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.

PLAINTIFFS' REPLY BRIEF

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PLAINTIFFS' REPLY BRIEF

Nearly one third of the States have asked the Court to exercise its original jurisdiction to resolve the challenges to the constitutional validity of the clawback provision of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) raised in the Plaintiff States' Complaint. In response, the Secretary of Health and Human Services asks the Court to conclude that the clawback, in effect, "functions" as a modest spending condition on the States' receipt of Medicaid funds. Def. Br. 14-16, 18-20. But that construction of the clawback provision does not comport with its unambiguous language, which expressly imposes an obligation to pay state funds into the federal Medicare account, thereby imposing a direct tax on the States to help fund a purely federal program.

The Secretary's suggestion that the Court should decline to exercise its original jurisdiction because federal district courts might provide adequate alternative fora for the timely and final resolution of the constitutional issues raised in this case is also unpersuasive. Litigating the issues raised by the States' Complaint in federal district courts and circuit courts would take many years; the effect of the clawback is immediate and of great magnitude. And because this case turns solely on the resolution of purely legal questions, the Court need not appoint a Special Master, and can resolve the case in a fraction of the time entailed by the process of litigating through the lower federal courts.

Fifteen States urge the Court to exercise its jurisdiction and resolve this important issue of pure law—involving billions of dollars and an unprecedented intrusion into the States' legislative processes. Indeed, it is precisely for cases like this, implicating foundational principles of structural federalism and democratic accountability, that the Constitution gives the Court original jurisdiction. Accordingly, the Court should exercise its original jurisdiction and resolve this lawsuit.

ARGUMENT

I. THE SECRETARY'S CONSTRUCTION OF THE CLAWBACK PROVISION DOES NOT COMPORT WITH ITS PLAIN TEXT.

The Secretary's proposed construction of the clawback is derived not from its express terms, but rather from the suggestion that it "functions" as "little more than an accounting feature" of the federal government, with purportedly "modest" ultimate effect on the States. Def. Br. 2-3, 8-9, 14-16, 18-20, 22. Thus, the Secretary asks the Court to determine the constitutional validity of the clawback based on his view of its purpose—to demand that States "repay" a portion of Medicaid funds commensurate with their expected savings when dual eligibles are transferred to Medicare Part D as a "condition" on their continued receipt of federal Medicaid funding. *See* Def. Br. 14-16, 18-20. But this form of analysis would be appropriate only if the clawback's meaning could not be derived from the text of the statute. Because the plain text of the statute imposes a tax on the States, the Secretary's suggestion that the Court look beyond the text to discover its meaning should be rejected.

A. The Unambiguous Text of the Clawback Provision, Interpreted As Written, Imposes a Tax on the States.

The Court has made clear that, in interpreting any statute, it employs "one, cardinal canon [of construction] before all others . . . that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The clawback provision expressly provides that the States *shall* make payments to the Secretary which *shall* be deposited into the Medicare Prescription Drug Account.

Specifically, at 42 U.S.C. §1396u-5(c)(1)(A), the MMA sets forth the States' payment obligations, under the heading "Phased-down State Contribution": "Each of the 50 States and the District of Columbia for each month beginning with January 2006 *shall provide* for payment under this subsection to the Secretary of the product of . . . [the statutory formula]." 42 U.S.C. §1396u-5(c)(1)(A) (emphasis added).[1] At 42 U.S.C. §1396u-5(c)(1)(B), the statute further provides that "all such payments be deposited into the Medicare Prescription Drug Account in the Federal Supplementary Medical Insurance Trust Fund." 42 U.S.C. §1396u-5(c)(1)(B).[2]

The plain text defines the nature of the payment obligation imposed on the States, as well as the manner and form of payment. Notably, the payment obligations are not described as returning Medicaid funds, nor does the text identify the payments as a condition on the States' receipt of Medicaid funds. Rather, the language simply commands that the States remit funds from their treasuries to the Secretary, based upon the applicable formula, for deposit into the Medicare Prescription Drug Account. *See* 42 U.S.C. §§1396u-5(c)(1)(A), (B). As such, it is, in form and operation, a tax.

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[1] The formula is described in the Plaintiff States' Bill of Complaint at ¶¶12-13.

[2] The Secretary asserts that the clawback is no different from the "buy-in" agreements between the States and the federal government whereby States use Medicaid funds to pay Medicare Part B premiums on behalf of individuals eligible for both Medicare and Medicaid, and those individuals are then enrolled in Medicare Part B. *See* 42 U.S.C. §§1395v, 1396d(a), 1396d(p)(3)(A). But there is a critical difference between the "buy-in" agreements and the clawback: States are offered the *choice* whether to take advantage of the Part B buy-in program and to what extent they participate, while the clawback *mandates* that the States make payments for a federal program over which the States have no control.

B. The Secretary Misinterprets the Compliance Provision of the Clawback, 42 U.S.C. §1396u-5(c)(1)(C), to Convert the Direct Tax Imposed by 42 U.S.C. §1396u-5(c)(1)(A) and (B) Into a Permissible Condition on Medicaid Funding.

Section 1396u-5(c)(1)(C), entitled "Compliance," creates a mechanism for the federal government to collect the tax imposed by §§1396u-5(c)(1)(A) and (B) if a State fails to voluntarily make payment. It provides that if a State fails to pay the amounts to the Secretary specified in §1396u-5(c)(1)(A), such amounts (plus interest) will then be collected by an offset on Medicaid monies otherwise payable to the State. *See* 42 U.S.C. §1396u-5(c)(1)(C). The Secretary apparently relies on the compliance section to characterize the payments demanded of the States in §§1396u-5(c)(1)(A) and (B) as simply a condition on the receipt of Medicaid funds permissible under the Spending Clause. *See* Def. Br. 2-3, 14-16, 18-20. But the collection mechanism provided by §1396u-5(c)(1)(C) cannot render the payment provisions of §§1396u-5(c)(1)(A) and (B) constitutional by converting them into a condition on Medicaid funding.[3] They remain, as written, direct, discriminatory, and unconstitutional taxes on the States.

The Secretary's reliance on *South Dakota v. Dole*, 483 U.S. 203 (1987), is misplaced. In *Dole*, a federal statute directed the Secretary of Transportation to withhold a percentage of federal highway funds from States that allowed the purchase or possession of alcoholic beverages by individuals under twenty-one years old. *Id.*, at 205. The Court concluded that Congress could act "indirectly under its spending power to encourage uniformity in the States' drinking ages," *id.*, at 206, even where it "might lack the power to impose a minimum national drinking age directly," *id.*, at 212.

Here, unlike *Dole*, Congress is using the clawback's payment provisions to directly tax the States, and

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[3] Indeed, as noted in the States' opening brief, Supp. Br. 16, the Court has expressly rejected the Secretary's suggestion that an unconstitutional tax can be rendered constitutional by making it conditional. *See South Carolina v. Baker*, 485 U.S. 505, 516 (1988).

commandeering their legislatures to raise and remit funds, in order to pay for a new federal prescription-drug benefit. The statute expressly imposes, through §§1396u-5(c)(1)(A) and (B), a direct payment obligation on the States to appropriate and remit state funds, not Medicaid funds, to the federal government to pay for Medicare. Only if a State fails to meet this general payment obligation is the Secretary directed to collect an offset, with interest, from Medicaid funds that would otherwise be paid to the State. *Dole* is therefore inapposite, and the Secretary's suggestion that Congress's imposition of a direct tax on the States is rendered an indirect and appropriate Spending Clause condition by §1396u-5(c)(1)(C) should be rejected.[4]

C. The Text of the Clawback Provision Also Cannot Fairly Be Construed as Merely an "Adjustment" in Federal Funding.

The Secretary also urges the Court to interpret the clawback as "an adjustment [that Congress is entitled to

[4] The Secretary's contention that the clawback is a permissible condition on the States' receipt of Medicaid funds is also problematic because it does not have the characteristics of any recognized condition on federal funding. The Spending Clause conditions the Court has recognized require the funding recipients to take some substantive action, not make payments to the federal government. *See, e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S.Ct. 1297, 1306-07 (2006) (upholding statute conditioning law schools' receipt of certain federal funds on allowing the military the same access to law students offered to other recruiters); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 214 (2003) (plurality opinion) (upholding statute conditioning the receipt of certain subsidies by public libraries upon the installation of filtering software on their internet-accessible computers); *id.*, at 220 (Breyer, J., concurring) (same); *Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991) (upholding grants of federal funding for family-planning services with the condition that the recipient use the funds only for programs in which abortion is not a method of family planning). The Secretary points to no case, nor are the Plaintiff States aware of a case, in which the Court has upheld a congressional requirement that the States make a cash payment to the federal government as a constitutionally valid Spending Clause condition.

make] in federal funding through a statutory provision that requires the States to repay a modest portion of the total amount of federal funds they receive for their Medicaid programs to reflect cost savings that they have simultaneously realized through Congress's provision of a prescription drug benefit." Def. Br. 19. But while Congress is entitled to make adjustments in the funding of Medicaid, a cooperative federal-state program, it cannot impose taxes on the States to fund a purely federal program—in this instance Medicare.

The Secretary's proposed construction of the clawback as merely an adjustment in a federal funding program does not comport with the statute's express provisions. If Congress intended to merely make an adjustment in the amount of funds States would receive under Medicaid after the introduction of Medicare Part D, it could easily have done so by, for example, modifying the formula that determines the federal medical assistance percentages (FMAPS), *i.e.*, the federal share of States' Medicaid payments. *See* 42 U.S.C. §1396d(b).

Nothing of the sort is reflected in the clawback. Rather, the clawback demands that States make monthly payments out of their treasuries to finance the Medicare program. *See* 42 U.S.C. §§1396u-5(c)(1)(A), (B). This obligation cannot be construed as a "mere adjustment" in Medicaid funding.[5]

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[5] The Secretary asks the Court, in effect, to treat the clawback's payment provisions, §§1396u-5(c)(1)(A) and (B), as insignificant, in both content and effect, because the compliance provision reveals that they are merely an accounting feature of the federal government to lower Medicaid funding. But the Court has admonished that "[i]t is 'a cardinal rule of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted)). The clawback's payment provisions expressly impose a tax to be paid from the States' treasuries to the federal government, and §1396u-5(c)(1)(C)'s collection mechanism can only transform the entire clawback into an "adjustment" of Medicaid funding if the Court improperly treats the payment provisions as insignificant or superfluous.

Finally, the Secretary's implication that the States' suit merely quibbles with Congress's failure to "label" the clawback as a condition on or adjustment to Medicaid funding, Def. Br. 18-20, misunderstands both the States' claims and the nature of the constitutional infirmities present in the statute. This is not a mere question of form. It is beyond cavil that Congress could obviate this lawsuit immediately, and at the same time effectively recoup funds commensurate with States' expected savings related to the transfer of dual eligibles to Part D coverage, by amending the MMA to eliminate the clawback payments and adjusting the formula calculating the FMAPS. This litigation does not seek to preclude Congress from constitutionally realizing this budgetary effect. Rather, the States object to the unconstitutional methodology which permits Congress to claim credit for a federal prescription drug benefit and force the hard task of paying for it substantially on the States. It is precisely this evasion of democratic accountability that the Court's tax immunity and commandeering doctrines were designed to prevent.

II. THE FEDERAL DISTRICT COURTS DO NOT PROVIDE ADEQUATE ALTERNATIVE FORA TO RESOLVE THE CONSTITUTIONAL ISSUES RAISED IN THIS LAWSUIT.

The Secretary argues that the Court should deny the States' requested relief and send the States to the district courts for two interconnected reasons: (1) doing so will, "as a practical matter," provide the most "efficient" and "cost effective" method of resolving any State challenges to the clawback, Def. Br. 14; and (2) there is no reason to expect that the Court's exercise of its original jurisdiction would lead to a more timely resolution of the case, Def. Br. 25.

Contrary to the Secretary's assertions, the Court could quickly resolve this case because it involves only questions of law, not disputed fact issues requiring proceedings before a Special Master. And the lower federal courts are not adequate alternative fora because they cannot provide the needed timely and definitive resolution of the important issues raised in this lawsuit.

A. The Court Could Reach a Far Speedier Final Resolution of the Constitutional Challenges to the Clawback Than Could the Lower Federal Courts.

The Secretary's argument that, even if the Court exercises its original jurisdiction, it may take a number of years to resolve the case, is based on the faulty premise that the case would require proceedings in front of a Special Master "to develop the record." Def. Br. 25. In support of this premise, the Secretary references cases involving fact-intensive water and boundary disputes that are plainly distinguishable from this lawsuit. *See* Def. Br. 25 (citing *Alaska v. United States*, 545 U.S. 75 (2005) (Special Master examined record of historical documents, from 1821 through the present time, regarding the Alexander Archipelago's waters); *Virginia v. Maryland*, 540 U.S. 56 (2003) (Special Master examined 1785 Compact and 1877 arbitration award related to Virginia's right to withdraw water from the Potomac River); *New Jersey v. New York*, 523 U.S. 767 (1998) (Special Master considers documents to determine whether New York or New Jersey has sovereign authority over Ellis Island)).

But this is not a water rights or boundary dispute case, and it does not involve examination of contested facts or a historical record. Rather, as noted in the States' opening brief, Supp. Br. 24-25, this case turns solely upon legal questions concerning the constitutional validity of the clawback provision of the MMA. The Court need not delay its consideration of the case by appointing a Special Master to "develop the record."

The Court's Rules provide for the timely resolution of cases like this one. Where, as here, no facts are in dispute, the Court may grant the motion for leave to file and order argument on the merits of the case. *See South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (explaining that no Special Master was appointed "because no issues of fact were raised in the complaint"). Were the Court to do so, it could resolve the case within the next year; a far more timely, efficient, and cost-effective final resolution of the constitutional challenges to the clawback than forcing the

States to litigate for years and years in the lower courts before ultimately reaching this Court *via* one or more certiorari petitions.[6]

B. The Constitutional Questions Presented in the States' Complaint Are of Serious National Concern, and Call for a Definitive Resolution By This Court in the First Instance.

Nearly a third of the States have requested that the Court exercise its original jurisdiction to decide this lawsuit. According to the Secretary's figures, the clawback payments demanded of the Plaintiff States alone in 2006 implicate the remittance to the federal government of over $700 million in state funds. Decl. of John D. Klemm, Appendix to Def. Br. In just the first five years of the clawback's operation, it is estimated that the States will be required to pay $48 billion to the federal government to help fund Medicare Part D. *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 May 23, 2006). Thus, the clawback's effects on state budgetary processes are immediate, substantial, and ongoing.

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[6] Indeed, in a number of cases, plaintiffs filing original actions have received relief within two years or less of filing their complaint, *see, e.g., United States v. Alabama*, 313 U.S. 274 (1941) (motion for leave to file complaint presented in November, 1940; decree issued, granting plaintiff relief in part, in May, 1941); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439 (1933) (motion for leave to file complaint granted in January, 1932; judgment for plaintiff in May, 1933). Where, as here, the suit turns on questions of law, it is reasonable to anticipate that the Court can resolve it quickly, and without appointing a Special Master. *See, e.g., United States v. North Carolina*, 136 U.S. 211, 216 (1890) (action brought in November, 1889, resolved by the Court in May, 1890, and "the only question presented" to the Court was a "matter of law."). And even if a Special Master were appointed, a quick resolution of this case would still be possible. *See, e.g., Texas v. Florida*, 306 U.S. 398 (1939) (leave to file complaint granted in March, 1937; Special Master appointed in June, 1937; decision on the merits in March, 1939).

The Court has recognized that the "unique concerns of federalism form[] the basis of [its] original jurisdiction." *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). The States' challenges to the validity of the clawback, founded on bedrock principles of our system of dual sovereignty, raise such unique and important concerns. Neither the federal district courts nor the courts of appeals can provide the needed and timely definitive resolution of the constitutional issues surrounding the clawback and presented in this suit. That timely resolution can occur only if the Court exercises its original jurisdiction to decide the case.

CONCLUSION

For the reasons set forth herein and in the Plaintiff States' opening brief, the Court should grant their motion for leave to file the complaint.

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