No. 135, Original

In The Supreme Court of the United States

STATES OF TEXAS, KENTUCKY, MAINE, MISSOURI, AND NEW JERSEY,

Plaintiffs,

v.

MICHAEL O. LEAVITT, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION

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MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff States of Texas, Kentucky, Maine, Missouri, and New Jersey, (the "Plaintiff States") move the Court to issue a preliminary injunction, restraining Defendant Michael O. Leavitt, Secretary, United States Department of Health and Human Services (the "Secretary"), and his officers, agents, and employees, from enforcing any of the provisions of 42 U.S.C. §1396u-5(c) until the Plaintiff States' motion now on file with the Court for leave to file their Bill of Complaint against the Secretary has been decided by the Court and the matters set forth in the Bill of Complaint have been resolved. This motion is based upon the Plaintiff States' Motion for Leave to File Bill of Complaint, Supporting Brief, and Bill of Complaint.

FACTUAL BACKGROUND

On December 8, 2003, Congress enacted the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the "MMA"). Pub. L. No. 108-173, 117 Stat. 2066. Part I of the MMA creates a new outpatient prescription drug coverage program ("Medicare Part D" or "Part D") under Medicare. Under Medicare Part D, the federal government will offer optional outpatient prescription drug coverage to all Medicare beneficiaries, including individuals (known as "dual eligibles") who were previously already covered for prescription drugs under the States' Medicaid programs. 42 U.S.C. §1395w-101.

The federal government will not, however, bear the entire expense for this new federal program. Instead, the MMA requires that States bear a significant portion of the cost of the new prescription drug benefit for dual eligibles. Under the statute, States must pay to the federal government most of the savings that Congress anticipates they will realize from no longer having to provide prescription drug coverage for dual eligibles under their Medicaid programs. 42 U.S.C. §1396u-5(c)(1)(A),(B). These payments have been termed "the clawback."

The program went into effect on January 1, 2006, and is administered by the United States Department of Health and Human Services, Centers for Medicare & Medicaid Services ("CMS").[1] The statute requires the

[1] The States' mandated contribution is a monthly payment each of the fifty States must now make to the federal government. Under the statutory formula, a State's monthly payment is $1/12$ the product of multiplying the following three factors: (1) the amount the State spent,

(Continued on following page)

Secretary to notify each State not later than October 15 before each year (beginning in 2006) of the amount of its clawback payment. 42 U.S.C. §1396u-5(c)(2)(B). Under current projections, the clawback will require the States to pay billions of dollars of state funds to the federal government over the next two years alone. *See* KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE "CLAWBACK:" STATE FINANCING OF MEDICARE DRUG COVERAGE (June 2004), http://www.kff.org/medicaid/upload/The-Clawback-State-Financing-of-Medicare-Drug-Coverage.pdf (last visited March 1, 2006).

The Secretary initially advised the States in October 2005 of their 2006 clawback payments. *See* Exhibits TX1, KY1, ME1, MO1, NJ1. However, CMS and the Secretary subsequently issued additional statements over the next several months, altering the amounts of the payments.[2] To

per capita, on dual eligibles in 2003 for Medicaid prescription drugs covered under Part D, trended forward based on factors specified in the statute; (2) the number of dual eligibles enrolled in Part D plans in that State; and (3) the "phase-down percentage" applicable to the year in which the payment is calculated. In 2006, the phase-down percentage is 90 percent, meaning that States must pay 90 percent of their anticipated savings to the federal government. That amount gradually declines to 75 percent for the year 2015 and years thereafter. *See* 42 U.S.C. §1396u-5(c)(1)(A); *see also* 42 C.F.R. §423.910. CMS is responsible for making these calculations. *See generally* Exhibits attached to Bill of Complaint.

[2] In December 2005, six weeks after its initial letters went to the States, CMS sent a second group of letters altering some States' 2006 clawback payments. *See* TX2; ME2; NJ2. And in February 2006, the Secretary sent yet another letter to the States' Governors advising them that their clawback payments were going to decrease significantly based on the Secretary's decision to alter a variable in the clawback formula. The Secretary did not, however, advise the States in this letter of their new clawback amounts, which are still undetermined. *See* TX3, KY2, ME3, MO2, NJ3.

date, neither CMS nor the Secretary has provided any final, written confirmation of the exact amounts owed by the States for 2006. It remains unclear when the federal government will demand the clawback payments, how the payments will be calculated, and what the amount of the payments will be.

Thus, the Plaintiff States are placed in the following situation: (1) payments of unknown millions of dollars will shortly be demanded of them by a federal agency to fund a purely federal program; (2) when the Secretary decides to advise the States of the amounts and due dates of the payments, the States' legislatures will be expected to immediately appropriate and remit the required state funds; and (3) the States now have no control over this significant portion of their budgeting processes.

I. THE COURT SHOULD GRANT THE PLAINTIFF STATES' REQUEST FOR A PRELIMINARY INJUNCTION.

The traditional standard for granting a preliminary injunction requires the plaintiff to show that "in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975). The interests of both sides, including any potential harm to the non-moving party if enjoined, must be considered in determining the propriety of a preliminary injunction. *See id.* As demonstrated below, the Plaintiff States meet these requirements, and the Court should enter a preliminary injunction.

A. The Operation of the Clawback Will Cause the Plaintiff States Irreparable Injury While Enjoining the Clawback Will Cause the Federal Government Minimal Harm.

If the States are forced to pay the clawback during the pendency of this litigation, they will suffer irreparable harm. The clawback exacts a direct tax on the States, interfering with the most basic function of each State's legislature – the allocation of scarce resources among competing, legitimate state interests. Funds that are allocated and paid to the federal government to meet a State's clawback obligation will no longer be subject to state control.

Every State has funding priorities and goals that will have to be set aside to pay the clawback. One State may need to invest more money in education, while another State may be dealing with a natural disaster. In every circumstance, if there are insufficient funds to meet each state goal, it is the State's priorities that will be sacrificed to pay the federal clawback.

Once a State sends funds to the federal government to fund Medicare, those funds will practically be unrecoverable. The money will be deposited for expenditure by the federal government, and, under principles of sovereign immunity, the States will likely have no realistic avenue of recovery against the federal government.

Although the States have not yet made any clawback payments, the clawback is already substantially interfering with their budget processes. Since October 2005, when CMS was required by statute to inform the States of their clawback payments, CMS has issued at least two, and in some cases three, contradictory letters to the States demanding different payment amounts for 2006. *See*

Exhibits TX1-3, KY1-2, ME1-3, MO1-2, and NJ1-3. The ongoing, disruptive control of a federal agency over state budgeting processes should not be permitted to continue.

Even assuming that CMS makes a final decision in the near future regarding the States' clawback payments for 2006, the clawback will continue to inflict irreparable harm on the States' budgeting processes year-in and year-out. Under the statute, the Secretary is not required to provide the States notice of the upcoming year's clawback bills until the preceding October. 42 U.S.C. §1396u-5(c)(2)(B). Therefore, the Plaintiff States, all of which operate on fiscal-year budgeting systems,[3] will be forced to pass budgets that account for and will be affected by the clawback payments, without knowing the amount of those payments.

The Plaintiff States will always be, as they are now, in the position of having to guess how much money CMS will demand for the upcoming year. States may overestimate their payments, causing harm to other state priorities. States may underestimate and find themselves in a budget crisis. Even the States that accurately predict the amounts of their payments suffer an affront to their sovereignty because they will be forced to expend state resources to fund a purely federal government program.

The clawback impedes the States' ability to control their budgets and allocate their scarce resources. It unconstitutionally removes money from the States' coffers and routes it to that of the federal government. It thus unduly

[3] *See* TEX. CONST. art. III, §49a; N.J. CONST. art. VIII, §2, para. 2; KY. CONST. §169; MO. CONST. art. 4, §23; ME. REV. STAT. tit. 5, §1663.

– and irreparably – harms the States by interfering with their ability to govern.

The federal government, on the other hand, will suffer minimal harm if the Court enjoins the clawback because it has other, constitutional means to recoup its desired portion of the States' anticipated savings under Part D. For example, Congress could directly modify its share of the States' expenditures for Medicaid. The federal government pays a substantial portion of the costs for Medicaid services, and the federal share of a State's medicaid payments – or the federal medical assistance percentage ("FMAP") – is determined through a statutory formula subject to annual adjustments. *See* 42 U.S.C. §1396d(b). If the federal government were enjoined from imposing the clawback's direct and discriminatory tax on the States, a direct means of recouping the cost would be available to Congress: simply reducing the FMAPs and spending less federal money on Medicaid. Of course that would require elected Members of Congress, rather than shifting the blame to the States, to face themselves the political consequences for their policy choices – the precise transparency and democratic accountability that the Court's federalism decisions require.

B. The Plaintiff States Are Likely to Prevail on the Merits.

The clawback is contrary to longstanding principles of our federal system: the doctrine that the federal government cannot tax the States *qua* States; the correlative precept that the federal government cannot commandeer the States as congressional field offices; and the explicit constitutional guarantee to the States of a republican form of government.[4] The Plaintiff States' complaint invokes each of these constitutional principles in their challenge to the clawback, and they are likely to succeed on each of their claims.

First, the clawback is an unconstitutional tax on the States under the intergovernmental-tax-immunity doctrine; a doctrine grounded in the principles of the Tenth Amendment and most recently addressed by the Court in *New York v. United States*, 326 U.S. 572 (1946). In *New York*, although the Court could not agree on the precise boundaries of the States' immunity from federal taxation, every Justice expressly agreed that the States retained immunity from direct, discriminatory federal taxation that substantially interferes with essential functions of state government.

In particular, the entire Court agreed that the federal government could not impose a tax that was discriminatory or that interfered with the essential functions of state government and state sovereignty. Justices Frankfurter and Rutledge concluded that the federal government could not tax state functions with attributes of sovereignty, including sources of revenue "uniquely capable of being earned only by a State." *Id.*, at 581-84 (Frankfurter, J., joined by Rutledge, J.). Chief Justice Stone, joined by Justices Reed, Murphy, and Burton, agreed that a discriminatory tax against States would be unconstitutional, but went even further, concluding that even if a tax did not discriminate, it would violate the tax-immunity

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[4] The Plaintiff States have advanced their claims under the Tenth Amendment to the United States Constitution, U.S. CONST. amend. X, and the Guarantee Clause, U.S. CONST. art. IV, §4.

doctrine if it "unduly interfere[d] with the performance of the State's functions of government." *Id.*, at 588 (Stone, C.J., concurring).[5]

Under any formulation advanced by the Justices in *New York*, the clawback fails. It is discriminatory because it is exacted only from States, and in their capacity as States. And it unduly interferes with essential functions of state government because it removes all control over a significant portion of each State's budget from the State's legislature and hands it over to an unelected federal agency. Under the principles set forth in *New York*, the clawback cannot stand.

The clawback likewise contravenes the anticommandeering doctrine as set forth in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). In *New York*, the Court struck down a statute that required the States to legislate according to Congress's direction, even though Congress could have directly legislated and achieved the same result. 505 U.S., at 167-68, 175-77. And in *Printz*, the Court invalidated a statute that only temporarily required state officials to implement a federal gun-control law. 521 U.S., at 933. These cases make clear that our constitutional structure forbids Congress from forcing States to implement directly its federal policy objectives – whether through the mandated

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[5] The dissenters (Justice Douglas, joined by Justice Black) likewise agreed that the federal government may not tax a State "as a State." They further urged that any activity that was within the limits of a State's police power was a legitimate governmental activity that the federal government could not tax, and, therefore, they would have struck down the tax at issue. *Id.*, at 591 (Douglas, J., dissenting).

passage of state legislation or the conscription of the services of State officials.

Were the law otherwise, as the Court noted in *New York* and *Printz*, the accountability function of our federal system would be seriously compromised. *New York*, 505 U.S., at 168-69; *Printz*, 521, U.S., at 930. Congress would be able to provide benefits to the federal electorate without having to endure the ordinary cost (in the form of higher taxes or decreased spending on other programs) of doing so. Conversely, Congress would be able to escape blame for unpopular legislation by passing responsibility onto the States. In either scenario, the citizenry is prevented from knowing what legislative body to hold responsible at election time.

Although the clawback is a different form of commandeering from that involved in *New York* and *Printz*, it violates the core principle that state legislatures may not be conscripted to provide for purely federal programs. The clawback demands that state legislatures – through their budgeting and appropriations processes – allocate and remit state funds directly to the federal government. And it creates the very accountability problems that concerned the Court in *New York* and *Printz* because it allows Congress to take credit for providing prescription drug coverage to senior citizens while passing much of the bill onto the States.

Finally, the clawback's usurpation of state budgetary processes contravenes the Guarantee Clause, U.S. CONST. art. IV, §4, which grants the States control over their internal governmental machinery and fiscal policy. Congress has commanded the States to pay funds to the federal government, for the support and operation of an entirely federal program. In so doing, Congress has denied – indeed, it has repudiated – the States' right to control their budgets and define state policy with respect to the funds at issue in their clawback payments. Because the clawback effectively transfers control over substantial state budgeting processes to a federal agency in direct violation of the Guarantee Clause, the Plaintiff States are also likely to prevail on this claim.

PRAYER FOR RELIEF

For these reasons, the Plaintiff States respectfully request that the Court issue a preliminary injunction forbidding the Secretary and his officers, agents, and employees, from enforcing any of the provisions of 42 U.S.C. §1396u-5(c) until the Plaintiff States' motion now on file with the Court for leave to file their Bill of Complaint against the Secretary has been decided by the Court and the matters set forth in the Bill of Complaint have been resolved.

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