are other States that like this expansion, and

11   they are very glad to have it.

12   The relief that you are seeking is to say

13   the whole expansion is no good, never mind that there

14   are States that say, we don't feel coerced, we think

15   this is good.

16   You are -- you are saying that because you

17   represent a sizeable number of States, you can destroy

18   this whole program, even though there may be as many

19   States that want it, that don't feel coerced, that say

20   -- think this is a good thing?

21   MR. CLEMENT: Justice Ginsburg, that's

22   right, but that shouldn't be a terrible concern because,

23   if Congress wants to do what it did in 1972 and pass a

24   statute that makes the expansion voluntary, every State

25   that thinks that this is a great deal can sign up.

1   What's telling here, though, is 26 States,

2   who think that this is a bad deal for them, actually are

3   also saying that they have no choice but to take this

4   because they can't afford to have their entire

5   participation in this 45-year-old program wiped out, and

6   they have to go back to square one and figure out how

7   they are going to deal with the visually impaired in

8   their State, the disabled in their State --

9   JUSTICE SCALIA: Mr. Clement, I didn't take

10   the time to figure this out, but maybe you did. Is

11   there any chance that all 26 States opposing it have

12   Republican governors, and all of the States supporting

13   it have Democratic governors? Is that possible?

14   MR. CLEMENT: There's a correlation,

15   Justice Scalia.

16   JUSTICE SCALIA: Yes.

17   (Laughter.)

18   JUSTICE GINSBURG: Let -- let me ask you

19   another thing, Mr. -- Mr. Clement. Most colleges and

20   universities are heavily dependent on the government to

21   fund their research programs and other things, and that

22   has been going on for a long time. And then Title IX

23   passes, and a government official comes around and

24   say -- says to the colleges, you want money for your

25   physics labs and all the other things you get it for,

 1   then you have to create an athletic program for girls.

 2   And the recipient says, I am being coerced, there is no

 3   way in the world I can give up all the funds to run all

 4   these labs that we have, I can't give it up, so I'm

 5   being coerced to accept this program that I don't want.

 6   Why doesn't your theory -- if your theory is

 7   any good, why doesn't it work any time something --

 8   someone receives something that is too good to give up?

 9   MR. CLEMENT: Well, Justice Ginsburg, there

10   is two reasons that might be different. One is, this

11   whole line of coercion only applies -- is only relevant,

12   really, when Congress tries to do something through the

13   spending power it couldn't do directly.

14   So if Congress tried to impose Title IX

15   directly, I guess the question for this Court would be

16   whether or not Section 5 of the 14th Amendment allowed

17   Congress to do that. I imagine you might think that it

18   did, and I imagine some of your colleagues might take

19   issue with that; but, that's -- that's the nature of the

20   question.

21   So one way around that would be, if Congress

22   can do it directly, you don't even have to ask whether

23   there is something special about the spending power.

24   That's how this Court resolved, for example, the Ferra

25   case about funding to -- to colleges.

 1   JUSTICE GINSBURG: I'm trying to understand

 2   your coercion theory. I know that there are cases of

 3   ours that have said there is a line between pressure and

 4   coercion, but we have never had, in the history of this

 5   country or the Court, any Federal program struck down

 6   because it was so good that it becomes coercive to be in

 7   it.

 8   MR. CLEMENT: Well, Justice Ginsburg, I'm

 9   going -- to say the second thing about my answer to your

10   prior question, which is just I also think that, you

11   know, it may be that spending on certain private

12   universities is something, again, that Congress can do,

13   and it doesn't matter whether it's coercion. But when

14   they are trying to get the States to expand their

15   Medicaid programs, that's --

16   JUSTICE GINSBURG: Let's take -- let's take

17   public colleges.

18   MR. CLEMENT: Okay. Then there -- then

19   there may be some limits on that, I mean, but, again,

20   I'm not sure, even in that context, there might not be

21   some things Congress can do. It's a separate question.

22   But once we take the premise, which I don't

23   think there is a disagreement here, that Congress could

24   not simply, as a matter of direct legislation under the

25   commerce power or something, say, States, you must

23

1 expand your Medicaid programs, if we take that as a

2 given, then I think we have to ask the question of

3 whether or not it's coercive.

4   Now, you -- in your second question, you

5 asked, well, you know, I mean, where's the case that

6 says that we've crossed that line? And this is that

7 case, I would respectfully say --

8   JUSTICE BREYER: And isn't the covenant

9 going to apply, as well, to the 1980 extension to

10 children 0 to 6 years old, 1990 requiring the extension

11 for children up to 18? All those prior extensions, to

12 me, seem just as big in amount, just about as big in the

13 number of people coming on the rolls, and they all are

14 governed by precisely the same statute that you are

15 complaining of here, which has been in the law since

16 '65.

17   MR. CLEMENT: Justice Breyer, I don't think

18 that our position here would necessarily extend to say

19 the 1984 amendments, and let me tell you why. You know,

20 I'm -- I'm not saying that absolutely that's guaranteed

21 that's not coercive, but here's reasons why they're

22 different.

23   The one major difference is the size of the

24 program. I mean, the expansion of Medicaid since 1984

25 is really breathtaking. Medicaid, circa 1984, the

24

1   Federal spending to the States was a shade over

2    $21 billion. Right now, it's $250 billion, and that's

3   before the expansion under this statute.

4   JUSTICE KAGAN: Well, if you are right, Mr.

5   Clement, doesn't that mean that Medicaid is

6   unconstitutional now?

7   MR. CLEMENT: Not necessarily,

8   Justice Kagan. And, again, it's because we are not here

9   with a one trick pony. And this -- one of the

10   factors -- we point you to three factors that make this

11   statute uniquely coercive. One of them is the sheer

12   size of this program.

13   And, you know, if you want a gauge on the

14   size of this program, the best place to look is the

15   government's own number. Footnote 6, page 73 --

16   JUSTICE KAGAN: So, when does a program

17   become too big? I want you to -- give me a dollar

18   number.

19   MR. CLEMENT: $3.3 trillion over the next 10

20   years. That's -- that --

21   JUSTICE KAGAN: I thought $1 trillion.

22   JUSTICE BREYER: I'll tell you this number,

23   which I did look up, that the amount, approximately, if

24   you look into it -- as a percentage of GDP, it's big,

25   but it was before this somewhere about 2-point-something

1   percent, fairly low, of GDP. It'll go up to something a

2   little bit over 3 percent of GDP. And now go look at

3   the comparable numbers, which I did look at, with the

4   expansion that we're talking about before.

5   The expansion from 0 to 18 or even from 0 to

6   6. And while you can argue those numbers, it's pretty

7   hard to argue that they aren't roughly comparable as a

8   percentage of the prior program or as a percentage of

9   GDP.

10   If I'm right on those numbers or even

11   roughly right -- I don't guarantee them -- then would

12   you have to say, well, indeed, Medicaid has been

13   unconstitutional since 1964.

14   And if not, why not?

15   MR. CLEMENT: The answer is no, and that's

16   because we're here saying there are three things that

17   make this statute unique.

18   JUSTICE SCALIA: What are your second and

19   third? I'm on pins and needles to hear your second --

20   (Laughter.)

21   MR. CLEMENT: One is the sheer size. Two is

22   the fact that this statute uniquely is tied to an

23   individual mandate which is decidedly nonvoluntary. And

24   three is the fact that they've leveraged the prior

25   participation in the program, notwithstanding that

1   they've broken this out as a separately segregated fund

2   going forward, which is not --

3   JUSTICE KAGAN: So, on the third -- on the

4   third, suppose you had the current program and Congress

5   wakes up tomorrow and says we think that there's too

6   much fraud and abuse in the program, and we're going to

7   put some new conditions on how the States use this money

8   so we can prevent fraud and abuse, and we're going to

9   tie it to everything that's been there initially.

10   Unconstitutional?

11   MR. CLEMENT: No, I think that is

12   constitutional because I think that's something that

13   Congress could do directly. It wouldn't have to limit

14   that to the spending program. And I think 18 U.S.C. 666

15   is -- is a statute -- you know, it may -- it's in the

16   criminal code. It may be tied to spending, but I think

17   that's -- that's a provision that I don't think is

18   constitutionally called into question.

19   JUSTICE KAGAN: I guess I don't get the

20   idea. I mean, Congress can legislate fraud and abuse

21   restrictions in Medicaid, and Congress can legislate

22   coverage expansions in Medicaid.

23   MR. CLEMENT: Well, Justice Kagan, I think

24   there's a difference, but if I'm wrong about that and

25   the consequence is that Congress has to break Medicaid

1   down into remotely manageable pieces as opposed to

2    $3.3 trillion over 10 years before the expansion, I

3   don't think that would be the end of the world. But I

4   really would ask you to focus on specifically what's

5   going on here, which is they take these newly eligible

6   people -- and that's a massive change in the way the

7   program works.

8   These are people who are healthy, childless

9   adults who are not covered in many States. They say,

10   okay, we're going to make you cover those. We're going

11   to have a separate program for how you get reimbursed

12   for that. You get reimbursed differently from all the

13   previously eligible individuals. But if you don't take

14   our money, we're going to take away your participation

15   in the program for the visually impaired and disabled.

16   If I may reserve the balance of my time.

17   CHIEF JUSTICE ROBERTS: Well, I'm -- I'm not

18   sure my colleagues have exhausted their questions, so --

19   JUSTICE SOTOMAYOR: I guess my greatest

20   fear, Mr. Clement, with your argument is the following:

21   The bigger the problem, the more resources it needs.

22   We're going to tie the hands of the Federal Government

23   in choosing how to structure a cooperative relationship

24   with the States. We're going to say to the Federal

25   Government, the bigger the problem, the less your powers

1   are. Because once you give that much money, you can't

2   structure the program the way you want. It's our money,

3   Federal Government. We're going to have to run the

4   program ourself to protect all our interests.

5   I don't see where to draw that line. The

6   uninsured are a problem for States only because they,

7   too, politically, just like the Federal Government,

8   can't let the poor die. And so, to the extent they

9   don't want to do that, it's because they feel

10   accountable to their citizenry. And so, if they want to

11   do it their way, they have to spend the money to do it

12   their way, if they don't want to do it the Federal way.

13   So, I just don't understand the logic of

14   saying, States, you can't -- you don't -- you're not

15   entitled to our money, but once you start taking it, the

16   more you take, the more power you have.

17   MR. CLEMENT: Well, Justice Sotomayor, a

18   couple of points. One is, I actually think that sort of

19   misdescribes what happened with Medicaid. I mean,

20   States were, as you suggest, providing for the poor and

21   the visually impaired and the disabled even before

22   Medicaid came along. Then all of a sudden, States --

23   the Federal Government said, look, we'd like to help you

24   with that, and we're going to give you money

25   voluntarily. And then over time, they give more money

1   with more conditions. And now they decide they're going

2   to totally expand the program, and they say that you

3   have to give up even your prior program, where we --

4   first came in and offered you cooperation, we're now

5   going to say you have to give that up if you don't take

6   our new conditions.

7   Secondarily, I do think that our principle

8   is not that when you get past a certain level, it

9   automatically becomes coercive per se. But I do think

10   when you get a program and you're basically telling

11   States that, look, we're going to take away

12   $3.3 trillion over the next 10 years, that at that

13   point, it's okay to insist that Congress be a little

14   more careful that it not be so aggressively coercive as

15   it was in this statute.

16   And I would simply say that -- we're not

17   here to tell you that this is going to be an area where

18   it's going to be very easy to draw the line. We're just

19   telling you that it's exceptionally important to draw

20   that line, and this is a case where it ought to be easy

21   to establish a beachhead, say that coercion matters, say

22   there's three factors of this particular statute that

23   make it as obviously coercive as any piece of

24   legislation that you've ever seen, and then you will

25   have effectively instructed Congress that there are

30

1   limits, and you will have laid down some administrable

2   rules.

3   JUSTICE SCALIA: Mr. Clement, the Chief has

4   said I can ask this.

5   CHIEF JUSTICE ROBERTS: He doesn't always

6   check first.

7   (Laughter.)

8   JUSTICE SCALIA: As I recall your -- your

9   theory, it is that to determine whether something is

10   coercive, you look to only one side, how much you're

11   threatened with losing or offered to receive. And the

12   other side doesn't matter.

13   I don't think that's realistic. I mean, I

14   think, you know, the -- the old Jack Benny thing, Your

15   Money or Your Life, and, you know, he says "I'm

16   thinking, I'm thinking." It's -- it's funny, because

17   it's no choice. You know? Your life? Again, it's just

18   money. It's an easy choice. No coercion, right? I

19   mean -- right?

20   Now, whereas, if -- if the choice were your

21   life or your wife's, that's a lot harder.

22   Now, is it -- is it coercive in both

23   situations?

24   MR. CLEMENT: Well, yes. It is.

25   (Laughter.)

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1   JUSTICE SCALIA: Really?

2   MR. CLEMENT: I would say that.

3   JUSTICE SCALIA: It's a tough choice.

4   And -- and --

5   JUSTICE KENNEDY: I thought you were going

6   to say that it's your money and your life.

7   (Laughter.)

8   MR. CLEMENT: And, well -- it is. But I

9   mean -- I might have missed something, but both of those

10   seem to be the hallmarks of coercion.

11   (Laughter.)

12   JUSTICE SCALIA: No, no, no. To say -- to

13   say you're -- when you say you're coerced, it means

14   you've been -- you've been given an offer you can't

15   refuse. Okay? You can't refuse your money or your

16   life. But your life or your wife's, I could refuse that

17   one.

18   (Laughter.)

19   JUSTICE SOTOMAYOR: Mr. Clement, he's not

20   going home tonight.

21   (Laughter.)

22   JUSTICE SCALIA: I'm talking about my life.

23   I think -- take mine, you know?

24   (Laughter.)

25   MR. CLEMENT: I wouldn't do that either,

 1   Justice.

 2   JUSTICE SCALIA: I won't use that as an

 3   example.

 4   Forget about it.

 5   CHIEF JUSTICE ROBERTS: That's enough

 6   frivolity for a while.

 7   But I want to make sure I understand where

 8   the meaningfulness of the choice is taken away. Is it

 9   the amount that's being offered, that it's just so much

10   money, of course you can't turn it down, or is it the

11   amount that's going to be taken away if you don't take

12   what they're offering?

13   MR. CLEMENT: It's both, Your Honor. And I

14   think that that's -- I mean, there really is -- there

15   really is, you know, three strings in this bow. I mean,

16   one is the sheer amount of money here makes it very,

17   very difficult to refuse, because it's not money that,

18   you know, that's come from some -- you know, China or,

19   you know, from the -- the -- you know, the export

20   tariffs like in the old day. It's coming from the

21   taxpayers. So, that's part of it.

22   The fact that they're being asked to give up

23   their continuing participation in a program that they've

24   been participating in for 45 years as a condition to

25   accept the new program, we think that's the second thing

1   that's critical --

2   CHIEF JUSTICE ROBERTS: Well, why isn't that

3   a consequence of how willing they have been since the

4   New Deal to take the Federal Government's money? And it

5   seems to me that they have compromised their status as

6   independent sovereigns because they are so dependent on

7   what the Federal Government has done, they should not be

8   surprised that the Federal Government, having attached

9   the -- they tied the strings, they shouldn't be

10   surprised if the Federal Government isn't going to start

11   pulling them.

12   MR. CLEMENT: With all due respect,

13   Mr. Chief Justice, I don't think we can say that, you

14   know, the States have gotten pretty dependent, so let's

15   call this whole federalism thing off. And I just think

16   it's too important, because, again, the consequence --

17   if you think about it -- if -- the consequence of saying

18   that we're not going to police the coercion line here

19   shouldn't be that well, you know, it's just too hard, so

20   we'll give the Federal Congress unlimited spending

21   power.

22   The consequence ought to be, if you really

23   can't police this line, then you should go back and

24   reconsider your cases that say that Congress can spend

25   money on things that it can't do directly.

1   Now, we're not asking you to go that far.

2   We're simply saying that, look, your spending power

3   cases absolutely depend on there being a line between

4   coercion --

5   JUSTICE SOTOMAYOR: But could you tell me --

6   MR. CLEMENT: -- and voluntary action.

7   JUSTICE SOTOMAYOR: I don't understand your

8   first answer to Justice Kagan. You don't see there

9   being a difference between the Federal Government saying

10   we want to take care of the poor; states, if you do

11   this, we'll pay 100 percent of your administrative

12   costs.

13   And you said that could be coercion. All

14   right? Doesn't the amount of burden that the State

15   undertakes to meet the Federal obligation count in this

16   equation at all?

17   MR. CLEMENT: It -- it certainly can,

18   Justice Sotomayor. I didn't mean to suggest, in

19   answering Justice Kagan's question, that my case was no

20   better than that hypothetical. I mean, but it's in the

21   nature of things that I do think the amount of the

22   money, even considered alone, does make a difference,

23   and it's precisely because it has an effect on their

24   ability to raise revenue from their own citizens. So

25   it's not just free money that they are turning down if

1   they want to; it really is --

2   JUSTICE SOTOMAYOR: Counsel, if we go back

3   to the era of matching what a State pays to what a State

4   gets, Florida loses. It's citizens pay out much less

5   than what they get back in Federal subsidies of all

6   kinds. So you can't really be making the argument that

7   Florida can't ask for more than it gives, because it's

8   really giving less than it receives.

9   MR. CLEMENT: Well, then I'll make --

10   JUSTICE SOTOMAYOR: You don't really want to

11   go back to that point, do you?

12   MR. CLEMENT: Well, then I'll make that

13   argument on behalf of Texas.

14   (Laughter.)

15   MR. CLEMENT: But it's not -- it's not what

16   my argument depends on, and that's the critical thing.

17   It's one aspect of what makes this statute uniquely

18   coercive.

19   And I really think if you ask the question,

20   what explains the idea that if you don't take this new

21   money, you are going to lose all your money under what

22   you have been doing for 45 years to help out the

23   visually impaired and the disabled, nobody in Congress

24   wants the States to stop doing that. They are just

25   doing it, and it's purely coercive, to condition the

1   money. It's leverage, pure and simple.

2   JUSTICE KENNEDY: If the inevitable

3   consequence of your position was that the Federal

4   Government could just do this on its own, the Federal

5   Government could have Medicaid, Medicare, and these

6   insurance regulations, assume that's true, then how are

7   the interests of federalism concerned? How are the

8   interests of federalism concerned if, in Florida or

9   Texas or some of the other objecting States, there are

10   huge Federal bureaucracies doing what this bill allows

11   the State bureaucracies to do?

12   I know you have thought about that. I would

13   just like your answer.

14   MR. CLEMENT: I have, and I would like to

15   elaborate that the one-word answer is "accountability."

16   If the Federal Government decides to spend

17   money through Federal instrumentalities, and the citizen

18   is hacked off about it, they can bring a Federal

19   complaint to a Federal official working in a Federal

20   agency.

21   And what makes this so pernicious is that

22   the Federal Government knows that the citizenry is not

23   going to take lightly the idea that there are huge, new

24   Federal bureaucracies popping up across the country.

25   And so they get the benefit of administering this

1   program through State officials, but then it makes it

2   very confusing for the citizen, who doesn't like this.

3   Do they complain to the State official because it's

4   being administered by a State official in a State

5   building, or do they --

6   JUSTICE KAGAN: But, Mr. Clement, that is

7   very confusing because the idea behind cooperative

8   Federal/State programs was exactly a federalism idea.

9   It was to give the States the ability to administer

10   those programs. It was to give the States a great deal

11   of flexibility in running those programs. And that's

12   exactly what Medicaid is.

13   MR. CLEMENT: Well, that's exactly what

14   Medicaid was. The question is, what will it be going

15   forward?

16   And I absolutely take your point,

17   Justice Kagan. Cooperative federalism is a beautiful

18   thing. Mandatory federalism has very little to

19   recommend it because it poses exactly the kind of

20   accountability --

21   JUSTICE KAGAN: Cooperative federalism does

22   not mean that there are no Federal mandates and no

23   Federal restrictions involved in a program that uses

24   90 percent here, 100 percent Federal money. It means

25   there is flexibility built into the program subject to

1   certain rules that the Federal Government has about how

2   it wishes its money to be used.

3   It's like giving a gift certificate. If I

4   give you a gift certificate for one store, you can't use

5   it for other stores; but, still, you can use it for all

6   kinds of different things.

7   MR. CLEMENT: I absolutely agree that if

8   it's cooperative federalism and the States have choices,

9   then that is perfectly okay. But when -- that's why

10 voluntariness in coercion is so important. Because if

11 you force a State to participate in a Federal program,

12 then -- I mean, as long as it's voluntary, then a State

13 official shouldn't complain if a citizen complains to

14 the State about the way the State's administering a

15 Federal program that it volunteered to participate in.

16 But at the point it becomes coercive, then it's not fair

17 to tell the citizen to complain to the State official,

18 they had no choice.

19   But who do they complain to at the Federal

20 level? There's nobody there, which would be -- I'm not

21 saying it's the best solution to have Federal

22 instrumentalities in every State, but it actually is

23 better than what you get when you have mandatory

24 federalism, and you lose the accountability that is

25 central to the federalism provisions in the

 1   Constitution.

 2   CHIEF JUSTICE ROBERTS: Thank you,

 3   Mr. Clement.

 4   General Verrilli.

 5   ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

 6   ON BEHALF OF THE RESPONDENTS

 7   GENERAL VERRILLI: Mr. Chief Justice, and

 8   may it please the Court:

 9   The Affordable Care Act's Medicaid expansion

10   provisions will provide millions of Americans with the

11   opportunity to have access to essential health care that

12   they cannot now afford. It is an exercise of the

13   Spending Clause power that complies with all of the

14   limits set forth in this Court's decision in Dole, and

15   the States do not contend otherwise. The States are

16   asking this Court to do something unprecedented, which

17   is to declare this an impermissibly coercive exercise of

18   power --

19   JUSTICE SCALIA: What do you think we meant

20   in those dicta in several prior cases, where we've said

21   that the Federal Government cannot be coercive through

22   the Spending Clause? What -- what do you think we

23   were -- give us a hypothetical.

24   GENERAL VERRILLI: Yes. First, if I could

25   just try to be a little more precise about it,

1   Justice Scalia. I think what the Court said in Steward

2   Machine and in Dole is that it's possible that you might

3   envision a situation in which there's coercion.

4   JUSTICE SCALIA: Okay.

5   GENERAL VERRILLI: And the courts didn't say

6   much more, but I can think of something.

7   One example I could think of that might

8   serve as a limit would be a Coyle-type situation, in

9   which the condition attached was -- worked a fundamental

10   transformation in the structure of State government in a

11   situation in which the State didn't have a choice but to

12   accept it. But -- and so --

13   JUSTICE SCALIA: Anything else, so long

14   as you --

15   GENERAL VERRILLI: Well, but --

16   JUSTICE SCALIA: You are talking about

17   situations where they have to locate their State house

18   in some other city --

19   GENERAL VERRILLI: Or you may have no

20   legislature or something like that.

21   JUSTICE SCALIA: -- and they have no choice.

22   But, short of that, they can make the State do anything

23   at all?

24   GENERAL VERRILLI: Well, no. Dole -- the

25   Dole conditions are real. The germaneness condition in

 1   Dole is real, for example. And so those --

 2   CHIEF JUSTICE ROBERTS: But none of those

 3   have addressed the coercion question.

 4   GENERAL VERRILLI: Right.

 5   CHIEF JUSTICE ROBERTS: So do you think it

 6   would be all right for the Federal Government to say,

 7   same program: States, you can take this, or you can

 8   leave it; but, if you don't take it, you lose every last

 9   dollar of Federal funding for every program?

10   GENERAL VERRILLI: I think that would raise

11   a germaneness issue, Mr. Chief Justice, but it's not

12   what we have here.

13   CHIEF JUSTICE ROBERTS: But there's no

14   coercion question at all?

15   GENERAL VERRILLI: Well, but I think -- I

16   think they are related. I think that the germaneness

17   inquiry in Dole really gets at coercion in some

18   circumstances, and that's why I think they are related;

19   but, we don't have that here.

20   And if I could, I would like to address --

21   CHIEF JUSTICE ROBERTS: No, I know we don't

22   have that here. How does germaneness get -- get

23   to coercion?

24   GENERAL VERRILLI: Well, because it gets to

25   be harder to see what --

1   CHIEF JUSTICE ROBERTS: That's germaneness;

2   there's no --

3   GENERAL VERRILLI: -- what the connection is

4   between getting you to do A and the money you are

5   getting for --

6   CHIEF JUSTICE ROBERTS: So it fails because

7   it is not germane; but, you are saying it would not fail

8   because it was coercive?

9   GENERAL VERRILLI: Well, I think that -- as

10 I said, I think they are really trying to get at the

11 same thing. And I -- but I do think it's quite

12 different here, and I would like to, if I could, take up

13 each of the --

14   CHIEF JUSTICE ROBERTS: No, no. I know it's

15 -- I know it's different here. I'm just trying to

16 understand if you accept the fact or regard it as true

17 that there is a coercion limit; or, that once the

18 Federal Government -- once you are taking Federal

19 Government money, the Federal Government money -- can

20 take it back, and that doesn't affect the voluntariness

21 of your choice?

22   Because it does seem like a serious problem.

23 We are assuming, under the Spending Clause the Federal

24 Government cannot do this, under the Constitution it

25 cannot do this; but, if it gets the State to agree to

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1   it, well, then it can.

2   And the concern is, if you can say, if you

3   don't agree to this you lose all your money, whether

4   that's really saying the limitation in the Constitution

5   is -- is largely meaningless.

6   GENERAL VERRILLI: Well, but I don't think

7   that this is a case that presents that question,

8   Mr. Chief Justice.

9   CHIEF JUSTICE ROBERTS: No, no, I know. I'm

10   just -- I know this -- I don't know if I will grant it

11   to you or not, but let's assume it's not this case. Do

12   you recognize any limitation on that concern?

13   GENERAL VERRILLI: I think the Court has

14   said, in Steward Machine and Dole, that this is

15   something that needs to be considered in an appropriate

16   case, and we acknowledge that; but, I do think it's so

17   dependent on the circumstances that it's very hard to

18   say in the abstract with respect to a particular program

19   that there is a --

20   JUSTICE SCALIA: You can't imagine a case in

21   which it is both germane and yet coercive, is what you

22   are saying. There is no such case as far as you know.

23   GENERAL VERRILLI: Well, I am not prepared

24   to -- to say right here that I can -- that --

25   JUSTICE SCALIA: I wouldn't think that is a

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1   surprise question. I mean, you know --

2   GENERAL VERRILLI: I mean, you know,

3   Congress has authority to act and --

4   JUSTICE SCALIA: Hey, I can't think of one.

5   I'm not blaming you for not thinking of one.

6   (Laughter.)

7   GENERAL VERRILLI: But I do think -- but I

8   do think -- I really do think that it's important to

9   look at this, an issue like this, if you are going to

10   consider it, it has got to be considered in the factual

11   context in which it arises.

12   JUSTICE ALITO: Well, let me give you a

13   factual context. Let's say Congress says this to the

14   States: We have got great news for you. We know that

15   your expenditures on education are a huge financial

16   burden, so we are going to take that completely off your

17   shoulders. We are going to impose a special Federal

18   education tax which will raise exactly the same amount

19   of money as all of the States now spend on education,

20   and then we are going to give you a grant that is equal

21   to what you spent on education last year.

22   Now, this is a great offer and we think you

23   will take it, but, of course, if you take it, it's going

24   to have some conditions because we're going to set rules

25   on teacher tenure, on collective bargaining, on

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1   curriculum, on textbooks, class size, school calendar,

2   and many other things. So, take it or leave it.

3   If you take it, you have to follow our rules

4   on all of these things. If you leave it, well, then

5   you're going to have to fine -- you are going to have to

6   tax your citizens, they're going to have to pay the

7   Federal education tax; but on top of that, you're going

8   to have to tax them for all of the money that you're now

9   spending on education, plus all of the Federal funds

10 that you were previously given.

11   Would that be -- would that reach the

12 point -- would that be the point where financial

13 inducement turns into coercion?

14   GENERAL VERRILLI: No, I don't think so --

15   JUSTICE ALITO: No?

16   GENERAL VERRILLI: -- because they do, the

17 States do have a choice there, especially as a -- as a

18 going-in proposition. The argument the States are

19 making here is not that they're -- that -- this is not a

20 going-in proposition. Their argument is that they're --

21 they are in a position where they don't have a choice

22 because of everything that has happened before. But --

23   JUSTICE ALITO: You might be right. But if

24 that's the case, then there's nothing left --

25   GENERAL VERRILLI: Well, but as a --

1   JUSTICE ALITO: -- of federalism.

2   GENERAL VERRILLI: As a practical matter, I

3   disagree with that, Justice Alito.   First of all, as a

4   practical matter, there's a pretty serious political

5   constraint on that situation ever arising, because it's

6   not like the Federal Government is going to have an easy

7   time of raising the kinds of tax revenues that need to

8   be -- needed to raised to work that kind of fundamental

9   transformation, and that's real.   And political

10   constraints do operate to protect federalism in this

11   area.

12   JUSTICE SCALIA: I would have thought there

13   was a serious political strain -- constraint on the

14   individual mandate, too, but that didn't work.   What you

15   call serious political constraints sometimes don't work.

16   GENERAL VERRILLI: But -- but with respect

17   to a situation like that one, Justice Scalia, the -- the

18   States have their education system, and they can decide

19   whether they're going to go in or not.   But here, of

20   course, I think it's important to trace through the

21   history of Medicaid.   It is not a case, as my friend

22   from the other side suggested, that the norm here is

23   that the Federal Government has offered to the States

24   the opportunity either to stay where they are or add the

25   new piece.

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1   We can debate that proposition with respect

2   to 1972 one way or another. The States have one view

3   about that; we have a different one. But starting in

4   the 1984 expansion, with respect to pregnant women and

5   infants, it was an expansion of the entire program;

6   States were given the choice to stay in the entire

7   program or not. 1989 when the program was expanded to

8   children under 6 years of age, under 133 percent of

9   poverty, same thing. 1990, kids 6 to 18 and 100 percent

10   of poverty, same thing. In fact, every major expansion,

11   same thing.

12   And so, I just think the history of the

13   program, and particularly when you read that in context

14   of 42 U.S.C. 1304, which reserves the right of the

15   Federal Government to amend the program going forward,

16   shows you that this is something that the States have

17   understood all along. This has been the evolution of

18   it, and with respect to --

19   CHIEF JUSTICE ROBERTS: Could you give me

20   some assurance? We heard the question about whether or

21   not the Secretary would use this authority to the extent

22   available. Is there circumstances where you are willing

23   to say that that would not be permissible? I'm thinking

24   of the Arizona letter, for example. I mean, if I had

25   the authority and I was in that position, I would use it

1   all the time. You might -- you want some little change

2   made? Well, guess what; I can take away all your money

3   if you don't make it. I win. Every time.

4   It seems that that would be the case. So,

5   why shouldn't we be concerned about the extent of

6   authority that the government is exercising, simply

7   because they could do something less? We have to

8   analyze the case on the assumption that that power will

9   be exercised, don't we?

10   GENERAL VERRILLI: Well, Mr. Chief Justice,

11   it would not be responsible of me to stand here in

12   advance of any particular situation becoming -- coming

13   before the Secretary of Health and Human Services and

14   commit to how that would be resolved one way or another.

15   But that --

16   CHIEF JUSTICE ROBERTS: No, I appreciate

17   that. I appreciate that, but I guess --

18   GENERAL VERRILLI: That discretion is there

19   in the statute, and I think there's every reason to

20   think it's real, but I do think, getting back to the

21   circumstances here --

22   JUSTICE KAGAN: Well, General, what's the --

23   been the history of its use? Has the Secretary in fact

24   ever made use of that authority?

25   GENERAL VERRILLI: That's correct, Justice

1   Kagan. It's never been used --

2   CHIEF JUSTICE ROBERTS: What about the

3   Arizona letter we just heard about today?

4   GENERAL VERRILLI: It has never been used to

5   cut off --

6   CHIEF JUSTICE ROBERTS: It's been used to

7   threaten --

8   JUSTICE SCALIA: Of course not.

9   CHIEF JUSTICE ROBERTS: Of course no State

10   is going say, okay, go ahead, make my day, take it away.

11   They're -- they're going to give in.

12   GENERAL VERRILLI: If we could go to the

13   situation we have here, Mr. Chief Justice, this -- with

14   respect to the Medicaid expansion, the States' argument

15   is, as they've said in their briefs -- they articulated

16   a little bit different this morning -- this afternoon.

17   But as they said it in their briefs was it's not what

18   you stand to gain, but what you stand to lose.

19   But I think an important thing in evaluating

20   that argument in this context is fully 60 percent of

21   Medicaid expenditures in this country are based on

22   optional choices. And I don't mean by that the optional

23   choices of the States to stay in the program in '84 or

24   '88 or '89. But -- but States are given choices to

25   expand the beneficiaries beyond the Federal minimum and

1   to expand services beyond the Federal minimum.

2   JUSTICE KENNEDY: And just a small point,

3   and please correct me if I am wrong. It -- does this

4   Act not require States to keep at the present level

5   their existing Medicaid expenditure? So some States may

6   have been more generous than others in Medicaid, but

7   this Act freezes that so the States can't go back. Or

8   am I incorrect?

9   GENERAL VERRILLI: It's much more nuanced

10   than that, Justice Kennedy. There is something called a

11   maintenance of effort provision which lasts until 2014,

12   until such time as the Medicaid expansion takes place

13   and the exchanges are in place. That applies to the

14   population. It says, with respect to the population,

15   you can't take anybody out. It does not apply to the

16   optional benefits where the States still have

17   flexibility. They can still reduce optional benefits

18   that they're now providing if they -- if they want to

19   control costs. They can also work on provider rates.

20   There's also -- with respect to demonstration projects

21   by which some States have expanded their populations

22   beyond the required eligibility levels, they don't have

23   to keep them in. And then there's also, if the State

24   has a budgetary crisis, it can get a waiver of that, as

25   Wisconsin did. So, that is a -- that's a provision I

1   think that does a significant degree less than my

2   friends on the other side have suggested in terms of --

3   in terms of its effect, and its effect beyond that is

4   just temporary.

5   But I do think with respect to the -- the

6   first of their three arguments for coercion, the sheer

7   size argument, that it's very difficult to see how that

8   is going to work, because if the question is about what

9   you stand to lose rather than what you stand to gain,

10   then it seems to me that it doesn't matter whether the

11   Medicaid expansion is substantial or whether it's

12   modest, or whether there's any expansion at all. The

13   States, for example -- the Federal Government, for

14   example, could decide that under -- under the current

15   system too much money has ended up flowing to nursing

16   home care and that money would be better serving the

17   general welfare if it were directed at infants and

18   children. But if the Federal Government said we're

19   going to redirect the spending priorities of the Federal

20   money that we're offering to you, the States could say,

21   well, geez, we don't like that; we'd like to keep

22   spending the money the way we were, and we have no

23   choice, because this has gotten too big for us to exit.

24   And so -- and in fact, it seems to me, standing here

25   today before these expansions take place, under their

1   theory, the provision is coercive.

2   JUSTICE SCALIA: The smaller it, is the

3   bigger the coercion.

4   GENERAL VERRILLI: Well --

5   JUSTICE SCALIA: The smaller what you're

6   demanding of them, the bigger the coercion to go along.

7   GENERAL VERRILLI: The more they stand to

8   lose. And -- and so -- and then it -- I'm sorry,

9   Justice Breyer.

10   JUSTICE BREYER: I -- just before you leave

11   that, I'd -- I'd appreciate it if you would expand a

12   little bit on the answer to Justice Kagan's question for

13   the reason, when I read the cutoff statute, which as I

14   said has been there since 1965 unchanged, it does refer

15   to the Secretary's discretion to keep the funding,

16   insofar as the funding has no relationship to the

17   failure to comply with the condition.

18   And as I read that, that gives the Secretary

19   the authority to cut off all the money, but the States'

20   refusal to accept the condition means they shouldn't

21   have. But nothing there says they can go beyond that

22   and cut off unrelated money. Now, there is a sentence

23   says maybe they could do that. I thought they had to

24   exercise that within reason.

25   GENERAL VERRILLI: Right. Well --

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1   JUSTICE BREYER: I don't know when it be

2 reasonable. So, you've looked into it, and that's what

3 I want to know.

4   GENERAL VERRILLI: Right.

5   JUSTICE BREYER: Is there -- I could find no

6 instance where they went beyond the funds that were

7 related to the thing that the State refused to do or

8 things affected by that. I would like you to tell me,

9 when you looked into it, that what I thought of in this

10 isolation chamber here is actually true. Or whether

11 they have gone around threatening people that we will

12 cut off totally unrelated funds.

13   What is the situation?

14   GENERAL VERRILLI: I think the situation is

15 generally as you've described it, but I do want to be

16 careful in saying I don't think it would be responsible

17 of me to commit now that the Secretary would exercise

18 the discretion uniformly in one way or another.

19   CHIEF JUSTICE ROBERTS: Well, but that's

20 just saying that when, you know, the analogy that has

21 been used, the gun to your head, "your money or your

22 life," you say, well, there's no evidence that anyone

23 has ever been shot.

24   GENERAL VERRILLI: But --

25   CHIEF JUSTICE ROBERTS: Well, it's because

1   you have to give up your wallet. You don't have a

2   choice.

3   GENERAL VERRILLI: But that --

4   CHIEF JUSTICE ROBERTS: And you cannot --

5   you cannot represent that the Secretary has never said:

6   And if you don't do it, we are going to take away all

7   the funds.

8   They cite the Arizona example; I suspect

9   there are others, because that is the leverage.

10   GENERAL VERRILLI: But it --

11   CHIEF JUSTICE ROBERTS: I'm not saying

12   there's anything wrong with it.

13   GENERAL VERRILLI: It's not coercion, Mr.

14   Chief Justice.

15   CHIEF JUSTICE ROBERTS: Wait a second. It's

16   not -- it's not coercion -- well, I guess that's what

17   the case is. It's not coercion --

18   GENERAL VERRILLI: It's not coercion.

19   CHIEF JUSTICE ROBERTS: -- to say I'm going

20   to take away all your funds, no matter how minor the

21   infringement?

22   GENERAL VERRILLI: But, of course --

23   JUSTICE BREYER: I don't know if that's so.

24   And all I asked in my question was I didn't ask you to

25   commit the Secretary to anything. I wanted to know what

1   the facts are.

2   GENERAL VERRILLI: I --

3   JUSTICE BREYER: I wanted to know what you

4   found in researching this case. I wanted you, in other

5   words, to answer the question the Chief Justice has: Is

6   it a common thing, that that happens, that this

7   unrelated threat is made? Or isn't it?

8   GENERAL VERRILLI: It's -- my understanding

9   is that these situations are usually worked out back and

10   forth between the States and the Federal Government.

11   And I think that most --

12   JUSTICE BREYER: And you are not privy to

13   what those are.

14   GENERAL VERRILLI: And I'm not. But --

15   JUSTICE SCALIA: And who wins?

16   GENERAL VERRILLI: Well, I think -- that's

17   what I think is the problem here, Justice Scalia, is it

18   seems to me we are operating under a conception that

19   isn't right.

20   The reason we have had all these Medicaid

21   expansions, and the reason, it seems to me, why we are

22   were where we are now, and why 60 percent of what's

23   being spent on Medicaid is based on voluntary decisions

24   by the States to expand beyond what Federal law

25   requires, iis because this is a good program and it

1   works. And the States generally like what it

2   accomplishes --

3   JUSTICE KAGAN: And, General Verrilli --

4   JUSTICE ALITO: General Verrilli, is this

5   discussion realistic? The objective of the Affordable

6   Care Act is to provide near universal health care.

7   Now, suppose that all of the 26 States that

8   are parties to this case were to say, well, we're not

9   going to -- we're not going to abide by the new

10   conditions. Then, there would be a huge portion -- a

11   big portion of the population that would not have

12   healthcare.

13   And it's a realistic possibility the

14   Secretary is going to say, well, okay, fine, you know.

15   We are going to cut off your new funds, but we are not

16   going to cut off your old funds, and just let that

17   condition sit there?

18   GENERAL VERRILLI: Well, just as I can't

19   make a commitment that the authority wouldn't be

20   exercised, I'm not going to make a commitment that it

21   would be exercised. But I do think that that -- to try

22   and move away from the first of their arguments, the

23   sheer size argument, to the second one, which is that

24   it's coercive by virtue of its relationship to the

25   Affordable Care Act, I really think that that's a

1   misconception, and I would like to be able to take a

2   minute and walk through and explain why that is.

3   JUSTICE KAGAN: General Verrilli, before you

4   do that, I'm sorry, but in response to the

5   Chief Justice's question, I mean, the money or your

6   life, has consequence because we are worried that that

7   person is actually going to shoot. So I think that this

8   question about are we -- what do we think the Secretary

9   is going to do is an important one.

10   And as I understand it, I mean, when the

11   Secretary withdraws funds, what the Secretary is doing

12   is withdrawing funds from poor people's health care, and

13   that the Secretary is reluctant and loathed to take

14   money away from poor people's health care. And that

15   that's why these things are always worked out. It's

16   that the Secretary really doesn't want to use this

17   power, and so the Secretary sits down with the State and

18   figures out a way for the Secretary not to use the

19   power.

20   GENERAL VERRILLI: That's correct,

21   Justice Kagan. That is no --

22   CHIEF JUSTICE ROBERTS: No, what the --

23   GENERAL VERRILLI: I'm sorry --

24   CHIEF JUSTICE ROBERTS: Go ahead.

25   GENERAL VERRILLI: That's another way of

1   trying to say what I was trying to say to Justice Scalia

2   earlier, is that the States and the Federal Government

3   share a common objective here, which is to get health

4   care to the needy. And, in the vast majority of

5   instances, they work together to make that happen.

6   CHIEF JUSTICE ROBERTS: But the question is

7   not -- obviously, the States are interested in the same

8   objective, and they have a disagreement, or they have

9   budget realities that they have to deal with. And

10   States say, well, we are going to cut by 10 percent what

11   we reimburse this for or that for, and the Federal

12   Government says, well, you can't.

13   And no one is suggesting that people want to

14   cut health care, but they have different views about how

15   to implement policy in this area.

16   And the concern is that the Secretary has

17   the total and complete say because the Secretary has the

18   authority under this provision to say, you lose

19   everything. No one's suggested in the normal course

20   that will happen; but, so long as the Federal government

21   has that power, it seems to be a significant intrusion

22   on the sovereign interests of the State.

23   Now, I'm not -- it may be something they

24   gave up many decades ago when they decided to live off

25   of Federal funds, but I don't think you can deny that

 1   it's a significant authority that we are giving the

 2   Federal Government to say, you can take away everything

 3   if the States don't buy into the next program.

 4   GENERAL VERRILLI: Well, but what I would

 5   say about that, Mr. Chief Justice, is that we recognize

 6   that these decisions aren't going to be easy decisions

 7   in some circumstances. As a practical matter, there may

 8   be circumstances in which they are very difficult

 9   decisions. But that's different from saying that they

10   are coercive, and that's different from saying that it's

11   an unconstitutional --

12   JUSTICE BREYER: Why is it different? Why

13   is it different? I mean, I thought it might be very

14   unlikely that a State would ever say -- the government

15   -- Federal Government would say, here's a condition that

16   you have to have a certain kind of eyeglasses for people

17   who don't see. And, by the way, if you don't do that,

18   we'll take away $42 billion of funding, okay?

19   I thought such a thing would not happen.

20   And I thought if it tried to happen, that it's governed

21   by the APA, and the person with the eyeglasses would say

22   it's arbitrary, capricious abuse of discretion. And

23   that's so, even though the statute says it's in the

24   discretion of the Secretary.

25   But Mr. -- your colleague and brother says

1   no, I'm wrong about the law there, and, moreover, they

2   would do it. That's what I'm hearing now, that they

3   would do it, and they do do it, and -- and, etc. So I

4   would like a little clarification.

5   GENERAL VERRILLI: In the situation

6   described in your hypothetical, Justice Breyer, I think

7   it's -- the Secretary of Health and Human Services would

8   never do it.

9   But what I'm saying is, with respect to the

10   Medicaid expansion in this case --

11   JUSTICE SCALIA: Could never do it or would

12   --

13   GENERAL VERRILLI: Would never do it.

14   JUSTICE SCALIA: It's your prediction, okay.

15   GENERAL VERRILLI: Well, and I think that it

16   would have to satisfy the administrative procedure. I

17   think that's a real constraint. What I'm not -- what I

18   don't feel able to do here is to say with respect to

19   this Medicaid expansion --

20   JUSTICE SCALIA: Are you willing to

21   acknowledge that the Administrative Procedure Act is a

22   limitation on the Secretary's ability to cut off all the

23   funds; she can't do it if it -- if that would be

24   unreasonable? Are you willing to accept that? I

25   wouldn't if I were you.

1   GENERAL VERRILLI: So --

2   (Laughter.)

3   GENERAL VERRILLI: What I'm trying to do

4   here is to -- is to suggest that the Secretary does have

5   discretion under the statute, and that that -- and that

6   --

7   JUSTICE SCALIA: Indeed, part of the

8   discretion is to cut off all of the funds. That's what

9   the statute says.

10   GENERAL VERRILLI: And it is possible, and

11   I'm not willing to give that away. But that doesn't

12   make this --

13   JUSTICE KAGAN: But, General Verrilli,

14   you're not willing to give away whether the APA would

15   bar that, but the APA surely has to apply to a

16   discretionary act of the Secretary.

17   GENERAL VERRILLI: I agree with that,

18   Justice Kagan, but --

19   JUSTICE BREYER: What's making you

20   reluctant?

21   GENERAL VERRILLI: I'm not trying to be --

22   I'm not trying to be reluctant. I understand how this

23   works. I'm trying to be careful about the authority of

24   the Secretary of Health and Human Services and how it

25   will apply in the future.

1   JUSTICE SCALIA: I wouldn't worry a lot if I

2   were you. I don't know of any case that, where the

3   Secretary's discretion explicitly includes a certain

4   act, we have held that, nevertheless, that act cannot be

5   performed unless we think it reasonable. I don't know

6   any case like that.

7   Yes, when there's just a general grant of

8   discretion, it has to be exercised reasonably. But

9   maybe Justice Breyer knows such a case.

10   JUSTICE BREYER: Yes, I do.

11   JUSTICE SCALIA: All right. Give it to me.

12   (Laughter.)

13   GENERAL VERRILLI: If I could go back to the

14   sheer size idea, there's, I think, another couple of

15   points that are important in thinking about whether

16   that's a principle courts could ever apply.

17   Once you get into that business -- in

18   addition to the problem I identified earlier, that it

19   basically means that Congress is frozen in place -- now,

20   based on the size of the program, you've got this

21   additional issue of having to make a judgment about in

22   what circumstances will -- will the loss of the Federal

23   funding be so significant that you would count it

24   as being coercive.

25   JUSTICE KENNEDY: I suppose one test could

1 be -- I just don't see that it would be very workable --

2 is whether or not it's so big that accountability is

3 lost, that it is not clear to the citizens that the

4 State or the Federal Government is administering the

5 program, even though it's a State administrator.

6   GENERAL VERRILLI: Well, but I think this

7 going to come from a --

8   JUSTICE KENNEDY: And I think that's

9 unworkable.

10   GENERAL VERRILLI: This is going to come

11 from a withdrawal situation. Their argument's about

12 it's what you stand to lose and with respect to

13 withdrawal.

14   I mean -- so, does it depend on -- is it an

15 absolute or a relative number with respect to how much

16 of the State budget? Is it a situation where you have

17 to make a calculation about how hard would it be for

18 that State to make up in State tax revenues the Federal

19 revenue they would lose? Does that depend on whether

20 it's a high tax State or a low tax State? It just seems

21 to me -- and then, what is the political climate in that

22 State? It seems to me like --

23   JUSTICE KENNEDY: In your view -- in your

24 view, does federalism require that there be a relatively

25 clear line of accountability for political acts?

1   GENERAL VERRILLI: Yes, of course, it does,

2   Justice Kennedy. But, here --

3   JUSTICE KENNEDY: Is that subsumed in the

4   coercion test, or is that an independent one?

5   GENERAL VERRILLI: You know, here, the

6   coercion test, as it's been discussed, I think, for

7   example, in Justice O'Connor's dissent in Dole and in

8   some of the other literature, does address federalism

9   concerns in the sense of the Federal Government using

10   Federal funding in one area to try to get states to act

11   in an area where the Federal Government may not have

12   Article I authority.

13   JUSTICE KENNEDY: Yes.

14   GENERAL VERRILLI: But, as Your Honor

15   suggested earlier, this is a situation in which, while

16   it is certainly true that the Federal Government

17   couldn't require the States, as the Chief Justice

18   indicated, to carry out this program, the Federal

19   Government could, as Your Honor suggested, expand

20   Medicare and do it itself.

21   JUSTICE KENNEDY: But do you agree that

22   there still is inherent and implicit in the idea of

23   federalism, necessary for the idea of federalism, that

24   there be a clear line of accountability so the citizen

25   knows that it's the Federal or the State government who

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1   should be held responsible for their program?

2   GENERAL VERRILLI: Certainly, but I

3   think the problem here is --

4   JUSTICE KENNEDY: And does coercion relate

5   to that, or is that a separate --

6   GENERAL VERRILLI: Yes, but I think --

7   JUSTICE KENNEDY: -- is that a separate

8   doctrine?

9   GENERAL VERRILLI: Well, I think it relates

10   to it in the opposite way that my friends on the other

11   side would like it to, in that I think their argument is

12   that it would subject us to such a high degree of

13   political accountability at the State level to withdraw

14   ourselves from the program, that it's an unpalatable

15   choice for us, and that's where the coercive effect

16   comes from. And that's why I think --

17   JUSTICE KENNEDY: Well, but I think the

18   answer would be that the State wants to preserve its

19   integrity, its identity, its responsibility in the

20   Federal system.

21   GENERAL VERRILLI: And it may -- and, of

22   course, it may do so, and it can make --

23   JUSTICE SCALIA: May it do so?

24   Doesn't the question come down to this --

25   maybe you can answer this yes. But -- but isn't the

1   question simply: Is it conceivable to you, as it was

2   evidently not to Congress, that any State would turn

3   down this offer, that they can't refuse? Is it

4   conceivable to you that any State would have said no to

5   this program? Congress didn't think that, because some

6   of its other provisions are based on the assumption that

7   every single State will be in this thing.

8   GENERAL VERRILLI: I think --

9   JUSTICE SCALIA: Now, do you -- can you

10   conceive of a State saying no? And -- and if you can't,

11   that sounds like coercion to me.

12   GENERAL VERRILLI: I think -- I think

13   Congress predicted that States would stay in this

14   program, but the -- prediction is not coercion. And the

15   reason Congress predicted it, I think, Justice Scalia,

16   is because the Federal government is paying 90-plus

17   percent of the costs. It increases State costs --

18   JUSTICE SCALIA: So what do you predict? If

19   you predict the same, that 100 percent of the States

20   will accept it, that sounds like coercion.

21   GENERAL VERRILLI: Prediction is not

22   coercion. I disagree, Justice Scalia. That's just an

23   assumption, and if it proves to be wrong, then Congress

24   has time to recalibrate. And beyond that, I do think if

25   -- I just want to go back to the -- the other part of

1   Your Honor's point -- that with respect to the

2   relationship between Medicaid and the -- the Act, and

3   particularly the minimum coverage provision, my -- my

4   friend Mr. Clement has suggested that you can infer

5   coercion because, with respect to the population to

6   which the provision applies, if there's no Medicaid,

7   there's no other way for them to satisfy the

8   requirement.

9   I want to work through that for a minute if

10   I may, because it's just incorrect.

11   First of all, with respect to anybody at

12   100 percent of the poverty line or above, there is an

13   alternative in the statute. It's the exchanges with tax

14   credits and with subsidies to insurance companies. So

15   with respect to that, the part of the population at

16   100 percent of poverty to 133 percent of poverty, the --

17   the statute actually has an alternative for them.

18   For people below 100 percent of poverty, it

19   -- it is true that there is no insurance alternative.

20   But by the same token, there is no penalty that is going

21   to be imposed on anybody in that group.

22   To begin with, right now, the -- the level

23   of 100 percent of poverty is $10,800. The -- the

24   requirement for filing a Federal income tax return is

25   $9,500. So anybody below $9,500, no penalty, because

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1   they don't have to file an income tax return. The

2   sliver of people between $9,500 and $10,800, the

3   question there is are they going to be able to find

4   health insurance that will cost them less than 8 percent

5   of their income.

6   JUSTICE ALITO: Well, I'm not -- in selling

7   this argument -- take the poorest of the poor. If there

8   is no Medicaid program, then they're not going to get

9   health care. Isn't that right?

10   GENERAL VERRILLI: Yes, that's true. But

11 this --

12   JUSTICE ALITO: So Congress obviously

13 assumed -- it thought it was inconceivable that any

14 State would reject this offer, because the objective of

15 the Affordable Care Act is to provide near-universal

16 care. And Medicaid is the way to provide care for at

17 least the poorest of the poor. So it -- it just didn't

18 occur to them that this was a possibility.

19   GENERAL VERRILLI: Well --

20   JUSTICE ALITO: And when -- when that's the

21 case, how can that not be coercion?

22   GENERAL VERRILLI: Well --

23   JUSTICE ALITO: Unless it's just a gift.

24 Unless it's just purely a gift.

25   Then it comes back to the question of

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1   whether you think it makes a difference that the

2   money -- a lot of the money to pay for this -- is going

3   to come out of the same taxpayers that the States have

4   to tax to get their money.

5   GENERAL VERRILLI: This is -- this is a --

6   this is -- these are Federal dollars that Congress has

7   offered to the States and said, we're going to make this

8   offer to you, but here's how these dollars need to be

9   spent. This is the essence of Congress's Article I

10   authority under the General Welfare Clause and the

11   Appropriations Clause. This is not some remote

12   contingency, or an effort to leverage in that regard.

13   This is how Congress is going to have the Federal

14   government's money be used if States choose to accept

15   it.

16   Yes, it was reasonable for Congress to

17   predict in this circumstance that the States were going

18   to -- to take this money, because -- because it is an

19   extremely generous offer of funds: 90-plus percent of

20   the funding. States can -- can expand their Medicaid

21   coverage to more than 20 percent of their population for

22   an increase of only 1 percent --

23   CHIEF JUSTICE ROBERTS: If it's such a good

24   deal --

25   GENERAL VERRILLI: -- of their funding.

1   CHIEF JUSTICE ROBERTS: -- why do you care?

2   If it's such a good deal, why do you need the club?

3   GENERAL VERRILLI: Well, the -- the --

4   CHIEF JUSTICE ROBERTS: If it's a good deal,

5   take it. We're not going to -- if you don't take it,

6   you're just hurting yourself. We're not going to --

7   GENERAL VERRILLI: That's -- that's a

8   judgment for Congress to make about how the Federal --

9   how Federal funds are going to be used if States choose

10   to accept them, and Congress has made that judgment.

11   That's Congress's judgment to make, and it's -- it

12   doesn't mean that it's coercive.

13   CHIEF JUSTICE ROBERTS: You have another
                                              `
14   15 minutes.

15   GENERAL VERRILLI: Lucky me. Lucky me.

16   (Laughter.)

17   JUSTICE KENNEDY: But the -- but the point

18   is -- but the -- the point is, there's -- there's no

19   real --

20   JUSTICE SOTOMAYOR: Can we go back --

21   JUSTICE KENNEDY: There's no real -- there's

22   no realistic choice. There's no real choice. And

23   Congress does not in effect allow for an out -- opt out.

24   We just know that.

25   And it's --

1   GENERAL VERRILLI: Well, I guess I --

2   JUSTICE KENNEDY: -- it's substantial.

3   GENERAL VERRILLI: I would go back, Justice

4   Kennedy, to the --

5   JUSTICE KENNEDY: I recognize the problem

6   with that test.

7   GENERAL VERRILLI: I would go back to the

8   fact that 60 percent of the Medicaid spending is now

9   optional. It's -- it's a result of choices that States

10   have made that -- it's expanded the --

11   JUSTICE KENNEDY: Even though they're now

12   frozen in, per our earlier discussions, to a large

13   extent.

14   GENERAL VERRILLI: Well, but -- well, no --

15   to a more -- much more modest extent was my point,

16   Justice Kennedy. For example, optional services where a

17   huge amount of money is spent -- more than $100 billion

18   annually -- the largest component of that is nursing

19   home services. That remains optional. It's -- right

20   now, once the minimum -- once the maintenance provision

21   remains in place, States have the flexibility to that --

22   reduce those numbers.

23   States have considerable flexibility now and

24   going forward with respect to the way that money is

25   spent. And I do think in terms of evaluating whether

1   this expansion should be considered coercive, it has got

2   to be evaluated against the backdrop of the fact that

3   the States are generally taking -- are generally taking

4   advantage of the opportunities of this statute to

5   greatly expand the amount of money that the Federal

6   government spends and the amount of money that they

7   spend to try to make the -- the lives of their citizens

8   better. I think --

9   JUSTICE KENNEDY: Of course, they have to do

10   so by hiring a very substantial number of more

11   employees. There will be State employees. There'll be

12   substantial State administrative expenses that are not

13   reimbursed.

14   GENERAL VERRILLI: Well, but -- I would take

15   issue with that, Justice Kennedy. Part of the

16   Affordable Care Act is that it -- it provides for new

17   streamlined eligibility processes to get people into the

18   system at a -- at a much faster and cheaper rate. There

19   are going to be costs to set that up. But under the

20   statute, the Federal government is going to pay

21   90 percent of those costs, the short-term set-up costs.

22   And then all of the projections that we have

23   seen suggest that the medium- to long-term costs once

24   these changes are in place are going to be dramatically

25   lower for the states --

1   CHIEF JUSTICE ROBERTS: Well, what --

2   GENERAL VERRILLI: -- on the administrative

3   side.

4   CHIEF JUSTICE ROBERTS: Obviously, the

5   Federal government isn't bound to that. And what if,

6   after the 90 percent, they say well, now -- from now on,

7   we're going to pay 70 percent? What happens then?

8   Where does that extra money come from?

9   GENERAL VERRILLI: Well, I think -- then --

10   then the States would have a choice at that -- at that

11   point whether they were going to stay in the program or

12   not. But that isn't what we have here, and --

13   CHIEF JUSTICE ROBERTS: There's no -- they

14   can just bail out -- whenever the government reduces the

15   amount of the percentage that it's going to pay, the

16   States can say, that's -- that's --

17   GENERAL VERRILLI: Well, I'm not saying it

18   would be an easy choice, Mr. Chief Justice --

19   JUSTICE SCALIA: They'd have to bail out of

20   Medicaid, you're talking about, not just there.

21   GENERAL VERRILLI: Right. That that would

22   be --

23   JUSTICE SCALIA: Oh.

24   GENERAL VERRILLI: Right. That that would

25   be the option. They can leave Medicaid if they decide

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1   that that isn't working for them. I'm not saying this

2   is an easy choice. I'm also not saying it would happen,

3   because the Secretary does have this discretion --

4   CHIEF JUSTICE ROBERTS: Well, the Secretary

5   has the discretion. We're talking about something else.

6   We're talking about fiscal realities, and whether or not

7   the Federal government is going to say we need to lower

8   our contribution to Medicaid and leave it up to the

9   States because we want the people to be mad at the

10   States when they have to have all these budget cuts to

11   keep it up, and not at the Federal government.

12   GENERAL VERRILLI: But that would be true,

13   Mr. Chief Justice, whether this Medicaid expansion

14   occurred or not and --

15   CHIEF JUSTICE ROBERTS: I know, but you've

16   been emphasizing that the Federal government is going to

17   pay 90 percent of this, 90 percent of this, and it's --

18   it's not something they can take to the bank, because

19   the next day or the next fiscal year, they can decide,

20   we're going to pay a lot less. And you, States, are

21   still on the hook, because you -- you don't -- you say

22   it's not an easy choice. We can say -- ask whether it's

23   coercion. You're not going to be able to bail out of

24   Medicaid. You just have to pay more because we're going

25   to pay less.

1   GENERAL VERRILLI: Well, like I said, I -- I

2   agree that it would be a difficult choice in some

3   circumstances. But that is not to say it's coercion as

4   a legal matter or even as a practical matter. And I

5   think it would depend on what the circumstances were on

6   how -- and I -- I think, trying to think about how a

7   court would ever answer the question of whether it was

8   coercive, it was too difficult as a practical matter for

9   States --

10   JUSTICE SOTOMAYOR: General, I'm trying

11   to --

12   GENERAL VERRILLI: -- to withdraw.

13   JUSTICE SOTOMAYOR: -- go back to that

14   because Justice Kennedy asked you whether there is -- I

15   think he said it's -- it's coercion if no one can be

16   politically accountable. I'm not sure how that could be

17   practically politically accountable because almost every

18   gift -- if the terms are attractive, it would be an un

19   -- unattractive political alternative to turn it down.

20   Dole itself was one of those cases. I think

21   every State raised the drinking age to 21; correct?

22   GENERAL VERRILLI: Yes, Justice Sotomayor,

23   and this argument was raised in Dole, and the Court

24   rejected it as a --

25   JUSTICE SOTOMAYOR: I guess my point is that

 1   political accountability has two components: What can I

 2   do if I like something, and what can I do if I don't

 3   like something? And if people really like something

 4   like Medicaid, they're not going to let you drop it,

 5   correct.

 6   GENERAL VERRILLI: Well, the citizens of the

 7   State, but that's the citizen of the State acting --

 8   JUSTICE SOTOMAYOR: Exactly. That's the

 9   whole point; that's their choice, right?

10   GENERAL VERRILLI: -- in the capacity of the

11   citizens of the State. And I think that's why I get --

12   try to get back to the point, that's why I think this is

13   wrong to think about this as coercion, because this is a

14   program that works effectively for the citizens of the

15   State, and States' governments -- and State governments

16   think that, and that's why it has expanded the way it

17   has expanded, because it's providing an essential

18   service for millions of needy citizens in these States.

19   It's providing access to health care that they would not

20   otherwise have.

21   CHIEF JUSTICE ROBERTS: You mentioned the --

22   the Dole case. Now, what was the threat in that case,

23   raise your drinking age to 21 or what?

24   GENERAL VERRILLI: Or lose a percentage of

25   your highway funds.

1   CHIEF JUSTICE ROBERTS: Do you remember the

2   percentage?

3   GENERAL VERRILLI: Seven percent, yes.

4   CHIEF JUSTICE ROBERTS: Yes. It's a pretty

5   small amount. That's really apples and oranges when

6   you're talking about lose all of your Medicaid funds or

7   lose -- I thought it was 5, but 7 -- 7 percent of your

8   highway funds.

9   GENERAL VERRILLI: It's -- I think I agree

10 with Your Honor, that it -- that it's different, but I

11 don't think that that makes coercion as a legal matter.

12 As I said, I think that this is a situation in which

13 the -- if the States -- is it -- I'm not saying it would

14 be an easy choice, but the States made the choice,

15 they've made the choice. And --

16   JUSTICE SOTOMAYOR: Well, they made a choice

17 with the stimulus bill, didn't they? Some governors

18 rejected the stimulus bill --

19   GENERAL VERRILLI: That's -- that's correct,

20 Justice Sotomayor. And --

21   JUSTICE SOTOMAYOR: -- and some of -- some

22 of their congressional or legislative processes

23 overturned that.

24   GENERAL VERRILLI: That's right.

25   JUSTICE SOTOMAYOR: In others, they

1   supported it. The percentages were smaller, but it's

2   always the preference of the voters as to what they

3   want, isn't it?

4   GENERAL VERRILLI: That is correct.

5   CHIEF JUSTICE ROBERTS: What was the threat

6   in the stimulus bill? What would the State lose?

7   GENERAL VERRILLI: That answer I don't know,

8   Mr. Chief Justice.

9   CHIEF JUSTICE ROBERTS: Would anything be

10 taken away, or would it just lose the opportunity to get

11 the money?

12   GENERAL VERRILLI: I don't know the answer

13 to that. I don't know the answer to that.

14   But if I may just say in conclusion that --

15 I'd like to take half a step back here, that this

16 provision, the Medicaid expansion that we're talking

17 about this afternoon and the provisions we talked about

18 yesterday, we've been talking about them in terms of

19 their effect as measures that solve problems, problems

20 in the economic marketplace, that have resulted in

21 millions of people not having health care because they

22 can't afford insurance.

23   There is an important connection, a profound

24 connection, between that problem and liberty. And I do

25 think it's important that we not lose sight of that.

1   That in this population of Medicaid eligible people who

2   will receive health care that they cannot now afford

3   under this Medicaid expansion, there will be millions of

4   people with chronic conditions like diabetes and heart

5   disease, and as a result of the health care that they

6   will get, they will be unshackled from the disabilities

7   that those diseases put on them and have the opportunity

8   to enjoy the blessings of liberty.

9   And the same thing will be true for -- for a

10   husband whose wife is diagnosed with breast cancer and

11   who won't face the prospect of being forced into

12   bankruptcy to try to get care for his wife and face the

13   risk of having to raise his children alone. And I could

14   multiply example after example after example.

15   In a very fundamental way, this Medicaid

16   expansion, as well as the provisions we discussed

17   yesterday, secure of the blessings of liberty. And I

18   think that that is important as the Court is considering

19   these issues that that be kept in mind. The -- the

20   Congress struggled with the issue of how to deal with

21   this profound problem of 40 million people without

22   health care for many years, and it made a judgment, and

23   its judgment is one that is, I think, in conformity with

24   lots of experts thought, was the best complex of options

25   to handle this problem.

1   Maybe they were right; maybe they weren't.

2   But this is something about which the people of the

3   United States can deliberate and they can vote, and if

4   they think it needs to be changed, they can change it.

5   And I would suggest to the Court, with profound respect

6   for the Court's obligation to ensure that the Federal

7   Government remains a government of enumerated powers,

8   that this is not a case in any of its aspects that calls

9   that into question. That this was a judgment of policy,

10   that democratically accountable branches of this

11   government made by their best lights.

12   And I would urge this Court to respect that

13   judgment and ask that the Affordable Care Act, in its

14   entirety, be upheld. Thank you.

15   CHIEF JUSTICE ROBERTS: Thank you, General.

16   Mr. Clement, you have 5 minutes.

17   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

18   ON BEHALF OF THE PETITIONERS

19   MR. CLEMENT: Thank you, Mr. Chief Justice

20   and may it please the Court:

21   Just a few points in rebuttal. First of all

22   we talked a lot about the sort of hallmark of coercion,

23   your money or your life, with somebody with a gun. I

24   would respectfully suggest that it is equally coercive

25   or certainly not uncoercive if I say your money or your

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1   life -- and by the way, I have discretion as to whether

2   or not I will shoot the gun. I don't think that

3   eliminates the coercion.

4   I also don't think this is a discretion that

5   the Secretary would ever be able to exercise. And the

6   reason is, we disagree on the details, but the Solicitor

7   General and I agree that, over the years, Congress has

8   had different approaches to expanding Medicare.

9   Sometimes, as in 1972, it makes the

10   expansion voluntary; that's also by the way what

11   happened with the stimulus funds, which were voluntary

12   funds. You didn't lose all your Medicaid funds, which

13   is why 17 States could say no.

14   Sometimes, they take the voluntary approach.

15   Sometimes, as in 1984, they take the mandatory approach.

16   If the Secretary exercised the discretion to say, you

17   know what, it really isn't reasonable for you to have to

18   give up your funding for the visually impaired and the

19   disabled, just to cover these newly eligible people, so

20   we will make it voluntary; we'll make that

21   discretionary -- that would essentially be creating --

22   converting a 1984 amendment approach to a 1972 amendment

23   approach, and I just don't think that is the kind of

24   discretion that the Secretary has, with all due respect.

25   Now, moving on to the next point,

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1   Justice Alito, your hypothetical, I think, aptly

2   captures the effect on this, based on the fact that

3   these tax dollars are being taken from the State's tax

4   base, and it's not like Steward Machine, where the

5   Federal Government would say, and oh, by the way, if you

6   don't take the option we are giving you, we are going to

7   have a Federal substitute that will go in, and we will

8   take care of the unemployed in your States.

9   Here, if you don't take this offer we are

10   giving you, your tax dollars will fund the other 49

11   States, and you will get nothing.

12   But of course, this situation is much more

13   coercive, even in your hypothetical, because it is tied

14   directly to the mandate. It's also tied to the -- to

15   participation in the preexisting program. So it is as

16   if there was yet another program for post-secondary

17   education; they gave them exactly your option --

18   option -- and then they also said, oh, and by the way;

19   you not only -- not get these funds, but you lose the

20   post-secondary fund as well.

21   It's really hard to understand tying the

22   preexisting participation in the program as anything

23   other than coercive. The Solicitor General makes a lot

24   of the fact that there are optional benefits under this

25   program.

1   Well, guess what? After the Medicaid

2   expansion there will be a lot less opportunity for the

3   States to exercise those options, because one of the

4   things that the expansion does -- precisely because the

5   expansion is designed to convert Medicaid into a program

6   that satisfies the requirement of the minimum essential

7   coverage of the individual mandate, things that used to

8   be voluntary will no longer be voluntary.

9   The perfect example is prescription

10   coverage. It's a big part of the benefits that some

11   States but not all provide voluntarily now. It will no

12   longer be voluntary after the expansion because the

13   Federal Government has deemed that prescription drugs to

14   be part of the minimal essential health coverage that

15   everybody in this country must have under the mandate.

16   So that option that the State has is being removed by

17   the expansion itself.

18   The Chief Justice made the point --

19   JUSTICE GINSBURG: Mr. Clement, may I ask

20   one question about the bottom line in this case? It

21   sounds to me like everything you said would be to the

22   effect of, if Congress continued to do things on a

23   voluntary basis, so we are getting these new eligibles,

24   and say, States, you can have it or not, you can

25   preserve the program as it existed before, you can opt

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1   into this.

2   But you are not asking the Court as relief

3   to say, well, that's how we -- we -- that's how we cure

4   the constitutional infirmity; we say this has to be on a

5   voluntary basis. Instead, you are arguing that this

6   whole Medicaid addition, that the whole expansion has to

7   be nullified; and moreover, the entire health care act.

8   Instead of having the easy repair, you say that if we

9   accept your position, everything falls.

10   MR. CLEMENT: Well, Justice Ginsburg, if we

11   can start with the common ground that there is a need

12   for repair because there is a coercion doctrine and this

13   statute is coercion, then we are into the question of

14   remedy. And we do think, we do take the position that

15   you describe in the remedy, but we would be certainly

16   happy if we got something here, and we got a recognition

17   that the coercion doctrine exists; this is coercive; and

18   we get the remedy that you suggest in the alternative.

19   Let me just finish by saying I certainly

20   appreciate what the Solicitor General says, that when

21   you support a policy, you think that the policy spreads

22   the blessings of liberty. But I would respectfully

23   suggest that it's a very funny conception of liberty

24   that forces somebody to purchase an insurance policy

25   whether they want it or not.

1   And it's a very strange conception of

2   federalism that says that we can simply give the States

3   an offer that they can't refuse, and through the

4   spending power which is premised on the notion that

5   Congress can do more because it's voluntary, we can

6   force the States to do whatever we tell them to. That

7   is a direct threat to our federalism.

8   Thank you.

9   CHIEF JUSTICE ROBERTS: Thank you,

10 Mr. Clement. And thank you, General Verrilli, Mr.

11 Kneedler, Mr. Carvin, Mr. Katsas, and in particular, of

12 course, Mr. Long and Mr. Farr.

13   The case is submitted.

14   (Whereupon, at 2:24 p.m., the case in the

15 above-entitled matter was submitted.)

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