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

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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.; for

17   Petitioners.

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

19   Department of Justice, Washington, D.C.; for

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, Florida v. The

5   Department of Health and Human Services.

6   Mr. Clement.

7   ORAL ARGUMENT OF PAUL D. CLEMENT

8   ON BEHALF OF THE PETITIONERS

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   a -- just a matter of clarification? Would you be

17   making the same argument if, instead of the Federal

18   Government picking up 90 percent of the cost, the

19   Federal 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.

24   So -- so, that really reduces to the question of why is

25   a big gift from the Federal Government a matter of

3

1 coercion? In other words, the Federal Government is

2 here saying we're giving you a boatload of money. There

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

4 are no 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 standalone program that just gave

11 100 percent, just 100 percent boatload, nothing but boatload --

12   JUSTICE KAGAN: Yes, I mean, if you --

13   MR. CLEMENT: Why, there would still be a

14 problem.   `

15   JUSTICE KAGAN: Yes, you do make that argument

16 in your brief, just a standalone program, a boatload of

17 money, no extraneous conditions, no matching funds, is

18 coercive?

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

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

21 question the idea that there are no -- no conditions.

22 And, of course, when you first asked, it was what about

23 the same program with 100 percent matching on the newly

24 eligible mandatory individuals, which is how the statute

25 refers to them. And that would have a very big

1   condition. And the very big condition is that the

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

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

4   government here is -- the Congress is leveraging their

5   entire prior participation --

6   JUSTICE KAGAN: Let me give you a

7   hypothetical, Mr. Clement.

8   MR. CLEMENT: -- in the program -- sure.

9   JUSTICE KAGAN: Now, suppose I'm an

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

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

12   $10 million a year to come work for me. And the person

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

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

15   going to say yes to that.

16   Now, we would both be agreed that that's not

17   coercive, right?

18   MR. CLEMENT: Well, I guess I'd want to know

19   where the money came from --

20   (Laughter.)

21   MR. CLEMENT: -- and if the money came

22   from --

23   JUSTICE KAGAN: Wow. Wow.

24   I'm offering you $10 million a year to come

25   work for me, and you're saying that this is anything but

1   a great choice?

2   MR. CLEMENT: Sure. If I told you,

3   actually, it came from my own bank account. And that's

4   what's really going on here, in part --

5   JUSTICE KAGAN: Ah. But, Mr. Clement --

6   MR. CLEMENT: -- and that's why it's not

7   simply a matter of saying --

8   JUSTICE KAGAN: Mr. Clement, can that

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

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

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

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

13   York could no more tell the Federal Government what to

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

15   Government can tell New York what to do with the monies

16   that New York is collecting.

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

18   the United States figured out a way to tax individuals

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

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

21   separate taxes. But, we all know that in the real

22   world, that to the extent the Federal Government

23   continues to increase taxes, that decreases the ability

24   of the States to tax their own citizenry, and it's a

25   real tradeoff.

1   JUSTICE SOTOMAYOR: Is that a limit on the

2   Federal Government's power to tax?

3   MR. CLEMENT: What's that?

4   JUSTICE SOTOMAYOR: Are you suggesting that

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

6   against the Federal Government raising their taxes

7   because somehow, the States will feel coerced to lower

8   their tax rate?

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

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

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

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

13   JUSTICE SOTOMAYOR: Now, counsel, what

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

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

16   States for whom the percentage of Medicaid funding to

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

18   others that are less than 10 percent.

19   And you say, across the board this is

20   coercive because no State, even at 10 percent, can give

21   it up. What -- what's the percentage of big gift that

22   the Federal Government can give? And -- because what

23   you're saying to me is, for a bankrupt State, there's no

24   gift the Federal Government could give them ever,

25   because it can only give them money without

7

 1   conditions --

 2   MR. CLEMENT: No, Justice Sotomayor --

 3   JUSTICE SOTOMAYOR: -- no matter how poorly

 4   the State is run, no matter how much the Federal

 5   Government doesn't want to subsidize abortions or

 6   doesn't want to subsidize some other State obligation,

 7   the Federal Government can't give them 100 percent of

 8   their needs.

 9   MR. CLEMENT: And -- and Justice Sotomayor,

10   I'm really saying the opposite, which is not that every

11   gift is coercive, no matter what the amount, no matter

12   how small. I'm saying essentially the opposite, which

13   is there has to be some limit. There has to be some

14   limit on coercion.   `

15   And the reason is quite simple, because this

16   Court's entire spending power jurisprudence is premised

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

18   Congress can do things pursuant to the spending power

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

20   precisely because the programs are voluntary. And if

21   you relax that assumption that the programs are

22   voluntary, and you're saying they're coercion, then you

23   can't have the spending power jurisprudence that's different.

24   JUSTICE SOTOMAYOR: So, what makes them

25   coercive; that the State doesn't want to face its voters

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

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

3   ourselves and giving up money for some other function?

4   That's what makes it coercive --

5   MR. CLEMENT: Well, it's --

6   JUSTICE SOTOMAYOR: -- that the State is

7   unwilling to say that?

8   MR. CLEMENT: Well, maybe -- maybe I can

9   talk about what makes it coercive by talking about the

10   actual statute at issue here and focusing on what I

11   think are the three hallmarks of this statute that make

12   it uniquely coercive.

13   One of them is the fact that this statute is

14   tied to the decidedly nonvoluntary individual mandate.

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

16   I think.

17   I'll continue. I thought you had a

18   question. I'm sorry.

19   The second factor, of course, is the fact

20   that Congress here made a distinct and conscious

21   decision to tie the State's willingness to accept these

22   new funds, not just to the new funds, but to their

23   entire participation in the statute, even though the

24   coverage for these newly eligible individuals is

25   segregated from the rest of the program. And this is

1 section 2001(a)(3). It's at page 23A of the appendix to

2 the blue brief.

3   JUSTICE GINSBURG: Isn't that true of every

4 Medicaid increase, that each time -- I mean, and this

5 started quite many years ago, and Congress has added

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

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

8 is the program. Take it or leave it.

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

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

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

12 Congress has made covering newly eligible individuals

13 totally voluntary. If the States want to cover the

14 newly eligible individuals, they'll get additional

15 money; but if they don't, they don't risk any of their

16 existing participation programs.

17   The 1972 program was a paradigm of that. It

18 created this 209(b) option for States to participate.

19 This Court talked about it in the Gray Panthers case.

20   There were other expansions that have taken

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

22 give States that option. But here's the second

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

24 Congress has created a separate part of the program for

25 the newly eligible mandatory individuals. That's what

1   they called them.

2   And those individuals are treated separately

3   from the rest of the program going forward forever.

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

5   everybody who was covered under the preexisting program.

6   Now, in light of that separation by Congress

7   itself of the newly eligible individuals from the rest

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

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

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

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

12   JUSTICE BREYER: Where does it say that?

13   I'm sorry. Where does it say that?

14   MR. CLEMENT: It says it at -- well, it --

15   where does it say what, Justice Breyer?

16   JUSTICE BREYER: What you just said. You

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

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

19   money that covers the old individuals.

20   That's what I heard you say.

21   MR. CLEMENT: Right. And then --

22   JUSTICE BREYER: And where does it say that?

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

24   places where it says it.

25   JUSTICE BREYER: Where?

1   MR. CLEMENT: The 2001(a)(3) makes a part of

2   my --

3   JUSTICE BREYER: Where is it in your brief?

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

5   JUSTICE BREYER: In the blue brief?

6   MR. CLEMENT: Blue brief.

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

8   MR. CLEMENT: And -- and this makes not the

9   point about the funding cutoff. This makes the point

10   just that these newly eligible individuals are really

11   treated separately --

12   JUSTICE BREYER: Okay --

13   MR. CLEMENT: -- forevermore.

14   JUSTICE BREYER: I want the part about the

15   funding cutoff.

16   MR. CLEMENT: Right. And there,

17   Justice Breyer --

18   JUSTICE BREYER: And that cite section is

19   what?

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

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

22   me.

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

24   JUSTICE BREYER: And I'll tell you what I

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

1   MR. CLEMENT: Right.

2   JUSTICE BREYER: And it's been in the

3   statute since 1965.

4   MR. CLEMENT: Exactly.

5   JUSTICE BREYER: And the cite I have is

6   42 U.S.C. Section 1396(c).

7   So are we talking about the same thing?

8   MR. CLEMENT: I -- if that's the -- if that

9   is the provision that gives the Secretary --

10   JUSTICE BREYER: Yes. Okay.

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

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

13 the end.

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

15 participation in the program, yes.

16   JUSTICE BREYER: It says, "The Secretary

17 shall notify the State agency" -- this is if they don't

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

19 State, or in his discretion, that payments will be

20 limited to categories under or parts of the State plan

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

22 Secretary is satisfied that he shall limit payments to

23 categories under or parts of the State plan not affected

24 by such failure."

25   So reading that in your favor, I read that

1   to say it's up to the Secretary whether, should a State

2   refuse to fund the new people, the Secretary will cut

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

4   State doesn't want it, and whether the Secretary can go

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

6   case where the Secretary ever did go further, but I also

7   would think that the Secretary could not go further

8   where going further would be an unreasonable thing to

9   do -- since government action is governed by the

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

11   general principle, it must always be reasonable.

12   So I want to know where this idea came from

13   that should State X say I don't want the new money, that

14   the Secretary would or could cut off the old money?

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

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

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

18   is not the absolute guarantee that the Secretary could

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

20   JUSTICE BREYER: All right. Now, let me

21   relieve you of that concern, and tell me how I --

22   whether I have -- that a basic principle of

23   administrative law -- indeed, all law -- is that the

24   government must act reasonably. And should a Secretary

25   cut off more money than the Secretary could show was

1   justified by being causally related to the State's

2   refusal to take the new money, you would march into

3   court with your clients and say, Judge, the Secretary

4   here is acting unreasonably. And I believe there is

5   implicit in this statute, as there is explicit in the

6   ADA, that any such cutoff decision must be reasonable.

7   Now, does that relieve you of your fear?

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

9   Justice --

10   JUSTICE BREYER: I didn't think it would,

11   but I --

12   (Laughter.)

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

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

15   One is -- I mean, I don't know the opinion

16   to cite for that proposition.

17   Second is, I've been -- we've been making in

18   this litigation since the very beginning this basic

19   point, the government has had opportunities at every

20   level of this system, and I suppose they'll have an

21   opportunity today to say: Fear not, States. If you

22   don't want to take the new conditions, all you will lose

23   is the new money. And when we --

24   JUSTICE BREYER: What I said -- I said

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

1   the Act, that there is some money that would be saved in

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

3   they don't take the new money, there is money that is

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

5   could be some pile like that.

6   It might be that the Secretary could show it

7   was reasonable to take that money away from the States,

8   too --

9   JUSTICE SCALIA: Mr. Clement --

10   JUSTICE BREYER: -- but my point is, you

11   have to show reasonableness before you can act.

12   JUSTICE SCALIA: -- do -- do you agree -- do

13   you agree that the government has to act reasonably?

14   MR. CLEMENT: You know --

15   JUSTICE SCALIA: Do -- do we strike down

16   unreasonable statutes? My God!

17   MR. CLEMENT: Well -- and, Justice Scalia, I

18   mean --

19   JUSTICE SCALIA: The Executive has to act

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

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

22   Secretary can strike the whole -- funding for the whole

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

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

25   the law, Your Honor.

1   JUSTICE BREYER: Yeah, but I have a

2   number -- all right.

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

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

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

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

7   Exhibit 33 to our motion for summary judgment. It's

8   not -- it's not in the joint appendix. We can lodge it

9   with the Court if they'd -- if you'd like.

10   But it's a letter that's in the record in

11   this litigation, and it's a letter from the Secretary to

12   Arizona, when Arizona floated the idea that it would

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

14   relatively small part of the whole program.

15   And what Arizona was told by the Secretary

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

17   losing $7.8 billion, the entirety of your Medicaid

18   participation. So, this is not something that we've

19   conjured up --

20   JUSTICE BREYER: All right --

21   JUSTICE KAGAN: Mr. Clement, let's let

22   this --

23   JUSTICE BREYER: To make you feel a little

24   better, I want to pursue this for 1 more minute.

25   There are cases, and many, of which

1   Justice Scalia knows as well, which use -- Holly Hill,

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

3   discretion." And in those cases, this Court has said

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

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

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

7   interpreting statutes, in applying those statutes, et

8   cetera.

9   End of my argument. End of my question.

10   Respond as you wish.

11   (Laughter.)

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

13   sure that the Court's federalism jurisprudence should

14   force States to depend on how a lower court reads Holly

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

16   an absolute certainty is that this Secretary -- this

17   statute gives the Secretary the right to remove all of

18   the State's funding under these programs.

19   And think about what that is --

20   JUSTICE SOTOMAYOR: May I ask you a

21   question, Mr. Clement? Do you think that the Federal

22   Government couldn't, if it chose -- Congress -- say:

23   The system doesn't work. We're just simply going to

24   rehaul it. It's not consistent with how -- what we want

25   to accomplish. We're just going to do away with the

1   system and start a new health care plan of some sort.

2   And, States, you can take the new plan, you can leave

3   them. We're going to give out 20 percent less, maybe

4   20 percent more, depending on what Congress chooses.

5   Can Congress do that? Does it have to

6   continue the old system because that is what the States

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

8   new system?

9   MR. CLEMENT: Justice Sotomayor, we're not

10   saying we have a vested right to participate in the

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

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

13   I'm not going to tell you that there's no possibility of

14   a coercion challenge to it, but I'm -- I'm not going to

15   say.

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

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

18   MR. CLEMENT: -- this ought -- well, can

19   we --

20   JUSTICE SOTOMAYOR: -- I think the usual

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

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

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

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

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

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

 2   of whether they choose to do that or not.

 3   But when have we defined the right or

 4   limited the right of government not to spend money in

 5   the ways that it thinks appropriate?

 6   MR. CLEMENT: Well, Justice Sotomayor,

 7   before -- I mean, I'll try to answer that question, too.

 8   But the first part of the question was, you know, what

 9   if the Congress just tried to scrap this and start over

10   again with a new program?

11   Here's why this is fundamentally different

12   and why it's fundamentally more coercive, because

13   Congress is not saying we want to scrap this program.

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

15   that States are providing services to the visually

16   impaired and the disabled under pre-existing Medicaid.

17   And that's why it's particularly questionable why

18   they're saying that if you don't take our new money,

19   subject to the new conditions, we're going to take all

20   of the money you've previously gotten that you've been

21   dependent on for 45 years, and you're using right now to

22   serve the visually impaired and the disabled --

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

24   I ask you -- question another line?

25   You represent, what, 26 States?

1   MR. CLEMENT: That's right,

2   Justice Ginsburg.

3   JUSTICE GINSBURG: And we're also told that

4   there are other States that like this expansion, and

5   they are very glad to have it.

6   The relief that you're seeking is to say the

7   whole expansion is no good, never mind that there are

8   States that say we don't feel coerced, we think this is

9   good.

10   You are -- you're saying that because you

11   represent a sizeable number of States, you can destroy

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

13   States that want it, that don't feel coerced, that

14   say -- think this is a good thing?

15   MR. CLEMENT: Justice Ginsburg, that's

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

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

18   statute that makes the expansion voluntary, every State

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

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

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

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

23   because they can't afford to have their entire

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

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

1   they're going to deal with the visually impaired in

2   their State, the disabled in their State -- of course --

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

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

5   there any chance that all 26 States opposing it have

6   Republican governors, and all of the States supporting

7   it have Democratic governors?

8   Is that possible?

9   MR. CLEMENT: There's a correlation,

10 Justice Scalia.

11   JUSTICE SCALIA: Yes. Yes.

12   (Laughter.)

13   JUSTICE GINSBURG: Let -- let me ask you

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

15 universities are heavily dependent on the government to

16 fund their research programs and other things, and

17 that's been going on for a long time. And then Title IX

18 passes, and a government official comes around and

19 say -- says to these colleges, if you want money for

20 your physics labs and all the other things you get it

21 for, then you have to create an athletic program for

22 girls. And the recipient says I am being coerced,

23 there's no way in the world I can give up all the funds

24 to run all these labs that we have. I can't give it up,

25 so I'm being coerced to accept this program that I don't

1   want.

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

3   any good, why doesn't it work anytime something --

4   someone receives something that's too good to give up?

5   MR. CLEMENT: Well, Justice Ginsburg,

6   there's two reasons that might be different. One is,

7   this whole line of coercion only applies -- is only

8   relevant, really, when Congress tries to do something

9   through the spending power it couldn't do directly.

10   So if Congress tried to impose Title IX

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

12   whether or not Section 5 of the Fourteenth Amendment

13   allowed Congress to do that. I imagine you might think

14   that it did, and I imagine some of your colleagues might

15   take issue with that, but that's -- that's the nature of

16   the question.

17   So, one way around that would be, if

18   Congress can do it directly, you don't even have to ask

19   whether there's something special about the spending

20   power. That's how this Court resolved, for example, the

21   FAIR case about funding to -- to colleges.

22   JUSTICE GINSBURG: Where on your -- I'm

23   trying to understand your coercion theory. I know that

24   there are cases of ours that have said there's a line

25   between pressure and coercion, but we have never had, in

1   the history of this country or the Court, any Federal

2   program struck down because it was so good that it

3   becomes coercive to be in it.

4   MR. CLEMENT: Well, Justice Ginsburg, if --

5   I'm going -- to say the second thing about my answer to

6   your prior question, which is just that I also think

7   that, you know, it may be that spending on certain

8   private universities is something, again, that Congress

9   can do, and it doesn't matter whether it's coercion.

10   But when they're trying to get the States to expand

11   their Medicaid programs, that's something --

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

13   public colleges.

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

15   there may be some limits on that. I mean -- but again,

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

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

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

19   think there's a disagreement here, that Congress could

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

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

22   expand your Medicaid programs. If we take that as a

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

24   whether or not it's coercive.

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

24

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

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

3   case, I would respectfully say --

4   JUSTICE BREYER: And isn't the covenant

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

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

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

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

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

10   governed by precisely the same statute that you're

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

12   '65.

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

14   that our position here would necessarily extend to say

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

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

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

18   different.

19   The one major difference is the size of the

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

21   is really breathtaking. Medicaid, circa 1984, the

22   Federal spending to the States was a shade over

23   $21 billion. Right now, it's $250 billion, and that's

24   before the expansion under this statute.

25   JUSTICE KAGAN: Well, if you are right,

1   Mr. Clement, doesn't that mean that Medicaid is

2   unconstitutional now?

3   MR. CLEMENT: Not necessarily,

4   Justice Kagan. And, again, it's because we're not here

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

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

7   statute uniquely coercive. One of them is the sheer

8   size of this program.

9   And, you know, if you want a -- if you want

10   a gauge on the size of this program, the best place to

11   look is the government's own number. Footnote 6, page 10

12   of their brief.

13   JUSTICE KAGAN: So, when does a program

14   become too big? I'd want you to -- give me a dollar

15   number.

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

17   years. That's -- that is --

18   JUSTICE KAGAN: I thought $1 trillion --

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

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

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

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

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

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

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

1   expansion that we're talking about before.

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

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

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

5   percentage of the prior program or as a percentage of

6   GDP.

7   If I'm right on those numbers or even

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

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

10   unconstitutional since 1964.

11   And if not, why not?

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

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

14   make this statute unique.

15   JUSTICE SCALIA: What are your second and

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

17   (Laughter.)

18   MR. CLEMENT: Yes, exactly.

19   Well, one is the sheer size. Two is the

20   fact that this statute uniquely is tied to an individual

21   mandate which is decidedly nonvoluntary. And three is

22   the fact that they've leveraged the prior participation

23   in the program, notwithstanding that they've broken this

24   out as a separately segregated fund going forward, which

25   is not to prove --

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

2   third, suppose you have the current program and Congress

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

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

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

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

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

8   Unconstitutional?

9   MR. CLEMENT: No, I think that is

10   constitutional because I think that's something that

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

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

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

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

15   that's -- that's a provision that I don't think its

16   constitutionality's called into question.

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

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

19   restrictions in Medicaid, and Congress can legislate

20   coverage expansions in Medicaid.

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

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

23   the consequence is that Congress has to break Medicaid

24   down into remotely manageable pieces as opposed to

25    $3.3 trillion over 10 years before the expansion, I

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

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

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

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

5   program works.

6   These are people who are healthy, childless

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

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

9   to have a separate program for how you get reimbursed

10   for that. You get reimbursed differently from all the

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

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

13   in the program for the visually impaired and the

14   disabled.

15   If I may reserve the balance of my time.

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

17   sure my colleagues have exhausted their questions.

18   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.

6   MR. CLEMENT: Well, if you --

7   JUSTICE SOTOMAYOR: The uninsured are a

8   problem for States only because they, too, politically,

9   just like the Federal Government, can't let the poor

10   die. And so, to the extent they don't want to do that,

11   it's because they feel accountable to their citizenry.

12   And so, if they want to do it their way, they have to

13   spend the money to do it their way, if they don't want

14   to do it the Federal way.

15   So, I -- I just don't understand the logic

16   of saying, States, you can't -- you don't -- you're not

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

18   more you take, the more power you have.

19   MR. CLEMENT: Well, Justice Sotomayor, a

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

21   misdescribes what happened with Medicaid. I mean,

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

23   the visually impaired and the disabled even before

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

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

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

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

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

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

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

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

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

8   our new conditions.

9   Secondarily, I do think that our principle

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

11   automatically becomes coercive per se. But I do think

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

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

14   $3.3 trillion over the next 10 years, that at that

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

16   more careful that it not be so aggressively coercive as

17   it was in this statute.

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

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

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

21   telling you that it's exceptionally important to draw

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

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

24   there's three factors of this particular statute that

25   make it as obviously coercive as any piece of

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

2   have effectively instructed Congress that there are

3   limits, and you will have laid down some administrable

4   rules.

5   JUSTICE SCALIA: Mr. Clement, the Chief has

6   said I can ask this.

7   CHIEF JUSTICE ROBERTS: He doesn't always

8   check first.

9   (Laughter.)

10   JUSTICE SCALIA: As -- as I recall your --

11 your theory, it is that to determine whether something

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

13 threatened with losing or offered to receive. And the

14 other side doesn't matter.

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

16 think, you know, the -- the old Jack Benny thing, your

17 money or your life, and, you know, he says, "I'm

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

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

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

21 mean -- right?

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

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

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

25 situations?

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

2   (Laughter.)

3   JUSTICE SCALIA: Really?

4   JUSTICE BREYER: Knew you would say that.

5   JUSTICE SCALIA: It's a tough choice.

6   And -- and --

7   JUSTICE KENNEDY: I thought you were going

8   to say this statute is your money and your life.

9   (Laughter.)

10   MR. CLEMENT: And it is. But I mean --

11   JUSTICE BREYER: Which way?

12   MR. CLEMENT: I might have missed something,

13   but both of those seem to be --

14   (Laughter.)

15   MR. CLEMENT: -- to be the hallmarks of

16   coercion.

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

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

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

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

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

22   one.

23   (Laughter.)

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

25   going home tonight.

1   (Laughter.)

2   CHIEF JUSTICE ROBERTS: No, let's leave the

3   wife out of it.

4   MR. CLEMENT: I was going to say,

5   Mrs. Clement's not going to --

6   JUSTICE SCALIA: No, I'm talking about my

7   life. I'd say take mine, you know?

8   (Laughter.)

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

10   Justice.

11   JUSTICE SCALIA: How could we use that

12   example?

13   Forget about it.

14   (Laughter.)

15   CHIEF JUSTICE ROBERTS: That's enough

16   frivolity for a while.

17   But I want to make sure I understand where

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

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

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

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

22   what they're offering?

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

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

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

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

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

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

4   from -- you know, the - the - the export tariffs like in

5   the old day. It's coming from the taxpayers. So,

6   that's part of it.

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

8   their continuing participation in a program that they've

9   been participating in for 45 years as a condition to

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

11   that's critical --

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

13   a consequence of how willing they have been since the

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

15   seems to me that they have compromised their status as

16   independent sovereigns because they are so dependent on

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

18   surprised that the Federal Government, having attached

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

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

21   pulling them.

22   MR. CLEMENT: With all due respect,

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

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

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

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

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

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

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

5   we'll give the Federal Congress unlimited spending

6   power.

7   The consequence ought to be, if you really

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

9   reconsider your cases that say that Congress can spend

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

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

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

13   cases absolutely depend on there being a line between

14   coercion --

15   JUSTICE SOTOMAYOR: But could you tell me --

16   MR. CLEMENT: -- and voluntary action.

17   JUSTICE SOTOMAYOR: I don't understand your

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

19   being a difference between the Federal Government saying

20   we want to take care of the poor; States, if you do

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

22   costs.

23   And you said that could be coercion. All

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

25   undertakes to meet the Federal obligation count in this

1   equation at all?

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

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

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

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

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

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

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

9   ability to raise revenue from their own citizens. So,

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

11   they want to; it really is --

12   JUSTICE SOTOMAYOR: Counsel, if we go back

13   to that era of matching what a State pays to what a

14   State gets, Florida loses. Its citizens pay out much

15   less than what they get back in Federal subsidies of all

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

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

18   really giving less than it receives.

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

20   JUSTICE SOTOMAYOR: You don't really want to

21   go back to that point, do you?

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

23   argument on behalf of Texas.

24   (Laughter.)

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

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

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

3   coercive.

4   And I really think if you ask the question,

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

6   money, you're going to lose all your money under what

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

8   visually impaired and the disabled? Nobody in Congress

9   wants the States to stop doing that. They're just doing

10 it, and it's purely coercive, to condition the money.

11 It's leverage, pure and simple.

12   JUSTICE KENNEDY: If the inevitable

13 consequence of your position was that the Federal

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

15 Government could have Medicaid, Medicare, and these

16 insurance regulations -- assuming that's true -- then

17 how are the interests of federalism concerned? How are

18 the interests of federalism concerned if, in Florida or

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

20 huge Federal bureaucracies doing what this bill allows

21 the State bureaucracies to do?

22   I know you've thought about that. I'd just

23 like your answer.

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

25 elaborate, but the one-word answer is "accountability."

1   If the Federal Government decides to spend

2   money through Federal instrumentalities, and the citizen

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

4   complaint to a Federal official working in a Federal

5   agency.

6   And what makes this so pernicious is that

7   the Federal Government knows that the citizenry is not

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

9   Federal bureaucracies popping up across the country.

10   And so, they get the benefit of administering this

11   program through State officials, but then it makes it

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

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

14   being administered by a State official in a State

15   building? Or do they --

16   JUSTICE KAGAN: But, Mr. Clement --

17   MR. CLEMENT: -- or do they --

18   JUSTICE KAGAN: -- that is very confusing,

19   because the idea behind cooperative Federal/State

20   programs was exactly a federalism idea. It was to give

21   the States the ability to administer those programs. It

22   was to give the States a great deal of flexibility in

23   running those programs. And that's exactly what

24   Medicaid is.

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

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

2 forward?

3   And I absolutely take your point,

4 Justice Kagan. Cooperative federalism is a beautiful

5 thing. Mandatory federalism has very little to

6 recommend it, because it poses exactly --

7   JUSTICE KAGAN: Cooperative federalism --

8   MR. CLEMENT: -- the kind of

9 accountability --

10   JUSTICE KAGAN: -- does not mean that there

11 are no Federal mandates and no Federal restrictions

12 involved in a program that uses 90 percent here,

13 100 percent Federal money. It means there's flexibility

14 built into the program subject to certain rules that the

15 Federal Government has about how it wishes its money to

16 be used.

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

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

19 it for other stores. But still, you can use it for all

20 kinds of different things.

21   MR. CLEMENT: But -- I absolutely agree that

22 if it's cooperative federalism and the States have

23 choices, then that is perfectly okay. But when --

24 that's why voluntariness in coercion is so important.

25 Because if you force a State to participate in a Federal

1   program, then -- I mean, as long as it's voluntary, then

2   a State official shouldn't complain if a citizen

3   complains to the State about the way the State's

4   administering a Federal program that it volunteered to

5   participate in. But at the point it becomes coercive,

6   then it's not fair to tell the citizen to complain to

7   the State official, they had no choice.

8   But who do they complain to at the Federal

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

10   saying it's the best solution to have Federal

11   instrumentalities in every State, but it actually is

12   better than what you get when you have mandatory

13   federalism, and you lose the accountability that is

14   central to the federalism provisions in the

15   Constitution.

16   CHIEF JUSTICE ROBERTS: Thank you,

17   Mr. Clement.

18   General Verrilli.

19   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

20   ON BEHALF OF THE RESPONDENTS

21   GENERAL VERRILLI: Mr. Chief Justice, and

22   may it please the Court:

23   The Affordable Care Act's Medicaid expansion

24   provisions will provide millions of Americans with the

25   opportunity to have access to essential health care that

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

2   Spending Clause power that complies with all of the

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

4   the States do not contend otherwise. The States are

5   asking this Court to do something unprecedented, which

6   is to declare this an impermissibly coercive exercise

7   of power.

8   JUSTICE SCALIA: What do you think we --

9   GENERAL VERRILLI: -- of power --

10   JUSTICE SCALIA: -- meant in -- in those --

11 those dicta in -- in several prior cases, where we've

12 said that the Federal Government cannot be coercive

13 through the Spending Clause? What -- what do you think

14 we were -- give -- give us a hypothetical.

15   GENERAL VERRILLI: Yes. First, if I could

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

17 Justice Scalia, I think the -- what the Court said in

18 Steward Machine and in Dole is that it's possible that

19 you might envision a situation in which there's

20 coercion.

21   JUSTICE SCALIA: Okay.

22   GENERAL VERRILLI: And the courts didn't say

23 much more, but I can think of something.

24   One example I could think of that might

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

1   which the condition attached was a -- worked a

2   fundamental transformation in the structure of State

3   government in a situation in which the State didn't have

4   a choice but to accept it. But -- and so --

5   JUSTICE SCALIA: But anything else, so long

6   as you --

7   GENERAL VERRILLI: Well, but I think --

8   JUSTICE SCALIA: -- you have to have --

9   you're talking about situations where they have to

10   locate their statehouse in some other city --

11   GENERAL VERRILLI: Or a unicameral

12   legislature, or something like that.

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

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

15   at all?

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

17   Dole conditions are real. The germaneness condition in

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

19   CHIEF JUSTICE ROBERTS: But none of those

20   have addressed the coercion question.

21   GENERAL VERRILLI: Right.

22   CHIEF JUSTICE ROBERTS: So, do you think it

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

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

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

1   dollar of Federal funding for every program?

2   GENERAL VERRILLI: I think that would raise

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

4   what we --

5   CHIEF JUSTICE ROBERTS: But there's no

6   coercion question at all?

7   GENERAL VERRILLI: -- have here.

8   Well, but I think -- I think -- I think

9   they're related. I think that the germaneness inquiry

10   in Dole really gets at coercion in some circumstances,

11   and that's why I think they are related. But we don't

12   have that here.

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

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

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

16   to coercion?

17   GENERAL VERRILLI: Well, because it gets to

18   be harder to see what --

19   CHIEF JUSTICE ROBERTS: That's germaneness;

20   there's no --

21   GENERAL VERRILLI: -- what the connection is

22   between getting you to do A and the money you're getting

23   for --

24   CHIEF JUSTICE ROBERTS: So, it fails because

25   it's not germane. But you're saying it would not fail

1 because it was coercive?

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

3 I said, I think they're really trying to get at the same

4 thing. And I -- but I do think it's quite different

5 here. And I -- I would like to, if I could, take up

6 each of the --

7   CHIEF JUSTICE ROBERTS: No, no. I know

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

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

10 that there is a coercion limit, or that once the Federal

11 Government -- once you're taking Federal Government

12 money, the Federal Government money -- can take it back,

13 and that doesn't affect the voluntariness of your

14 choice?

15   Because it does seem like a serious problem.

16 We're assuming, under the Spending Clause the Federal

17 Government cannot do this. Under the Constitution it

18 cannot do this. But if it gets the State to agree to

19 it, well then it can.

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

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

22 that's really saying the -- the limitation in the

23 Constitution is -- is largely meaningless.

24   GENERAL VERRILLI: Well, but I -- but I

25 don't think that this is a case that presents that

1   question, Mr. Chief Justice.

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

3   just -- I know this -- I don't know if I'll grant it to

4   you or not, but let's assume it's not this case.

5   Do you recognize any limitation on that

6   concern?

7   GENERAL VERRILLI: Well, I think the Court

8   has said, in Steward Machine and Dole, that this is

9   something that needs to be considered in an appropriate

10   case, and we acknowledge that. But I do think it's so

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

12   say in the abstract with respect to a particular program

13   that there is a --

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

15   which it is both germane and yet coercive, is what

16   you're saying. There is no such case as far as you

17   know.

18   GENERAL VERRILLI: Well, I'm -- I'm not

19   prepared to -- to say right here that I can -- that -

20   I'm not prepared to give that decision.

21   JUSTICE SCALIA: I wouldn't think that

22   that's a surprise question. I mean, you know --

23   GENERAL VERRILLI: Well, I -- Congress has

24   authority to act and --

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

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

2   (Laughter.)

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

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

5   look at this -- an issue like this, if you're going to

6   consider it, it's got to be considered in the factual

7   context --

8   JUSTICE ALITO: Well, let me give --

9   GENERAL VERRILLI: -- in which it arises.

10   JUSTICE ALITO: -- you a factual context.

11   Let's say Congress says this to the States: We -- we've

12   got great news for you. We know that your expenditures

13   on education are a huge financial burden, so we're going

14   to take that completely off your shoulders. We are

15   going to impose a special Federal education tax which

16   will raise exactly the same amount of money as all of

17   the States now spend on education, and then we are going

18   to give you a grant that is equal to what you spent on

19   education last year.

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

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

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

23   on teacher tenure, on collective bargaining, on

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

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

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

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

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

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

5   Federal education tax. But on top of that, you're going

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

7   spending on education, plus all of the Federal funds

8   that you were previously given.

9   Would that be -- would that reach the

10   point -- would that be the point where financial

11   inducement turns into coercion?

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

13   JUSTICE ALITO: No?

14   GENERAL VERRILLI: -- because they do -- the

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

16   going-in proposition. I mean, the argument the States

17   are making here is not that they're -- that -- this is

18   not a going-in proposition. Their -- their argument is

19   that they're -- they are in a position where they don't

20   have a choice because of everything that's happened

21   before. But --

22   JUSTICE ALITO: You might be right. But if

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

24   GENERAL VERRILLI: Well, but as a --

25   JUSTICE ALITO: -- of federalism.

1   GENERAL VERRILLI: -- as a practical

2   matter -- I disagree with that, Justice Alito. First of

3   all, as a practical matter, there's a pretty serious

4   political constraint on that situation ever arising,

5   because it's not like the Federal Government is going to

6   have an easy time of raising the kinds of tax revenues

7   that need to be -- needed to raised to work that kind of

8   fundamental transformation, and that's real. And -- and

9   political constraints do operate to protect federalism

10   in this area, and --

11   JUSTICE SCALIA: I would have thought there

12   was a serious political strain -- constraint on the

13   individual mandate, too, but that didn't work.

14   What you call serious political constraints

15   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 the 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.

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. Are 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.

4   Every time, it seems that that would be the

5   case.

6   So, why shouldn't we be concerned about the

7   extent of authority that the government is exercising

8   simply because they could do something less? We have to

9   analyze the case on the assumption that that power will

10   be exercised, don't we?

11   GENERAL VERRILLI: Well, Mr. Chief Justice,

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

13   advance of any particular situation becoming -- coming

14   before the Secretary of Health and Human Services and

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

16   But that --

17   CHIEF JUSTICE ROBERTS: No, I appreciate

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

19   GENERAL VERRILLI: That discretion is there

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

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

22   circumstances here --

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

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

25   ever made use of that authority?

1   GENERAL VERRILLI: That's correct, Justice

2   Kagan. It's never been used to --

3   CHIEF JUSTICE ROBERTS: What about the

4   Arizona letter we just heard about today?

5   GENERAL VERRILLI: It has never been used to

6   cut off --

7   CHIEF JUSTICE ROBERTS: It's been used to

8   threaten --

9   JUSTICE SCALIA: Of course not.

10   CHIEF JUSTICE ROBERTS: Of course, no State

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

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

13   GENERAL VERRILLI: If we could go to the

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

15   respect to the Medicaid expansion, the States' argument

16   is, as they've said it in their briefs, they

17   articulated a little bit different this morning -- this

18   afternoon. But as they said it in their briefs was it's

19   not what you stand to gain, but what you stand to lose.

20   But I think an important thing in evaluating

21   that argument in this context is fully 60 percent of

22   Medicaid expenditures in this country are based on

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

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

25   '88 or '89. But -- but States are given choices to

1   expand the beneficiaries beyond the Federal minimum and

2   to expand services beyond the Federal minimum.

3   JUSTICE KENNEDY: And just a small point,

4   and please correct me if I'm wrong. It -- does this Act

5   not require States to keep at the present level their

6   existing Medicaid expenditure? So, some States may have

7   been more generous than others in Medicaid, but this Act

8   freezes that so the States can't go back. Or am I

9   incorrect?

10   GENERAL VERRILLI: It's much more nuanced

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

12   maintenance of effort provision which lasts until 2014,

13   until such time as the Medicaid expansion takes place

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

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

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

17   optional benefits where the States still have

18   flexibility. They can still reduce optional benefits

19   that they're now providing if they -- if they want to,

20   to control costs. They can also work on provider rates.

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

22   by which some States have expanded their populations

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

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

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

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

 2   think that does a significant degree less than my

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

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

 5   just temporary.

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

 7   first of their three arguments for coercion, the sheer

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

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

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

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

12   Medicaid expansion is substantial or whether it's

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

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

15   example, could decide that under the -- under the

16   current system, too much money has ended up flowing to

17   nursing home care and that money would be better serving

18   the general welfare if it were directed at infants and

19   children.

20   But if the Federal Government said we're

21   going to redirect the spending priorities of the Federal

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

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

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

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

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

2   today before these expansions take place, under their

3   theory, the provision is coercive.

4   JUSTICE SCALIA: The smaller it, is the

5   bigger the coercion.

6   GENERAL VERRILLI: Well --

7   JUSTICE SCALIA: The smaller what you're

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

9   GENERAL VERRILLI: The more they stand to

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

11   Justice Breyer.

12   JUSTICE BREYER: Just before you leave that,

13   I'd appreciate it if you would expand a little bit on

14   the answer to Justice Kagan's question for the reason,

15   when I read the cutoff statute, which as I said has been

16   there since 1965 unchanged, it does refer to the

17   Secretary's discretion to keep the funding, insofar as

18   the funding has no relationship to the failure to comply

19   with the condition.

20   And as I read that, that gives the Secretary

21   the authority to cut off all the money that the States'

22   refusal to accept the condition means they shouldn't

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

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

25   says maybe they could do that. But I thought they had

1   to exercise that within reason.

2   GENERAL VERRILLI: Right. Well --

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

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

5   I want to know.

6   GENERAL VERRILLI: Well --

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

8   instance where they went beyond the funds that were

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

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

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

12 isolation chamber here is actually true. Or whether

13 they have gone around threatening people that we will

14 cut off totally unrelated funds.

15   What is the situation?

16   GENERAL VERRILLI: I think the situation is

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

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

19 of me to commit now that the Secretary would exercise

20 the discretion uniformly in one way or another.

21   CHIEF JUSTICE ROBERTS: Well, but that's

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

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

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

25 has ever been shot.

1   GENERAL VERRILLI: But --

2   CHIEF JUSTICE ROBERTS: Well, it's because

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

4   choice.

5   GENERAL VERRILLI: But that --

6   CHIEF JUSTICE ROBERTS: And you cannot --

7   you cannot represent that the Secretary has never said:

8   And if you don't do it, we're going to take away all the

9   funds.

10   They cite the Arizona example. I suspect

11   there are others, because that is the leverage.

12   GENERAL VERRILLI: But it --

13   CHIEF JUSTICE ROBERTS: I'm not saying

14   there's anything wrong with it.

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

16   Chief Justice.

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

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

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

20   GENERAL VERRILLI: It's not coercion.

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

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

23   infringement?

24   GENERAL VERRILLI: But, of course --

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

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

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

3   the facts are.

4   GENERAL VERRILLI: I --

5   JUSTICE BREYER: I wanted to know what you

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

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

8   it a common thing that that happens, that this unrelated

9   threat is made? Or isn't it?

10   GENERAL VERRILLI: It's -- my understanding

11   is that these situations are usually worked out back and

12   forth between the States and the Federal Government.

13   And I think that most --

14   JUSTICE BREYER: You're not privy to conversations.

15   GENERAL VERRILLI: And I'm not. And -- but

16   the --

17   JUSTICE SCALIA: And who wins?

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

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

20   seems to me we're operating under a conception that

21   isn't right.

22   The reason we've had all these Medicaid

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

24   were where we are now and why 60 percent of what's being

25   spent on Medicaid is based on voluntary decisions by the

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1   States to expand beyond what Federal law requires, is

2   because this is a good program and it works. And the

3   States generally like what it accomplishes.

4   JUSTICE KAGAN: And, General Verrilli --

5   JUSTICE ALITO: And General Verrilli, is this --

6   is this discussion realistic? The objective of the

7   Affordable Care Act is to provide near universal health

8   care.

9   Now, suppose that all of the 26 States that

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

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

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

13   big portion of the population that would not have health

14   care.   `

15   And it's a realistic possibility that the

16   Secretary is going to say, well, okay, fine, you know,

17   we're going to cut off your new funds, but we're not

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

19   condition sit there?

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

21   make a commitment that the authority wouldn't be

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

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

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

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

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

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

3   misconception, and I'd like to be able to take a minute

4   and walk through and explain why that is.

5   JUSTICE KAGAN: General Verrilli, before you

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

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

8   life" has consequence because we're worried that that

9   person is actually going to shoot. So, I think that

10   this question about are -- what do we think the

11   Secretary is going to do is an important one.

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

13   Secretary withdraws funds, what the Secretary is doing

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

15   that the Secretary is reluctant and loath to take money

16   away from poor people's health care and that that's why

17   these things are always worked out. It's that the

18   Secretary really doesn't want to use this power, and so

19   the Secretary sits down with the State and figures out a

20   way for the Secretary not to use the power.

21   GENERAL VERRILLI: That's correct,

22   Justice Kagan. That is no --

23   CHIEF JUSTICE ROBERTS: No, what the --

24   GENERAL VERRILLI: I'm sorry --

25   CHIEF JUSTICE ROBERTS: I'm sorry. Go ahead.

1   GENERAL VERRILLI: That's another way of

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

3   earlier, is that the States and the Federal Government

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

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

6   instances, they work together to make that happen.

7   CHIEF JUSTICE ROBERTS: Yes, but the

8   question is not -- obviously, the States are interested

9   in the same objective, and they have a disagreement, or

10   they have budget realities that they have to deal with.

11   And States say, well, we're going to cut by 10 percent

12   what we reimburse this for or that for, and the Federal

13   Government says, well, you can't.

14   And no one is suggesting that people want to

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

16   to implement policy in this area.

17   And the concern is that the Secretary has

18   the total and complete say because the Secretary has the

19   authority under this provision to say you lose

20   everything. No one has suggested in the normal course

21   that will happen, but so long as the Federal Government

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

23   on the sovereign interests of the State.

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

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

 1 Federal funds, but I don't think you can deny that it's

 2 a significant authority that we're giving the Federal

 3 Government to say you can take away everything if the

 4 States don't buy into the next program.

 5   GENERAL VERRILLI: Well, but what I would

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

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

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

 9 be circumstances in which they are very difficult

10 decisions. But that's different from saying that

11 they're coercive, and it's different from saying that is

12 an -- that it's an unconstitutional --

13   JUSTICE BREYER: Why is it different? Why

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

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

16 Federal Government would say here's a condition that you

17 have to have a certain kind of eyeglasses for people who

18 don't see. And, by the way, if you don't do that, we'll

19 take away $42 billion of funding. Okay?

20   I thought such a thing would not happen.

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

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

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

24 that's so even though the statute says it's in the

25 discretion of the Secretary.

1   But Mr. -- your colleague and brother says

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

3   would do it. That's what I'm hearing now.

4   GENERAL VERRILLI: No. I --

5   JUSTICE BREYER: That they would do it, and

6   they do do it, and -- et cetera. So, I'd like a little

7   clarification.

8   GENERAL VERRILLI: In the situation

9   described in your hypothetical, Justice Breyer, I think

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

11   never do it. But what I'm saying is, with respect to

12   the Medicaid expansion in this case --

13   JUSTICE SCALIA: Could never do it or

14   wouldn't?

15   GENERAL VERRILLI: Would never do it.

16   JUSTICE SCALIA: It's your prediction.

17   Okay.

18   GENERAL VERRILLI: Well, and I think that it

19   would have to satisfy the Administrative Procedure Act,

20   and that's a real constraint. What I'm not -- what I

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

22   this Medicaid expansion --

23   JUSTICE SCALIA: Are you willing to

24   acknowledge that the Administrative Procedure Act is a

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

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

2   unreasonable? Are you willing to accept that? I

3   wouldn't if I were you.

4   GENERAL VERRILLI: So --

5   (Laughter.)

6   GENERAL VERRILLI: What I'm -- what I'm

7   trying to do here is to -- is to suggest that the

8   Secretary does have discretion under the statute, and

9   that that -- and that's not --

10   JUSTICE SCALIA: Indeed, part of the

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

12   the statute says, and I think --.

13   GENERAL VERRILLI: And it is possible, and

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

15   make this --

16   JUSTICE KAGAN: But, General Verrilli,

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

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

19   discretionary act of the Secretary.

20   GENERAL VERRILLI: I agree with that,

21   Justice Kagan, but --

22   JUSTICE BREYER: What's making you

23   reluctant?

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

25   I'm not trying to be reluctant. I understand how -- how

1   this works. I'm trying to be careful about the

2   authority of the Secretary of Health and Human Services

3   and how it will apply in the future.

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

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

6   Secretary's discretion explicitly includes a certain

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

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

9   any case like that.

10   GENERAL VERRILLI: Holly Hill.

11   JUSTICE SCALIA: Yes, when there's just a

12   general grant of discretion, it has to be exercised

13   reasonably. But maybe Justice Breyer knows such a case.

14   JUSTICE BREYER: Yes, I do.

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

16   (Laughter.)

17   GENERAL VERRILLI: If I could go back to the

18   sheer size idea, there are, I think, another couple of

19   points that are important in thinking about whether

20   that's a principle courts could ever apply.

21   Once you get into that business -- in

22   addition to the problem I identified earlier, that it

23   basically means that Congress has frozen in place now,

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

25   additional issue of having to make a judgment about in

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

2   funding be so significant that you would count it

3   as being coercive.

4   JUSTICE KENNEDY: I suppose one test could

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

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

7   lost, that it is not clear to the citizen that the State

8   or the Federal Government is administering the program,

9   even though it's a State administrator.

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

11   think this going to come from a --

12   JUSTICE KENNEDY: And I think that's

13   unworkable.

14   GENERAL VERRILLI: This is going to come

15   from a withdrawal situation. Their argument's about

16   it's what you stand to lose, and with respect to

17   withdrawal -- I mean -- so, does it depend on -- is it

18   an absolute or a relative number with respect to how

19   much of the State budget? Is it a situation where you

20   have to make a calculation about how hard would it be

21   for that State to make up in State tax revenues the

22   Federal revenue they would lose? Does that depend on

23   whether it's a high tax State or a low tax State? It

24   just seems to me -- and then, what is the political

25   climate in that State? It seems to me like --

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1   JUSTICE KENNEDY: In your view -- in your

2   view, does federalism require that there be a relatively

3   clear line of accountability for political acts?

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

5   Justice Kennedy. But, here --

6   JUSTICE KENNEDY: Is that subsumed in the

7   coercion test, or is that an independent test?

8   GENERAL VERRILLI: You know, here, the

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

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

11   some of the other literature, does address federalism

12   concerns in the sense of the Federal Government using

13   Federal funding in one area to try to get States to act

14   in an area where the Federal Government may not have

15   Article I authority.

16   JUSTICE KENNEDY: Yes.

17   GENERAL VERRILLI: But, as Your Honor

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

19   it is certainly true that the Federal Government

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

21   indicated, to carry out this program, the Federal

22   Government could, as Your Honor suggested, expand

23   Medicare and do it itself.

24   JUSTICE KENNEDY: But do you agree that

25   there still is inherent, implicit in the idea of

1   federalism, necessary for the idea of federalism, that

2   there be a clear line of accountability so the citizen

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

4   should be held responsible for their program?

5   GENERAL VERRILLI: Certainly, but I

6   think the problem here is --

7   JUSTICE KENNEDY: And does coercion relate

8   to that, or is that a separate --

9   GENERAL VERRILLI: Yes, but I think --

10   JUSTICE KENNEDY: -- is that a separate

11   doctrine?

12   GENERAL VERRILLI: Well, I think it relates

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

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

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

16   political accountability at the State level to withdraw

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

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

19   comes from. And that's why I think coercion --

20   JUSTICE KENNEDY: Well, but I think the

21   answer would be that the State wants to preserve its

22   integrity, its identity, its responsibility in the

23   Federal system.

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

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

1   JUSTICE SCALIA: May it do so?

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

3   maybe you can answer this "yes." But isn't the question

4   simply: Is it conceivable to you, as it was evidently

5   not to Congress, that any State would turn down this

6   offer, that they can't refuse? Is it conceivable to you

7   that any State would have said no to this program?

8   Congress didn't think that, because some of its other

9   provisions are based on the assumption that every single

10   State will be in this thing.

11   GENERAL VERRILLI: I think --

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

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

14   that sounds like coercion to me.

15   GENERAL VERRILLI: I think -- I think

16   Congress predicted that States would stay in this

17   program, but the -- prediction is not coercion. And the

18   reason Congress predicted it, I think, Justice Scalia,

19   is because the Federal Government is paying 90-plus

20   percent of the costs. It increases State costs by 21

21   percent.

22   JUSTICE SCALIA: So, what do you predict?

23   If you predict the same, that 100 percent of the States

24   will accept it, that sounds like coercion.

25   GENERAL VERRILLI: Prediction is not

69

1   coercion. I disagree, Justice Scalia. That's just an

2   assumption, and if it proves to be wrong, then Congress

3   has time to recalibrate. And beyond that, I do think --

4   I just want to go back to the -- the other part of Your

5   Honor's point -- that with respect to the relationship

6   between Medicaid and the -- and the Act and particularly

7   the minimum coverage provision, my friend Mr. Clement

8   has suggested that you can infer coercion because, with

9   respect to the population to which the provision

10   applies, if there's no Medicaid, there's no other way

11   for them to satisfy the requirement.

12   I want to work through that for a minute, if

13   I may, because it's just incorrect.

14   First of all, with respect to anybody at

15   100 percent of the poverty line or above, there is an

16   alternative in the statute. It's the exchanges with tax

17   credits and with subsidies to insurance companies. So,

18   with respect to that, the part of the population at

19   100 percent of poverty to 133 percent of poverty, the --

20   the statute actually has an alternative for them.

21   For people below 100 percent of poverty, it

22   is true that there is no insurance alternative. But by

23   the same token, there is no penalty that is going to be

24   imposed on anybody in that group.

25   To begin with, right now, the level of

1   100 percent of poverty is $10,800. The -- the

2   requirement for filing a Federal income tax return is

3    $9500. So, anybody below $9500, no penalty, because

4   they don't have to file an income tax return. The

5   sliver of people between $9500 and $10,800 -- the

6   question there is, are they going to be able to find

7   health insurance that will cost them less than 8 percent

8   of their income? And so --

9   JUSTICE ALITO: Well, I'm not following this

10   argument. Take the poorest of the poor. If there is no

11   Medicaid program, then they're not going to get health

12   care. Isn't that right?

13   GENERAL VERRILLI: Yes, that's true. But

14   this --

15   JUSTICE ALITO: And so, Congress obviously

16   assumed -- it thought it was inconceivable that any

17   State would reject this offer, because the objective of

18   the Affordable Care Act is to provide near-universal

19   care, and Medicaid is the way to provide care for at

20   least the poorest of the poor. So, it just didn't occur

21   to them that this was a possibility. When --

22   GENERAL VERRILLI: Well, I --

23   JUSTICE ALITO: When that's the case, how

24   can that not be coercion?

25   GENERAL VERRILLI: Well, it --

1   JUSTICE ALITO: Unless it's just a gift.

2   Unless it's just purely a gift.

3   And it comes back to the question of whether

4   you think it makes a difference that the money -- a lot

5   of the money to pay for this is going to come out of the

6   same taxpayers that the States have to tax to get their

7   money.

8   GENERAL VERRILLI: This is -- this is a --

9   this is -- these are Federal dollars that Congress has

10 offered to the States and said we're going to make this

11 offer to you, but here's how these dollars need to be

12 spent. This is the essence of Congress's Article I

13 authority under the General Welfare Clause and the

14 Appropriations Clause. This is not some remote

15 contingency or an effort to leverage in that regard.

16 This is how Congress is going to have the Federal

17 Government's money be used if States choose to accept

18 it.

19   Yes, it was reasonable for Congress to

20 predict in this circumstance that the States were going

21 to take this money, because -- because it is an

22 extremely generous offer of funds: 90-plus percent of

23 the funding. States can -- can expand their Medicaid

24 coverage to more than 20 percent of their population for

25 an increase of only 1 percent --

1   CHIEF JUSTICE ROBERTS: If it's such a good

2   deal --

3   GENERAL VERRILLI: -- of their funding.

4   CHIEF JUSTICE ROBERTS: -- why do you care?

5   If it's such a good deal, why do you need the club?

6   GENERAL VERRILLI: Well, the -- the --

7   CHIEF JUSTICE ROBERTS: It's a good deal,

8   take it. We're not going to -- if you don't take it,

9   you're just hurting yourself.

10   GENERAL VERRILLI: Yes, but that's --

11   CHIEF JUSTICE ROBERTS: We're not going

12   to --

13   GENERAL VERRILLI: That's a judgment for

14   Congress to make about how the Federal -- how Federal

15   funds are going to be used if States choose to accept

16   them, and Congress has made that judgment. That's

17   Congress's judgment to make, and it's -- it doesn't mean

18   that it's coercive.

19   CHIEF JUSTICE ROBERTS: You have another

20   15 minutes — at least.

21   GENERAL VERRILLI: Lucky me. Lucky me.

22   (Laughter.)

23   JUSTICE KENNEDY: But the -- but the point

24   is -- but the point is --

25   JUSTICE SOTOMAYOR: Can we go back --

1   JUSTICE KENNEDY: -- there's no real --

2   there's no realistic choice.   There's no real choice.

3   And Congress does not in effect allow for an out -- opt

4   out.   We just know that.

5   GENERAL VERRILLI: Well, I guess I --

6   JUSTICE KENNEDY: And it's substantial.

7   GENERAL VERRILLI: I would go back, Justice

8   Kennedy, to the --

9   JUSTICE KENNEDY: I recognize the problem

10   with that test.

11   GENERAL VERRILLI: I would go back to the

12   fact that 60 percent of the Medicaid spending is now

13   optional.   It's -- it's a result of choices that States

14   have made that – it's expanded the – their own applications.

15   JUSTICE KENNEDY: Even though they're now

16   frozen in, per our earlier discussion, to a large extent.

17   GENERAL VERRILLI: Well, no, to a much more

18   modest extent was my point, Justice Kennedy.   For

19   example, optional services where a huge amount of money

20   is spent -- more than $100 billion annually -- the

21   largest component of that is nursing home services.

22   That remains optional.   It's -- right now, once the

23   minimum -- once the maintenance-of-effort provision

24   remains in place, States have the flexibility to reduce

25   that -- those numbers.

1   States have considerable flexibility now and

2   going forward with respect to the way that money is

3   spent. And I do think in terms of evaluating whether

4   this expansion should be considered coercive, it's got

5   to be evaluated against the backdrop of the fact that

6   the States are generally -- are generally taking

7   advantage of the opportunities of this statute to

8   greatly expand the amount of money that the Federal

9   Government spends and the amount of money that they

10   spend to try to make the -- the lives of their citizens

11   better. I think it's very --

12   JUSTICE KENNEDY: Of course, they have to do

13   so by hiring a very substantial number of more

14   employees. There will be State employees. There'll be

15   substantial State administrative expenses that are not

16   reimbursed.

17   GENERAL VERRILLI: Well, but -- I would take

18   issue with that, Justice Kennedy. Part of the

19   Affordable Care Act is that it -- it provides for new

20   streamlined eligibility processes to get people into the

21   system at a -- at a much faster and cheaper rate. There

22   are going to be costs to set that up. But under the

23   statute, the Federal Government is going to pay

24   90 percent of those costs, the short-term set-up costs.

25   And then all of the projections that we have

1   seen suggest that the medium- to long-term costs, once

2   these changes are in place, are going to be dramatically

3   lower for the States --

4   CHIEF JUSTICE ROBERTS: Well, what --

5   GENERAL VERRILLI: -- on the administrative

6   side.

7   CHIEF JUSTICE ROBERTS: Obviously, the

8   Federal Government isn't bound to that. And what if,

9   after the 90 percent, they say, well, now -- from now

10   on, for the States -- we're going to pay 70 percent?

11   What happens then? Where does that extra money come from?

12   GENERAL VERRILLI: Well, I think -- then --

13   then the States would have a choice at that -- at that

14   point whether they were going to stay in the program or

15   not. But that isn't what we have here, and --

16   CHIEF JUSTICE ROBERTS: There's no -- they

17   can just bail out as soon -- whenever the government

18   reduces the amount of the percentage --

19   GENERAL VERRILLI: Well --

20   CHIEF JUSTICE ROBERTS: -- that it's willing

21   to pay, the States can say that's -- that's --

22   GENERAL VERRILLI: I'm not saying it would

23   be an easy choice, Mr. Chief Justice --

24   JUSTICE SCALIA: They'd have to bail out of

25   Medicaid, you're talking about --

1   GENERAL VERRILLI: The States would have

2   to --

3   JUSTICE SCALIA: -- not just -- yes.

4   GENERAL VERRILLI: The States would have to --

5   right. That would be --

6   CHIEF JUSTICE ROBERTS: Oh.

7   GENERAL VERRILLI: Right. That that would

8   be the option. They can leave Medicaid if they decide

9   that that isn't working for them. I'm saying -- I'm not

10   saying this is an easy choice. I'm also not saying it

11   would happen, because the Secretary does have this

12   discretion. So --

13   CHIEF JUSTICE ROBERTS: Well, the Secretary

14   has the discretion. We're talking about something else.

15   We're talking about fiscal realities and whether or not

16   the Federal Government is going to say we need to lower

17   our contribution to Medicaid and leave it up to the

18   States because we want the people to be mad at the

19   States when they have to have all these budget cuts to

20   keep it up, and not at the Federal Government.

21   GENERAL VERRILLI: But that would be true,

22   Mr. Chief Justice, whether this Medicaid expansion

23   occurred or not. So --

24   CHIEF JUSTICE ROBERTS: I know, but you've

25   been emphasizing that the Federal Government is going to

 1   pay 90 percent of this, 90 percent of this. And it's

 2   not something you can take to the bank, because the next

 3   day or the next fiscal year, they can decide we're going

 4   to pay a lot less, and you, States, are still on the

 5   hook, because you don't -- you say it's not an easy

 6   choice. We can say -- ask whether it's coercion.

 7   You're not going to be able to bail out of Medicaid.

 8   You just have to pay more because we're going to pay

 9   less.

10   GENERAL VERRILLI: Well, like I said, I -- I

11   agree that it would be a difficult choice in some

12   circumstances. But that is not to say it's coercion as

13   a legal matter or even as a practical matter. And I

14   think it would depend on what the circumstances were on

15   how -- and I think, trying to think about how a court

16   would ever answer the question of whether it was

17   coercive, it was too difficult as a practical matter for

18   States --

19   JUSTICE SOTOMAYOR: General, I'm trying

20   to --

21   GENERAL VERRILLI: -- to withdraw.

22   JUSTICE SOTOMAYOR: -- go back to that

23   because Justice Kennedy asked you whether there's -- I

24   think he said it's coercion if no one can be politically

25   accountable. I'm not sure how that could be practically

1   politically accountable, because almost every gift -- if

2   the terms are attractive, it would be an unattractive

3   political alternative to turn it down.

4   Dole itself was one of those cases. I think

5   every State raised the drinking age to 21; correct?

6   GENERAL VERRILLI: Yes, Justice Sotomayor,

7   and this argument was raised in Dole, and the Court

8   rejected it as a --

9   JUSTICE SOTOMAYOR: I guess my point is that

10   political accountability has two components: What can I

11   do if I like something, and what can I do if I don't

12   like something? And if people really like something

13   like Medicaid, they're not going to let you drop it,

14   correct?   `

15   GENERAL VERRILLI: Well, the citizens of the

16   State, but that's the citizens of the State acting --

17   JUSTICE SOTOMAYOR: Exactly. That's the

18   whole point; that's their choice, right?

19   GENERAL VERRILLI: -- in their capacity as

20   citizens of the State. And I think that's why I get --

21   try to get back to the point, that's why I think this is

22   wrong to think about this as coercion, because this is a

23   program that works effectively for the citizens of the

24   State, and States' governments -- and State governments

25   think that, and that's why it has expanded the way it

1   has expanded, because it's providing an essential

2   service for millions of needy citizens in these States.

3   It's providing access to health care that they would not

4   otherwise have.

5   CHIEF JUSTICE ROBERTS: You mentioned the --

6   the Dole case. Now, what was the threat in that case,

7   raise your drinking age to 21 or what?

8   GENERAL VERRILLI: Or lose a percentage of

9   your highway funds.

10   CHIEF JUSTICE ROBERTS: Do you remember the

11   percentage?

12   GENERAL VERRILLI: Seven percent, yes.

13   CHIEF JUSTICE ROBERTS: Yes. It's a pretty

14   small amount. That's really apples and oranges when

15   you're talking about lose all of your Medicaid funds or

16   lose -- I thought it was 5, but 7 -- 7 percent of your

17   highway funds.

18   GENERAL VERRILLI: It's -- I think -- I

19   agree with Your Honor that it -- that it's different,

20   but I don't think that that makes coercion as a legal

21   matter. As I said, I think that this is a situation in

22   which the -- if the States -- is it -- I'm not saying it

23   would be an easy choice, but the States made the choice,

24   they've made the choice. And --

25   JUSTICE SOTOMAYOR: Well, they made a choice

1   with the stimulus bill, didn't they? Some governors

2   rejected the stimulus bill --

3   GENERAL VERRILLI: That's -- that's correct,

4   Justice Sotomayor. And --

5   JUSTICE SOTOMAYOR: -- and some of -- some

6   of their congressional or legislative processes

7   overturned that.

8   GENERAL VERRILLI: That's right.

9   JUSTICE SOTOMAYOR: In others, they

10   supported it. The percentages were smaller, but it's

11   always the preference of the voters as to what they

12   want, isn't it?

13   GENERAL VERRILLI: That's -- that is

14   correct.   `

15   CHIEF JUSTICE ROBERTS: What was the threat

16   in the stimulus bill? What would the State lose?

17   GENERAL VERRILLI: That answer I don't know,

18   Mr. Chief Justice.

19   CHIEF JUSTICE ROBERTS: Would anything be

20   taken away, or would it just lose the opportunity to get

21   the money?

22   GENERAL VERRILLI: I don't know the answer

23   to that. I don't know the answer to that.

24   But if I may just say in conclusion that --

25   I'd like to take half a step back here. That this

1   provision, the Medicaid expansion that we're talking

2   about this afternoon and the provisions we talked about

3   yesterday, we've been talking about them in terms of

4   their effect as measures that solve problems, problems

5   in the economic marketplace, that have resulted in

6   millions of people not having health care because they

7   can't afford insurance.

8   There is an important connection, a profound

9   connection, between that problem and liberty. And I do

10   think it's important that we not lose sight of that.

11   That in this population of Medicaid eligible people who

12   will receive health care that they cannot now afford

13   under this Medicaid expansion, there will be millions of

14   people with chronic conditions like diabetes and heart

15   disease, and as a result of the health care that they

16   will get, they will be unshackled from the disabilities

17   that those diseases put on them and have the opportunity

18   to enjoy the blessings of liberty.

19   And the same thing will be true for -- for a

20   husband whose wife is diagnosed with breast cancer and

21   who won't face the prospect of being forced into

22   bankruptcy to try to get care for his wife and face the

23   risk of having to raise his children alone. And I could

24   multiply example after example after example.

25   In a very fundamental way, this Medicaid

1   expansion, as well as the provisions we discussed

2   yesterday, secure of the blessings of liberty. And I

3   think that that is important as the Court is considering

4   these issues that that be kept in mind. The -- the

5   Congress struggled with the issue of how to deal with

6   this profound problem of 40 million people without

7   health care for many years, and it made a judgment, and

8   its judgment is one that is, I think, in conformity with

9   what lots of experts' thought, was the best complex of

10   options to handle this problem.

11   Maybe they were right; maybe they weren't.

12   But this is something about which the people of the

13   United States can deliberate and they can vote, and if

14   they think it needs to be changed, they can change it.

15   And I would suggest to the Court, with profound respect

16   for the Court's obligation to ensure that the Federal

17   Government remains a government of enumerated powers,

18   that this is not a case in any of its aspects that calls

19   that into question. That this was a judgment of policy

20   that democratically accountable branches of this

21   government made by their best lights.

22   And I would urge this Court to respect that

23   judgment and ask that the Affordable Care Act, in its

24   entirety, be upheld. Thank you.

25   CHIEF JUSTICE ROBERTS: Thank you, General.

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1   Mr. Clement, you have 5 minutes.

2   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

3   ON BEHALF OF THE PETITIONERS

4   MR. CLEMENT: Thank you, Mr. Chief Justice

5   and may it please the Court:

6   Just a few points in rebuttal. First of all

7   we've talked a lot about the sort of hallmark of

8   coercion, your money or your life, with somebody with a

9   gun. I would respectfully suggest that it is equally

10   coercive and certainly not uncoercive if I say your

11   money or your life -- and by the way, I have discretion

12   as to whether or not I will shoot the gun. I don't

13   think that eliminates the coercion.

14   I also don't think this is a discretion that

15   the Secretary would ever be able to exercise. And the

16   reason is we disagree on the details, but the Solicitor

17   General and I agree that, over the years, Congress has

18   had different approaches to expanding Medicare.

19   Sometimes, as in 1972, it makes the

20   expansion voluntary. That's also, by the way, what

21   happened with the stimulus funds, which were voluntary

22   funds. You didn't lose all your Medicaid funds, which

23   is why 17 States could say no.

24   Sometimes, they take the voluntary approach.

25   Sometimes, as in 1984, they take the mandatory approach.

1   If the Secretary exercised the discretion to say, you

2   know what, it really isn't reasonable for you to have to

3   give up your funding for the visually impaired and the

4   disabled, just to cover these newly eligible people, so

5   we will make it voluntary; we'll make that

6   discretionary -- that would essentially be creating --

7   converting a 1984 amendment approach to a 1972 amendment

8   approach, and I just don't think that is the kind of

9   discretion that the Secretary has, with all due respect.

10   Now, moving on to the next point,

11   Justice Alito, your hypothetical, I think, aptly

12   captures the effect on this, based on the fact that

13   these tax dollars are being taken from the State's tax

14   base, and it's not like Steward Machine, where the

15   Federal Government would say, and oh, by the way, if you

16   don't take the option we're giving you, we're going to

17   have a Federal substitute that will go in, and we'll

18   take care of the unemployed in your State.

19   Here, if you don't take this offer that

20   we're giving you, your tax dollars will fund the other

21   49 States, and you'll get nothing.

22   But, of course, this situation is much more

23   coercive, even than your hypothetical, because it is

24   tied directly to the mandate. It's also tied to

25   the participation in the pre-existing program. So, it's

1   as if there was yet another program for post-secondary

2   education; they gave them exactly your option --

3   option -- and then they also said, oh, and by the way,

4   you not only not get these funds, but you lose the

5   post-secondary funds as well.

6   It's really hard to understand tying the

7   pre-existing participation in the program as anything

8   other than coercive.

9   The Solicitor General makes a lot of the

10   fact that there are optional benefits under this

11   program. Well, guess what? After the Medicaid

12   expansion, there will be a lot less opportunity for the

13   States to exercise those options, because one of the

14   things that the expansion does -- precisely because the

15   expansion is designed to convert Medicaid into a program

16   that satisfies the requirement of the minimum essential

17   coverage of the individual mandate, things that used to

18   be voluntary will no longer be voluntary.

19   The perfect example is prescription

20   coverage. That's a big part of the benefits that some

21   States, but not all, provide voluntarily now. It will

22   no longer be voluntary after the expansion because the

23   Federal Government has deemed prescription drugs to be

24   part of the minimal essential health coverage that

25   everybody in this country must have under the mandate.

1   So, that option that the State has is being removed by

2   the expansion itself.

3   The Chief Justice made the point --

4   JUSTICE GINSBURG: Mr. Clement, may I ask

5   one question about your bottom line in this case? It

6   sounds to me like everything you said would be to the

7   effect of, if Congress continued to do things on a

8   voluntary basis, so with adding these new eligibles,

9   and say, States, you can have it or not, you can

10   preserve the program as it existed before, you can opt

11   into this.

12   But you're not asking the Court as relief to

13   say, well, that's how we -- that's how we cure the

14   constitutional infirmity; we say this has to be on a

15   voluntary basis. Instead, you are arguing that this

16   whole Medicaid -- the addition, that the whole expansion

17   has to be nullified and, moreover, the entire Health

18   Care Act. Instead of having the easy repair, you say

19   that if we accept your position, everything falls.

20   MR. CLEMENT: Well, Justice Ginsburg, if we

21   can start with the common ground that there's a need for

22   a repair because there is a coercion doctrine and this

23   statute is coercion, then we're into the question of

24   remedy. And we do think -- we do take the position that

25   you describe in the remedy, but we would be certainly

happy if we got something here, and we got a recognition

that the coercion doctrine exists; this is coercive; and

we get the remedy that you suggest in the alternative.

Let me just finish by saying that I

certainly appreciate what the Solicitor General says,

that when you support a policy, you think that the

policy spreads the blessings of liberty. But I would

respectfully suggest that it's a very funny conception

of liberty that forces somebody to purchase an insurance

policy whether they want it or not.

And it's a very strange conception of

federalism that says that we can simply give the States

an offer that they can't refuse, and through the

spending power, which is premised on the notion that

Congress can do more -- because it's voluntary, we can

force the States to do whatever we tell them to. That

is a direct threat to our federalism.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Clement. And thank you, General Verrilli, Mr.

Kneedler, Mr. Carvin, Mr. Katsas, and in particular, of

course, Mr. Long and Mr. Farr.

The case is submitted.

(Whereupon, at 2:24 p.m., the case in the

above-entitled matter was submitted.)

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