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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, ET AL. :

Petitioners : No. 11-400

v. :

DEPARTMENT OF HEALTH AND :

HUMAN SERVICES, ET AL., :

- - - - - x

Washington, D.C.

Wednesday, March 28, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

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

DONALD B. VERRILLI, JR., ESQ., Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will continue argument this afternoon in case 11-400 Florida v. Department of Health and Human Services.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The constitutionality of the Act's massive expansion of Medicaid depends on the answer to two related questions: First is the expansion coercive and second does that coercion matter.

JUSTICE KAGAN: Mr. Clement, can I ask you just a matter of clarification? Would you be making the same argument if instead of the Federal government picked up 90 percent of the cost the Federal government picked up 100 percent of the cost.

MR. CLEMENT: Justice Kagan, if everything else in the statute remained the same, I would be making the exact same argument.

JUSTICE KAGAN: The exact same argument. So that really reduces to the question of why is a big gift from the Federal government a matter of coercion? In

1 other words, the Federal government is here saying, we
2 are giving you a boatload of money. There are no --
3 there's no matching funds requirement, there are no
4 extraneous conditions attached to it, it's just a
5 boatload of Federal money for you to take and spend on
6 poor people's healthcare. It doesn't sound coercive to
7 me, I have to tell you.

8 MR. CLEMENT: Well, Justice Kagan, let me --
9 I mean, I eventually want to make a point where even if
10 you had a stand alone program that just gave
11 100 percent, again 100 percent boatload, nothing but
12 boat load -- well, there would still be a problem.

13 JUSTICE KAGAN: And you do make that
14 argument in your brief, just a stand alone program, a
15 boatload of money, no extraneous conditions, no matching
16 funds, is coercive?

17 MR. CLEMENT: It is. But before I make that
18 point, can I simply say you built into your question the
19 idea that there are no conditions. And of course, when
20 you first asked it was what about the same program with
21 100 percent matching on the newly eligible mandatory
22 individuals, which is how the statute refers to them.
23 And that would have a very big condition. And the very
24 big condition is that the States in order to get that
25 new money, they would have to agree not only to the new

1 conditions but the government here is -- the Congress is
2 leveraging their entire prior participation in the
3 program --

4 JUSTICE KAGAN: Well, let me give you a
5 hypothetical, Mr. Clement.

6 MR. CLEMENT: Sure.

7 JUSTICE KAGAN: Now, suppose I'm an employer
8 and I see somebody I really like and I want to hire that
9 person. And I say Im going to give you \$10 million a
10 year to come work for me. And the person says well, I
11 -- you know, I've never been offered anywhere
12 approaching \$10 million a year, of course I'm going to
13 say yes to that. Now we would both be agreed that
14 that's not coercive, right.

15 MR. CLEMENT: Well, I guess I would want to
16 know where the money came from. And if the money came
17 from --

18 JUSTICE KAGAN: Wow, wow. I'm offering you
19 \$10 million a year to come work for me and you are
20 saying this is anything but a great choice?

21 MR. CLEMENT: Sure, if I told you actually
22 it came from my own bank account. And that's what's
23 really going on here in part. And that's why it's not
24 --

25 JUSTICE KAGAN: But, Mr. Clement -- Mr.

1 Clement, can that possibly be. When a taxpayer pays
2 taxes to the Federal government, the person is acting as
3 a citizen of the United States. When a taxpayer pays
4 taxes to New York, a person is acting as a citizen of
5 New York. And New York could no more tell the Federal
6 government what to do with the Federal government's
7 money than the Federal government can tell New York what
8 to do with the moneys that New York is collecting.

9 MR. CLEMENT: Right. And if New York and
10 the United States figured out a way to tax individuals
11 at greater than 100 percent of their income then maybe
12 you could just say it's two separate sovereigns and two
13 separate taxes. But we all know that in the real world
14 that to the extent that the Federal government continues
15 to increase taxes that decreases the ability of the
16 States to tax their own citizenry and it's a real
17 tradeoff.

18 JUSTICE SOTOMAYOR: Well, I would admit on
19 the Federal government's power to tax.

20 MR. CLEMENT: What's that.

21 JUSTICE SOTOMAYOR: Are you suggesting that
22 at a certain point the States would have a claim against
23 the Federal government raising their taxes because
24 somehow the States will feel coerced to lower their tax
25 rate?

1 MR. CLEMENT: No, Justice Sotomayor, I'm
2 not. What I'm suggesting is that it's not simply the
3 case that you can say, well, it's free money, so we
4 don't even have to ask whether the program's coercive.

5 JUSTICE SOTOMAYOR: Now, counsel, what
6 percentage does it become coercive? Meaning, as I look
7 at the figures I've seen from amici, there are some
8 states for whom the percentage of Medicaid funding to
9 their budget is close to 40 percent, but there are
10 others that are less than 10 percent.

11 And you say, across the board this is
12 coercive because no state, even at 10 percent, can give
13 it up. What's the percentage of big gift that the
14 federal government can give? Because what you're saying
15 to me is, for a bankrupt state, there's no gift the
16 federal government could give them ever, because it can
17 only give them money without conditions.

18 No matter how poorly the state is run, no
19 matter how much the federal government doesn't want to
20 subsidize abortions or doesn't want to subsidize some
21 other state obligation, the federal government can't
22 give them 100 percent of their needs.

23 MR. CLEMENT: And, Justice Sotomayor, I'm
24 really saying the opposite, which is not that every gift
25 is coercive, no matter what the amount, no matter how

1 small. I'm saying essentially the opposite, which is
2 there has to be some limit. There has to be some limit
3 on coercion.

4 And the reason is quite simple, because this
5 Court's entire spending power jurisprudence is premised
6 on the notion that spending power is different, and that
7 Congress can do things pursuant to the spending power
8 that it can't do pursuant to its other enumerated powers
9 precisely because the programs are voluntary. And if
10 you relax that assumption that the programs are
11 voluntary, and you are saying they are coercion, then
12 you can't have the spending power jurisprudence --

13 JUSTICE SOTOMAYOR: What makes them
14 coercive; that the state doesn't want to face its voters
15 and say, instead of taking 10, 20, 30, 40 percent of the
16 government's offer of our budget and paying for it
17 ourselves and giving up money for some other function?
18 That's what makes it coercive --

19 MR. CLEMENT: Well --

20 JUSTICE SOTOMAYOR: -- that the state is
21 unwilling to say that?

22 MR. CLEMENT: Maybe I can talk about what
23 makes it coercive by talking about the actual statute at
24 issue here and focusing on what I think are the three
25 hallmarks of this statute that make it uniquely

1 coercive.

2 One of them is the fact that this statute is
3 tied to the decidedly nonvoluntary individual mandate.
4 And that makes this unique, but it makes it significant,
5 I think.

6 I will continue. I thought you had a
7 question. I'm sorry.

8 The second factor, of course, is the fact
9 that Congress here made a distinct and conscious
10 decision to tie the state's willingness to accept these
11 new funds, not just to the new funds but to their entire
12 participation in the statute, even though the coverage
13 for these newly eligible individuals is segregated from
14 the rest of the program. And this is section 2001A3 at
15 page 23A of the appendix to the blue brief.

16 JUSTICE GINSBURG: Isn't that true of every
17 Medicaid increase? That each time -- I mean, and this
18 started quite many years ago, and Congress has added
19 more people and given more benefits -- and every time,
20 the condition is, if you want the Medicaid program, this
21 is the program, take it or leave it.

22 MR. CLEMENT: No, Justice Ginsburg, this is
23 distinct in two different directions. One is, in some
24 of the prior expansions of the program, but not all,
25 Congress has made covering newly eligible individuals

1 totally voluntary. If the states wants to cover the
2 newly eligible individuals, they will get the money;
3 but, if they don't, they don't risk any of their
4 existing participation programs.

5 The 1972 program was a paradigm of that. It
6 created this 209(b) option for states to participate.
7 This court talked about it in the Gray Panthers case.

8 There were other expansions that have taken
9 place, such as the 1984 expansions, where they didn't
10 give states that option; but, here's the second
11 dimension in which this is distinct, which is, here,
12 Congress has created a separate part of the program for
13 the newly eligible mandatory individuals. That's what
14 they called them.

15 And those individuals are treated separately
16 from the rest of the program going forward forever.
17 They are going to be reimbursed at a different rate from
18 everybody who's covered under the preexisting program.

19 Now, in light of that separation by Congress
20 itself of the newly eligible individuals from the rest
21 of the program, it's very hard to understand Congress's
22 decision to say, look if you don't want to cover these
23 newly eligible individuals, you don't just not get the
24 new money, you don't get any of the money under the --

25 JUSTICE BREYER: Where does it say that?

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

2 MR. CLEMENT: It says -- well, it -- where
3 does it say what, Justice Breyer?

4 JUSTICE BREYER: What you just said. You
5 said, Congress said, if you don't take the new money to
6 cover the new individuals, you don't get any of the old
7 money that covers the old individuals. That's what I
8 heard you say.

9 MR. CLEMENT: Right.

10 JUSTICE BREYER: And where does it say that?

11 MR. CLEMENT: It says it -- there's two
12 places where it says it.

13 JUSTICE BREYER: Yeah, where?

14 MR. CLEMENT: The 2001A3 makes it part of my
15 brief.

16 JUSTICE BREYER: Where is it in your brief?

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

18 JUSTICE BREYER: In the blue brief?

19 MR. CLEMENT: Blue brief.

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

21 MR. CLEMENT: And this makes not the point
22 about the funding cutoff. This makes the point just
23 that these newly eligible individuals are really treated
24 separately forevermore.

25 JUSTICE BREYER: I want the part about the

1 funding cutoff.

2 MR. CLEMENT: Right. And there,

3 Justice Breyer --

4 JUSTICE BREYER: And that cite section is
5 what?

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

7 JUSTICE BREYER: Well, I have it in front of
8 me.

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

10 JUSTICE BREYER: And I will tell you what I
11 have, what I have in front of me, what it says.

12 MR. CLEMENT: Right.

13 JUSTICE BREYER: And it's been in the
14 statute since 1965.

15 MR. CLEMENT: Exactly.

16 JUSTICE BREYER: And the cite I have is
17 42 U.S.C. Section 1396(c). So are we talking about the
18 same thing?

19 MR. CLEMENT: If that's the -- if that is
20 the provision that gives the secretary --

21 JUSTICE BREYER: Yeah, okay.

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

23 JUSTICE BREYER: And here's what it says at
24 the end.

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

1 all participation in the program, yes.

2 JUSTICE BREYER: It says, "The secretary
3 shall notify the state agency" -- this is if they don't
4 comply -- "that further payments will not be made to the
5 state or, in his discretion, that payments will be
6 limited to categories under or parts of the state plan
7 not affected by such failure, which it repeats until the
8 secretary is satisfied that he shall limit payments to
9 categories under or parts of the state plan not affected
10 by such failure."

11 So, reading that in your favor, I read that
12 to say, it's up to the secretary whether, should a state
13 refuse to fund the new people, the secretary will cut
14 off funding for the new people, as it's obvious the
15 state doesn't want it, and whether the secretary can go
16 further. I also should think -- I could not find one
17 case where the secretary ever did go further, but I also
18 would think that the secretary could not go further
19 where going further would be an unreasonable thing to
20 do, since government action is governed by the
21 Administrative Procedure Act, since it's governed by the
22 general principle, it must always be reasonable.

23 So I want to know where this idea came from
24 that should state X say, "I don't want the new money,"
25 that the secretary would or could cut off the old money?

1 MR. CLEMENT: And, Justice Breyer, here's
2 where it comes from, which is from the very beginning of
3 this litigation, we've pointed out that what's coercive
4 is not the absolute guarantee that the secretary could
5 cut off every penny, but the fact that she could.

6 JUSTICE BREYER: All right. Now, let me
7 relieve you of that concern, and tell me whether I have.
8 That a basic principle of administrative law, indeed,
9 all law, is that the government must act reasonably.
10 And should a secretary cut off more money than the
11 secretary could show was justified by being causally
12 related to the state's refusal to take the new money,
13 you would march into court with your clients and say,
14 "Judge, the secretary here is acting unreasonably, and I
15 believe there is implicit in this statute, as there is
16 explicit in the ADA, that any such cut-off decision must
17 be reasonable."

18 Now, does that relieve you of your fear?

19 MR. CLEMENT: It doesn't for this reason,
20 Justice --

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

22 MR. CLEMENT: Well, but here's the reason.
23 Here's the reason, Justice Breyer, it doesn't.

24 One is, I mean, I don't know the opinion to
25 cite for that proposition.

1 Second is, we have been making in this
2 litigation since the very beginning this basic point,
3 the government has had opportunities at every level of
4 this system, and I suppose they will have an opportunity
5 today to say, "fear not, States, if you don't want to
6 take the new conditions, all you will lose is the new
7 money."

8 JUSTICE BREYER: And I said -- I said
9 because it could be, you know, given the complexity of
10 the act, that there is some money that would be saved in
11 the program if the States take the new money, and if
12 they don't take the new money there is money that is
13 being spent that wouldn't otherwise be spent. There
14 could be some pile like that.

15 It might be that the secretary could show it
16 was reasonable to take that money away from the states,
17 too.

18 JUSTICE SCALIA: Mr. Clement --

19 JUSTICE BREYER: But my point is, you have
20 to show reasonableness before you can act.

21 JUSTICE SCALIA: -- do you agree -- do you
22 agree that the government has to act reasonably? Do we
23 strike down unreasonable statutes? My God.

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

25 JUSTICE SCALIA: The executive has to act

1 reasonably, that's certain, in implementing a statute;
2 but, if the statute says, in so many words, that the
3 secretary can strike the whole -- funding for the whole
4 program, that's the law, unreasonable or not, isn't it?

5 MR. CLEMENT: That's the way I would read
6 the law, Your Honor.

7 JUSTICE BREYER: Yeah, but I have a
8 number -- all right.

9 MR. CLEMENT: And if I could just add one
10 thing just to the discussion is the point that, you
11 know, this is not all hypothetical. I mean, in -- there
12 was a record in the district court, and there is an
13 Exhibit 33 to our motion to summary judgment. It is not
14 in the joint appendix. We can lodge it with the Court
15 if you'd like. But it's a letter in the record in this
16 litigation, and it's a letter from the secretary to
17 Arizona, when Arizona floated the idea that it would
18 like to withdraw from the CHIP program, which is a
19 relatively small part of the whole program.

20 And what Arizona was told by the secretary
21 is that if you withdraw from the CHIP program, you risk
22 losing \$7.8 billion, the entirety of your Medicaid
23 participation. So this is not something that we've
24 conjured up --

25 JUSTICE BREYER: All right.

1 JUSTICE KAGAN: Mr. Clement --

2 JUSTICE BREYER: To make you feel a little
3 better, I want to pursue this for one more minute.
4 There are cases and many, of which Justice Scalia knows
5 as well, which uses the Holy Hill, uses the same word as
6 this statute: In the Secretary's discretion. And in
7 those cases this Court has said, that doesn't mean the
8 Secretary can do anything that he or she wants, but
9 rather, they are limited to what is not arbitrary,
10 capricious, and abuse of discretion in interpreting
11 statutes, in applying those statutes, et cetera. End of
12 my argument; end of my question. Respond as you wish.

13 (Laughter.)

14 MR. CLEMENT: Well, Justice Breyer, I'm not
15 sure that the Court's federalism jurisprudence should
16 force States to defend on how a lower court reads Holy
17 Hill. I think that really right here what we know to an
18 absolute certainty is that this Secretary -- this
19 statute gives the Secretary the right to remove all of
20 the State's funding under these programs. Think about
21 what that is, just --

22 JUSTICE SOTOMAYOR: Mr. Clement, do you
23 think that the Federal Government couldn't, if it chose,
24 Congress, say, this system doesn't work. We are just
25 simply going to rehaul it. It is not consistent with

1 how -- what we want to accomplish. We're just going to
2 do away with the system and start a new health care plan
3 of some sort. And States, you can take the new plan,
4 you can leave them. We are going to give out 20 percent
5 less, maybe 20 percent more, depending on what Congress
6 chooses.

7 Can Congress do that? Does it have to
8 continue the old system because that is what the States
9 are relying upon and it's coercive now to give them a
10 new system?

11 MR. CLEMENT: Justice Sotomayor, we are not
12 saying we have a vested right to participate in the
13 Medicaid program as it exists now. So if Congress
14 wanted to scrap the current system and have a new one,
15 I'm not going to tell you that there is no possibility
16 of a coercion challenge to it, but I'm not going to
17 say --

18 JUSTICE SOTOMAYOR: That's what I -- I want
19 to know how I draw the line, meaning --

20 MR. CLEMENT: Well, can --

21 JUSTICE SOTOMAYOR: -- I think the usual
22 definition of coercion is, I don't have a choice. I'm
23 not sure what -- why it's not a choice for the States.
24 They may not pay for something else. If they don't take
25 Medicaid and they want to keep the same level of

1 coverage, they may have to make cuts in their budget to
2 other services they provide. That's a political choice
3 of whether they choose to do that or not.

4 But when have we defined the right or
5 limited the right of government not to spend money in
6 the ways that it thinks appropriate?

7 MR. CLEMENT: Well, Justice Sotomayor,
8 before -- I mean, I will try to answer that question,
9 too. But the first part of the question was, what if
10 Congress just tried to scrap this and start over again
11 with a new program?

12 Here's why this is fundamentally different
13 and why it's fundamentally more coercive, because
14 Congress is not saying we want to scrap this program.
15 They don't have a single complaint, really, with the way
16 that States are providing services to the visually
17 impaired and the disabled under pre-existing Medicaid.
18 And that's why it's particularly questionable why they
19 are saying that if you don't take our new money subject
20 to the new conditions, we are going to take all of the
21 money you have previously gotten, that you have been
22 dependent on for 45 years and you are using right now to
23 serve the visually impaired and the disabled --

24 JUSTICE GINSBURG: Mr. Clement, may I -- may
25 I ask you -- question another line. You represent,

1 what, 26 States?

2 MR. CLEMENT: That's right, Justice
3 Ginsburg.

4 JUSTICE GINSBURG: And we are also told that
5 there are other States that like this expansion and they
6 are very glad to have it. The relief that you are
7 seeking is to say the whole expansion is no good, never
8 mind that there are States that say, we don't feel
9 coerced, we think this is good.

10 You are -- you are 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, the
14 States, thinking that 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 are going to deal with the visually impaired in
2 their State, the disabled in their State --

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 at all that 26 States opposing it have
6 Republican governors and all of the states supporting it
7 have Democratic governors? Is that possible?

8 MR. CLEMENT: There's a correlation,
9 Justice Scalia.

10 JUSTICE SCALIA: Yes.

11 (Laughter.)

12 JUSTICE GINSBURG: Let -- let me ask you
13 another thing, Mr. -- Mr. Clement. Most colleges and
14 universities are heavily dependent on the government to
15 fund their research programs and other things. And that
16 has been going on for a long time. And then Title IX
17 passes, and a government official comes around and
18 say -- says to the colleges, you want money for your
19 physics labs and all the other things you get it for,
20 then you have to create an athletic program for girls.
21 And the recipient says, I am being coerced, there is no
22 way in the world I can give up all the funds to run all
23 these labs that we have, I can't give it up, so I'm
24 being coerced to accept this program that I don't want.

25 Why doesn't your theory, if your theory is

1 any good, why doesn't it work any time, something --
2 someone receives something that is too good to give up?

3 MR. CLEMENT: Well, Justice Ginsburg, there
4 is two reasons that might be different. One is this
5 whole line of coercion only applies -- is only relevant,
6 really, when Congress tries to do something through the
7 spending power it couldn't do directly. So if Congress
8 tried to impose Title IX directly, I guess the question
9 for this Court would be whether or not Section 5 of the
10 14th Amendment allowed Congress to do that?

11 I imagine you might think that it did and I
12 imagine some of your colleagues might take issue with
13 that, but that's -- that's the nature of the question.
14 So one way around that would be if Congress can do it
15 directly, you don't even have to ask whether there is
16 something special about the spending power. That's how
17 this Court resolved, for example, the Ferrera case about
18 funding to -- to colleges.

19 JUSTICE GINSBURG: I'm trying to understand
20 your coercion theory. I know that there are cases of
21 ours that have said there is a line between pressure and
22 coercion, but we have never had, in the history of this
23 country or the Court, any Federal program struck down
24 because it was so good that it becomes coercive to be in
25 it.

1 MR. CLEMENT: Well, Justice Ginsburg, I'm
2 going -- to say the second thing about my answer to your
3 prior question was just, I also think that, you know, it
4 may be that spending on certain private universities is
5 something again that Congress can do, and it doesn't
6 matter whether it's coercion, but when they are trying
7 to get the States to expand their Medicaid programs,
8 that's --

9 JUSTICE GINSBURG: Let's take -- let's take
10 public colleges.

11 MR. CLEMENT: Okay. Then there -- then
12 there may be some limits on that -- I mean, but again,
13 I'm not sure even in that context there might not be
14 some things Congress can do. It's a separate question.

15 But once we take a premise, which I don't
16 think there is a disagreement here, that Congress could
17 not simply as a matter of direct legislation under the
18 commerce power or something say, States, you must expand
19 your Medicaid programs. If we take that as a given,
20 then I think we have to ask the question about whether
21 or not it's coercive.

22 Now, you -- in your second question you ask,
23 well, you know, I mean, where's the case that says that
24 we've crossed that line. And this is that case, I would
25 respectfully say.

1 JUSTICE BREYER: Then the government can
2 reply as well to the 1980 extension to children 0 to
3 6 years old, 1990 requiring the extension for children
4 up to 18, all those prior extensions to me seem just as
5 big in amount, just about as big in the number of people
6 coming on the rolls, and they are all governed by
7 precisely the same statute that you are complaining of
8 here, which has been in the law since '65.

9 MR. CLEMENT: Justice Breyer, I don't think
10 that our position here would necessarily extend to say
11 the 1984 amendments, and let me tell you why. You know,
12 I'm -- I'm I am not saying that absolutely that's
13 guaranteed that's not coercive, but here's reasons why
14 they're different.

15 The one major difference is of the size of
16 the program. I mean, the expansion of Medicaid since
17 1984 is really breathtaking. Medicaid, circa, 1984 the
18 Federal spending to the States was a shade over
19 \$21 billion. Right now it's \$250 billion, and that's
20 before the expansion under this statute.

21 JUSTICE KAGAN: Well, if you are right, Mr.
22 Clement, doesn't that mean that Medicaid is
23 unconstitutional now?

24 MR. CLEMENT: Not necessarily, Justice
25 Kagan. And again, it's because we are not here with a

1 one trick pony. One of the factors -- we point you to
2 three factors that make this statute uniquely coercive.
3 One of them is the sheer size of this program. And, you
4 know, if you want a gauge on the size of this program,
5 the best place to look is the government's own number.
6 Footnote 6, page 73 --

7 JUSTICE KAGAN: So, when does a program
8 become too big? I want you to give me a dollar number.

9 MR. CLEMENT: \$3.3 trillion over the next 10
10 years. That's -- that --

11 JUSTICE BREYER: I'll tell you this number,
12 which I did look up, that the amount, approximately, if
13 you look into it -- as a percentage of GDP, it's big,
14 but it was before this somewhere about 2-point-something
15 percent, fairly low, of GDP. It'll go up to something a
16 little bit over 3 percent of GDP. And now go look at
17 the comparable numbers, which I did look at, with the
18 expansion that we're talking about before.

19 The expansion from 0 to 18 or even from 0 to
20 6. And while you can argue those numbers, it's pretty
21 hard to argue that they aren't roughly comparable as a
22 percentage of the prior program or as a percentage of
23 GDP.

24 If I'm right on those numbers or even
25 roughly right -- I don't guarantee them -- then would

1 you have to say, well, indeed, Medicaid has been
2 unconstitutional since 1964.

3 And if not, why not?

4 MR. CLEMENT: The answer is no, and that's
5 because we're here saying there are three things that
6 make this statute unique.

7 JUSTICE SCALIA: What are your second and
8 third? I'm on pins and needles to hear your --

9 (Laughter.)

10 MR. CLEMENT: One is the sheer size. Two is
11 the fact that this statute uniquely is tied to an
12 individual mandate which is decidedly nonvoluntary. And
13 three is the fact that they've leveraged the prior
14 participation in the program, notwithstanding that
15 they've broken this out as a separately segregated fund
16 going forward, which is not --

17 JUSTICE KAGAN: So on the third -- on the
18 third, suppose you had the current program and Congress
19 wakes up tomorrow and says "we think that there's too
20 much fraud and abuse in the program, and we're going to
21 put some new conditions on how the States use this money
22 so we can prevent fraud and abuse, and we're going to
23 tie it to everything that's been there initially."

24 Unconstitutional?

25 MR. CLEMENT: No, I think that is

1 constitutional because I think that's something that
2 Congress could do directly. It wouldn't have to limit
3 that to the spending program. And I think 18 U.S.C. 666
4 is -- is a statute -- it's in the criminal code, it may
5 be tied to spending, but I think that's -- that's a
6 provision that I don't think it's constitutional; I
7 think it's called into question.

8 JUSTICE KAGAN: I guess I don't get the
9 idea. I mean, Congress can legislate fraud and abuse
10 restrictions in Medicaid, and Congress can legislate
11 coverage expansions in Medicaid.

12 MR. CLEMENT: Well, Justice Kagan, I think
13 there's a difference, but if I'm wrong about that and
14 the consequence is that Congress has to break Medicaid
15 down into remotely manageable pieces as opposed to
16 \$3.3 trillion over 10 years before the expansion, I
17 don't think that would be the end of the world. But I
18 really would ask you to focus on specifically what's
19 going on here, which is they take these newly eligible
20 people -- and that's a massive change in the way the
21 program works.

22 These are people who are healthy, childless
23 adults who are not covered in many States. They say
24 okay, we're going to make you cover those. We're going
25 to have a separate program for how you get reimbursed

1 for that. You get reimbursed differently from all the
2 previously eligible individuals. But if you don't take
3 our money, we're going to take away your participation
4 in the program for the visually impaired and disabled.

5 If I may reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Well, I'm -- I'm not
7 sure my colleagues have exhausted their questions, so --

8 JUSTICE SOTOMAYOR: I guess my greatest
9 fear, Mr. Clement, with your argument is the following:
10 The bigger the problem, the more resources it needs.
11 We're going to tie the hands of the Federal government
12 in choosing how to structure a cooperative relationship
13 with the States. We're going to say to the Federal
14 government, the bigger the problem, the less your powers
15 are. Because once you give that much money, you can't
16 structure the program the way you want.

17 It's our money, Federal government. We're
18 going to have to run the program ourselves to protect all
19 our interests. I don't see where to draw that line.
20 The uninsured are a problem for States only because
21 they, too, politically, just like the Federal
22 government, can't let the poor die. And so to the
23 extent they don't want to do that, it's because they
24 feel accountable to their citizenry. And so if they
25 want to do it their way, they have to spend the money to

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

3 So I -- I just don't understand the logic of
4 saying States, you can't -- you don't -- you're not
5 entitled to our money, but once you start taking it, the
6 more you take, the more power you have.

7 MR. CLEMENT: Well, Justice Sotomayor, a
8 couple of points. One is, I actually think that sort of
9 misdescribes what happened with Medicaid. I mean,
10 States were, as you suggest, providing for the poor and
11 the visually impaired and disabled even before Medicaid
12 came along. Then all of a sudden, States -- the Federal
13 government says look, we'd like to help you with that,
14 and we're going to give you money voluntarily. And then
15 over time, they give more money with more conditions,
16 and now they decide they're going to totally expand the
17 program, and they say that you have to give up even your
18 prior program, where we -- first came in and offered you
19 cooperation, we're now going to say you have to give
20 that up if you don't take our new conditions.

21 Secondly, I do think that our principle
22 is not that when you get past a certain level, it
23 automatically becomes coercive per se. But I do think
24 when you get a program and you're basically telling
25 States that look, we're going to take away \$3.3 trillion

1 over the next 10 years, that at that point, it's okay to
2 insist that Congress be a little more careful that it
3 not be so aggressively coercive as it was in this
4 statute.

5 And I would simply say that -- we're not
6 here to tell you that this is going to be an area where
7 it's going to be very easy to draw the line. We're just
8 telling you that it's inceptionally important to draw
9 that line, and this is a case where it ought to be easy
10 to establish a beachhead, say that coercion matters, say
11 there's three factors of this particular statute that
12 make it as obviously coercive as any piece of
13 legislation that you've ever seen, and then you will
14 have effectively instructed Congress that there are
15 limits, and you have laid down some administrable rules.

16 JUSTICE SCALIA: Mr. Clement, the Chief has
17 said I can ask this.

18 CHIEF JUSTICE ROBERTS: He doesn't always
19 check first.

20 (Laughter.)

21 JUSTICE SCALIA: As I recall your -- your
22 theory, it is that to determine whether something is
23 coercive, you look to only one side, how much you're
24 threatened with losing or offered to receive. And the
25 other side doesn't matter.

1 I don't think that's realistic. I mean, I
2 think, you know, the -- the old Jack Benny thing, Your
3 Money Or Your Life, and, you know, he says "I'm
4 thinking, I'm thinking." It's -- it's funny, because
5 it's no choice. You know? Your life? Again, it's just
6 money. It's an easy choice. No coercion, right? I
7 mean -- right?

8 Now whereas, if -- if the choice were your
9 life or your wife's, that's a lot harder.

10 Now, is it -- is it coercive in both
11 situations?

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

13 (Laughter.)

14 JUSTICE SCALIA: Really?

15 MR. CLEMENT: I would say that.

16 JUSTICE SCALIA: It's a tough choice.

17 And -- and --

18 JUSTICE KENNEDY: I thought you were going
19 to say "this is your money and your life."

20 (Laughter.)

21 MR. CLEMENT: And well -- it is. But I
22 mean -- I might have missed something, but both of those
23 seem to be coercion.

24 (Laughter.)

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

1 say you're -- when you say you're coerced, it means
2 you've been -- you've been given an offer you can't
3 refuse. Okay? You can't refuse your money or your
4 life. But your life or your wife's, I could refuse that
5 one.

6 (Laughter.)

7 JUSTICE SOTOMAYOR: He's not going home
8 tonight.

9 CHIEF JUSTICE ROBERTS: Let's leave the wife
10 out of this --

11 JUSTICE SCALIA: I'm talking about my life.
12 I think -- take mine, you know?

13 (Laughter.)

14 MR. CLEMENT: I wouldn't do that either,
15 Judge.

16 JUSTICE SCALIA: I won't use that as an
17 example.

18 Forget about it.

19 CHIEF JUSTICE ROBERTS: That's enough
20 frivolity for a while.

21 But I want to make sure I understand where
22 the meaningfulness of the choice is taken away, is it
23 the amount that's being offered, that it's just so much
24 money, of course you can't turn it down, or is it the
25 amount that's going to be taken away if you don't take

1 what they're offering?

2 MR. CLEMENT: It's both, Your Honor. And I
3 think that that's -- I mean, there really is -- I --
4 there really is, you know, three strings in this bow. I
5 mean, one is, the sheer amount of money here makes it
6 very, very difficult to refuse, because it's not money
7 that, you know, that's come from some -- you know, China
8 or, you know, the -- the -- the export tariffs like in
9 the old day. It's coming from the taxpayers, so that's
10 part of it.

11 The fact that they're being asked to give up
12 their continuing participation in a program that they've
13 been participating in for 45 years as a condition to
14 accept the new program, we think that's the second thing
15 that's critical --

16 CHIEF JUSTICE ROBERTS: Well, why isn't that
17 a consequence of how willing they have been since the
18 New Deal to take the Federal government's money? And it
19 seems to me that they have compromised their status as
20 independent sovereigns because they are so dependent on
21 what the Federal government has done, they should not be
22 surprised that the Federal government having attached
23 the -- they tied the strings, they shouldn't be
24 surprised if the Federal government isn't going to start
25 pulling them.

1 MR. CLEMENT: With all due respect,
2 Mr. Chief Justice, I don't think we can say that, you
3 know, the States have gotten pretty dependent, so let's
4 call this whole federalism thing off. And I just think
5 it's too important. Because again, the consequence --
6 if you think about it -- if -- the consequence of saying
7 that we're not going to police the coercion line here
8 shouldn't be that well, you know, it's just too hard, so
9 we'll give the Federal Congress unlimited spending
10 power.

11 The consequence ought to be, if you really
12 can't police this line, then you should go back and
13 reconsider your cases that say that Congress can spend
14 money on things that it can't do directly.

15 Now, we're not asking you to go that far.
16 We're simply saying that look, your spending power cases
17 absolutely depend on there being a line between coercion
18 --

19 JUSTICE SOTOMAYOR: But could you tell me --

20 MR. CLEMENT: -- and voluntary action.

21 JUSTICE SOTOMAYOR: I don't understand your
22 first answer to Justice Kagan. You don't see there
23 being a difference between the Federal government saying
24 we want to take care of the poor. States, if you do
25 this, we'll pay 100 percent of your administrative

1 costs. And you said that could be coercion. All right.
2 Doesn't the amount of burden that the State undertakes
3 to meet the Federal obligation count in this equation at
4 all?

5 MR. CLEMENT: It -- it certainly can,
6 Justice Sotomayor. I didn't mean to suggest in
7 answering Justice Kagan's question that my case was no
8 better than that hypothetical. I mean, but if in the
9 nature of things that I do think the amount of the money
10 even considered alone does make a difference, and it's
11 precisely because it has an effect on their ability to
12 raise revenue from their own citizens. So it's not just
13 free money that they are turning down if they want to.
14 It really is --

15 JUSTICE SOTOMAYOR: Counsel, if we go back
16 to the era of matching what a State pays to what a State
17 gets, Florida loses. It's citizens pay out much less
18 than what they get back in Federal subsidies of all
19 kinds. So you can't really be making the argument that
20 Florida can't ask for more than it gives, because it's
21 really giving less than it receives.

22 MR. CLEMENT: Well then --

23 JUSTICE SOTOMAYOR: You don't really want to
24 go to that point, do you?

25 MR. CLEMENT: Well, then I will make that

1 argument on behalf of Texas.

2 (Laughter.)

3 MR. CLEMENT: But it's not, it's not what my
4 argument depends on. And that's the critical thing.
5 It's one aspect of what makes this statute uniquely
6 coercive.

7 And I really think if you ask the question:
8 What explains the idea that if you don't take this new
9 money you are going to lose all your money under what
10 you have been doing for 45 years to help out the
11 visually impaired and disabled? Nobody in Congress
12 wants the States to stop doing that. They are just
13 doing it, and it's purely coercive to condition the
14 money. It's leverage, pure and simple.

15 JUSTICE KENNEDY: If the inevitable
16 consequence of your position was that the Federal
17 government could just do this on its own, the Federal
18 government could have Medicaid, Medicare, and these
19 insurance regulations. Assume that's true. Then how
20 are the interests of federalism concerned? How are the
21 interests of federalism concerned if in Florida or Texas
22 or some other objecting States there are huge Federal
23 bureaucracies doing what this bill allows the State
24 bureaucracies to do. I know you have thought about
25 that. I would just like your answer.

1 MR. CLEMENT: I have, and I would like to
2 elaborate that the one word answer is "accountability."

3 If the Federal government decides to spend
4 money through Federal instrumentalities and the
5 citizenry is hacked off about it, they can bring a
6 Federal complaint to a Federal official working in a
7 Federal agency. And what makes this so pernicious is
8 that the Federal government knows that the citizenry is
9 not going to take lightly the idea that there are huge,
10 new Federal bureaucracies popping up across the country.
11 And so they get the benefit of administering this
12 program through State officials, but then it makes it
13 very confusing for the citizen who doesn't like this.
14 Do they complain to the State official because it's
15 being administered in the State official in a State
16 building?

17 JUSTICE KAGAN: Mr. Clement, that is very
18 confusing because the idea behind cooperative
19 Federal/State programs was exactly a federalism idea.
20 It was to give the States the ability to administer
21 those programs. It was to give the States a great deal
22 of flexibility in running those programs. And that's
23 exactly what Medicaid is.

24 MR. CLEMENT: Well, that's exactly what
25 Medicaid was. The question is: What will it be going

1 forward? And I absolutely take your point, Justice
2 Kagan. Cooperative federalism is a beautiful thing.
3 Mandatory federalism has very little to recommend it
4 because it poses exactly the kind of accountability --

5 JUSTICE KAGAN: Cooperative federalism does
6 not mean that there are no Federal mandates and no
7 Federal restrictions involved in a program that uses
8 90 percent here, 100 percent Federal money. It means
9 there is flexibility built into the program subject to
10 certain rules that the Federal government has about how
11 it wishes its money to be used. It's like giving a gift
12 certificate. If I give you a gift certificate for one
13 store, you can't use it for other stores. But still you
14 can use it for all kinds of different things.

15 MR. CLEMENT: I absolutely agree that if
16 it's cooperative federalism and the States have choices,
17 then that is perfectly okay. But when -- that's why
18 voluntariness and coercion is so important. Because if
19 you force a State to participate in a Federal program,
20 then -- I mean, as long as it's voluntary then a State
21 official shouldn't complain if a citizen complains to
22 the State about the way the State's administering a
23 Federal program that it volunteered to participate in.
24 But at the point it becomes coercive, then it's not fair
25 to tell the citizen to complain to the State official.

1 They had no choice.

2 But who do they complain at the Federal
3 level? There's nobody there, which would be -- I'm not
4 saying it's the best solution to have Federal
5 instrumentalities in every State, but it actually is
6 better than what you get when you have mandatory
7 federalism and you lose the accountability that is
8 central to the federalism provisions in the
9 Constitution.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Clement.

12 General Verrilli?

13 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.,
14 ON BEHALF OF THE RESPONDENTS

15 GENERAL VERRILLI: Mr. Chief Justice, and
16 may it please the Court:

17 The Affordable Care Act's Medicaid expansion
18 provisions will provide millions of Americans with the
19 opportunity to have access to essential health care that
20 they cannot now afford. It is an exercise of the
21 Spending Clause power that complies with all of the
22 limits set forth in this Court's decision in *Dole*, and
23 the States do not contend otherwise. The States are
24 asking this Court to do something unprecedented, which
25 is, to declare this an impermissibly coercive exercise.

1 JUSTICE SCALIA: What do you think we meant
2 in those dicta in several prior cases where we've said
3 that the Federal government cannot be coercive through
4 the Spending Clause? What -- what do you think we
5 were -- give us a hypothetical.

6 GENERAL VERRILLI: Yes. First, if I could
7 just try to be a little more precise about it,
8 Justice Scalia. I think what the Court said in *Steward*
9 *Machine* and in *Dole* is that it's possible that you might
10 envision a situation in which there's coercion --

11 JUSTICE SCALIA: Okay.

12 GENERAL VERRILLI: And the courts didn't say
13 much more. But I can think of something. One example I
14 could think of that might serve as a limit would be a
15 *Coyle* type situation, in which the condition attached
16 was worth a fundamental transformation in the structure
17 of State government in a situation in which the State
18 didn't have a choice but to accept it. But -- and so --

19 JUSTICE SCALIA: Anything else, so long
20 as you --

21 GENERAL VERRILLI: Well, but --

22 JUSTICE SCALIA: You are talking about
23 situations where they have to locate their State house
24 in some other city --

25 GENERAL VERRILLI: Or you may have a

1 legislature --

2 JUSTICE SCALIA: And they have no choice.
3 But short of that, they can make the State do anything
4 at all?

5 GENERAL VERRILLI: No, no. Dole -- the Dole
6 conditions are real. The germaneness condition in Dole
7 is real, for example, and so those --

8 CHIEF JUSTICE ROBERTS: None of those have
9 addressed the coercion question.

10 GENERAL VERRILLI: Right.

11 CHIEF JUSTICE ROBERTS: So then you think it
12 would be all right for the Federal government to say --
13 same program: States, you can take this or you can
14 leave it. But if you don't take it, you lose every last
15 dollar of Federal funding for every program.

16 GENERAL VERRILLI: I think that would raise
17 a germaneness issue, Mr. Chief Justice, but it's not
18 what we have here.

19 CHIEF JUSTICE ROBERTS: But there's no
20 coercion question at all.

21 GENERAL VERRILLI: Well, but I think -- I
22 think they are related. I think that the germaneness
23 inquiry in Dole really gets at coercion in some
24 circumstances, and that's why I think they are related.
25 But we don't have that here.

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

2 CHIEF JUSTICE ROBERTS: No, I know we don't
3 have that here. How does germaneness get -- get
4 to coercive?

5 GENERAL VERRILLI: Because it gets to be
6 harder to see what --

7 CHIEF JUSTICE ROBERTS: That's germane if
8 there's no --

9 GENERAL VERRILLI: What the connection is
10 between getting you to do A and the money you are
11 getting for --

12 CHIEF JUSTICE ROBERTS: So it fails because
13 it is not germane. But you are saying it would not fail
14 because it was coercive.

15 GENERAL VERRILLI: Why -- I think that -- as
16 I said, I think they are really trying to get at the
17 same thing, and I -- but I do think it's quite different
18 here, and I would like to, if I could, take up each of
19 the --

20 CHIEF JUSTICE ROBERTS: No, I know -- I know
21 it's different here. I'm just trying to understand if
22 you accept the fact or regarded as true that there is a
23 coercion limit, or that once the Federal government --
24 once you are taking Federal government money, the
25 Federal government money -- can take it back, and that

1 doesn't affect the voluntariness of your choice.
2 Because it does seem like a serious problem. We are
3 assuming under the Spending Clause the Federal
4 government cannot do this. Under the Constitution it
5 cannot do this. But if it gets the State to agree to
6 it, well, then it can. And the concern is, if you can
7 say: If you don't agree with this, you lose all your
8 money, whether that's really saying the limitation in
9 the Constitution is -- is largely meaningless.

10 GENERAL VERRILLI: Well, but I don't think
11 that this is a case that presents that question.

12 CHIEF JUSTICE ROBERTS: No, no, I know. I
13 know this. I don't know if I will grant it to you or
14 not. But let's assume it's not this case. Do you
15 recognize any limitation on that concern?

16 GENERAL VERRILLI: I think the Court has
17 said in Steward Machine and Dole that this is something
18 that needs to be considered in an appropriate case. And
19 we acknowledge that. But I do think it's so dependent
20 on the circumstances that it's very hard to say in the
21 abstract with respect to a particular program that there
22 is a --

23 JUSTICE SCALIA: You can't imagine a case in
24 which it is both germane and yet coercive, is what you
25 are saying. There is no such case as far as you know.

1 GENERAL VERRILLI: Well, I am not prepared
2 to -- to say right here that I can -- that --

3 JUSTICE SCALIA: I wouldn't think that is a
4 surprise question, you know?

5 GENERAL VERRILLI: Congress has authority to
6 act and --

7 JUSTICE SCALIA: I can't think of one. I'm
8 not blaming you for not thinking of one.

9 (Laughter.)

10 GENERAL VERRILLI: But I do think -- I
11 really do think that it's important to look at this, an
12 issue like this. If you are going to consider it, it
13 has got to be considered in a factual context from which
14 it arises.

15 JUSTICE ALITO: Let me give you a factual
16 context. Let's say Congress says this to the States:
17 We have got great news for you; we know your
18 expenditures on education are a huge financial burden,
19 so we are going to take that completely off your
20 shoulders; we are going to impose a special Federal
21 education tax which will raise exactly the same amount
22 of money as all of the States now spend on education;
23 and then we are going to give you a grant that is equal
24 to what you spent on education last year.

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

1 will take it, but of course, if you take it, it's going
2 to have some conditions because we are going to set
3 rules on teacher tenure, on collective bargaining, on
4 curriculum, on textbooks, class size, school calendar
5 and many other things. So take it or leave it.

6 If you take it, you have to follow our rules
7 on all of these things. If you leave it, well, then you
8 are going to have to fine -- you are going to have to
9 tax your citizens, they are going to have to pay the
10 Federal education tax; but on top of that, you were
11 going to have to tax them for all of the money that you
12 are now spending on education. Plus all of the Federal
13 funds that you were previously given.

14 Would that be -- would that reach the
15 point -- would that be the point where financial
16 inducement turns into coercion?

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

18 JUSTICE ALITO: No.

19 GENERAL VERRILLI: -- because they do, the
20 States do have a choice there, especially as a -- as a
21 going-in proposition. The argument the States are
22 making here is not that they're -- that -- this is not a
23 going-in proposition. Their argument is that they're --
24 they are in a position where they don't have a choice
25 because of everything that has happened before. But --

1 JUSTICE ALITO: You might be right. But if
2 that is the case then there is nothing left --

3 GENERAL VERRILLI: Well, but as a --

4 JUSTICE ALITO: -- of federalism.

5 GENERAL VERRILLI: As a practical matter, I
6 disagree with that, Justice Alito. First of all, as a
7 practical matter there is a pretty serious political
8 constraint on that situation ever arising, because it's
9 not like the Federal Government is going to have an easy
10 time of raising the kinds of tax revenues that need to
11 be -- needed to raised to work that kind of fundamental
12 transformation, and that is real. And political
13 constraints do operate to protect federalism in this
14 area.

15 JUSTICE SCALIA: I would have thought there
16 was a serious political strain -- constraint on the
17 individual mandate, too, but that didn't work. What you
18 call serious political constraints sometimes don't work.

19 GENERAL VERRILLI: But -- but with respect
20 to a situation like that one, Justice Scalia, the -- the
21 States have their education system, and they can decide
22 whether they are going to go in or not. But here, of
23 course, I think it's important to trace through the
24 history of Medicaid. It, it is not a case, as my friend
25 from the other side suggested, that the norm here is

1 that the Federal Government has offered to the States
2 the opportunity either to stay where they are or add the
3 new piece. We can debate that proposition with respect
4 to 1972 one way or another, the States have one view
5 about that; we have a different one. But starting in
6 the 1984 expansion, with respect to pregnant women and
7 infants, it was an expansion of the entire program;
8 States were given the choice to stay in the entire
9 program or not. 1989 when the program was expanded to
10 children under 6 years of age, under 133 percent of
11 poverty, same thing. 1990, kids 6 to 18 and 100 percent
12 of poverty, same thing. In fact, every major expansion,
13 same thing.

14 And so I just think the history of the
15 program, and particularly when you read that in context
16 of 42 U.S.C. 1304, which reserves the right of the
17 Federal Government to amend the program going forward,
18 shows you that this is something that the States have
19 understood all along. This has been the evolution of
20 it, and with respect to --

21 CHIEF JUSTICE ROBERTS: Could you give me
22 some assurance? We heard the question about whether or
23 not the Secretary would use this authority to the extent
24 available. Is there circumstances where you are willing
25 to say that that would not be permissible? I'm thinking

1 of the Arizona letter, for example. I mean, if I had
2 the authority and I was in that position, I would use it
3 all the time. You might -- you want some little change
4 made? Well, guess what; I can take away all your money
5 if you don't make it. I win. Every time. It seems
6 that that would be the case.

7 So why shouldn't we be concerned about the
8 extent of authority that the government is exercising,
9 simply because they could do something less? We have to
10 analyze the case on the assumption that that power will
11 be exercised, don't we?

12 GENERAL VERRILLI: Well, Mr. Chief Justice,
13 it would not be responsible of me to stand here in
14 advance of any particular situation becoming -- coming
15 before the Secretary of Health and Human Services and
16 commit to how that would be resolved one way or another.
17 But that --

18 CHIEF JUSTICE ROBERTS: No, I appreciate
19 that. I appreciate that, but I guess --

20 GENERAL VERRILLI: That discretion is there
21 in the statute, and I have every reason to think it is
22 real, but I do think, getting back to the circumstances
23 here --

24 JUSTICE KAGAN: Well, General, what's the --
25 been the history of its use? Has the Secretary in fact

1 ever made use of that authority?

2 GENERAL VERRILLI: That's correct, Justice
3 Kagan. It's never been used --

4 CHIEF JUSTICE ROBERTS: What about the
5 Arizona letter we just heard about today?

6 GENERAL VERRILLI: It has never been used to
7 cut off --

8 CHIEF JUSTICE ROBERTS: It's been used to
9 threaten --

10 JUSTICE SCALIA: Of course not.

11 CHIEF JUSTICE ROBERTS: Of course no States
12 would say okay, go ahead but -- make my day, take it
13 away; they are -- they are going to give in.

14 GENERAL VERRILLI: If we could go to the
15 situation we have here, Mr. Chief Justice, this -- with
16 respect to the Medicaid expansion, the States' argument
17 is, as they said in their briefs, they articulated a
18 little bit different this morning -- this afternoon.
19 But as they said it in their briefs, was, it's not what
20 you stand to gain, but what you stand to lose. But I
21 think an important thing in evaluating that argument in
22 this context is fully 64 percent of Medicaid
23 expenditures in this country are based on optional
24 choices; and I don't mean by that the optional choices
25 of the States to stay in the program in '84 or '88 or

1 '89. But -- but States are given the choices to expand
2 the beneficiaries beyond the Federal minimum and to
3 expand services beyond the Federal minimum.

4 JUSTICE KENNEDY: And just a small point,
5 and please correct me if I am wrong. It -- does this
6 Act not require States to keep at the present level
7 their existing Medicaid expenditure? So some States may
8 have been more generous than others in Medicaid, but
9 this Act freezes that so the States can't go back. Or
10 am I incorrect?

11 GENERAL VERRILLI: It's much more nuanced
12 than that, Justice Kennedy. There is something called a
13 maintenance of effort provision which lasts until 2014,
14 until such time as the Medicaid expansion takes place
15 and the exchanges are in place. That applies to the
16 population. It says with respect to the population, you
17 can't take anybody out. It does not apply to the
18 optional benefits where the States still have
19 flexibility, they can still reduce optional benefits
20 that they are now providing if they -- if they want
21 to -- to control costs. They can also work on provider
22 rates, there's also with respect to demonstration
23 projects by which some States have expanded their
24 populations beyond the required eligibility levels, they
25 don't have to keep them in. So -- and then there's

1 also, if the State has a budgetary crisis, it can get a
2 waiver of that, as Wisconsin did. So that is a --
3 that's a provision I think that does a significant
4 degree less than my friends on the other side have
5 suggested in terms of -- in terms of its effect, and its
6 effect beyond that is just temporary.

7 I do think with respect to the -- the first
8 of their three arguments for coercion, the sheer size
9 argument, that it's very difficult to see how that is
10 going to work; because if the question is about what you
11 stand to lose rather than what you stand to gain, then
12 it seems to me that it doesn't matter whether the
13 Medicaid expansion is substantial or whether it's
14 modest, or whether there is any expansion at all. The
15 States, for example -- the Federal Government, for
16 example, could decide that under -- under the current
17 system too much money has ended up flowing to nursing
18 care and that money would be better serving the general
19 welfare if it were directed at infants and children.
20 But if the Federal Government said we are going to
21 redirect the spending priorities of the Federal money
22 that we are offering to you, the States could say well,
23 Geez, we don't like that; we would like to keep spending
24 the money the way we were, and we have no choice,
25 because this has gotten too big for us to exit. And so

1 -- and in fact, it seems to me, standing here today
2 before these expansions take place, under their theory,
3 the provision is --

4 JUSTICE SCALIA: The smaller it, is the
5 bigger the coercion.

6 GENERAL VERRILLI: -- well --

7 JUSTICE SCALIA: The smaller what you are
8 demanding of them, the bigger the coercion to go along.

9 GENERAL VERRILLI: The more they stand to
10 lose. And -- and so -- and then it -- I'm sorry,
11 Justice Breyer.

12 JUSTICE BREYER: I -- just before you leave
13 that, I'd -- I'd appreciate it if you would expand a
14 little bit on the answer to Justice Kagan's question.
15 For the reason, when I read the cutoff statute, which as
16 I said has been there since 1965 unchanged, it does
17 refer to the Secretary's discretion to keep the funding,
18 insofar as the funding has no relationship to the
19 failure to comply with the condition.

20 And as I read that, that gives the Secretary
21 the authority to cut off all the money, but the State's
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. I thought they had to

1 exercise that within reason.

2 GENERAL VERRILLI: Well --

3 JUSTICE BREYER: I don't know when it be
4 reasonable. So you have looked into it, and that's what
5 I want to know.

6 GENERAL VERRILLI: Right.

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 run around threatening people that we will cut
14 off totally unrelated funds.

15 What is the situation?

16 GENERAL VERRILLI: I think the situation is
17 generally as you have described it, but I do want to be
18 careful in saying I -- I don't think it would be
19 responsible of me to commit now that the Secretary would
20 exercise 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 is 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 represent -- you cannot represent that the Secretary has
8 never said, "and if you don't do it, we are going to
9 take away all the funds. " They cite the Arizona
10 example; I suspect there are others, because that is the
11 leverage.

12 GENERAL VERRILLI: But it --

13 CHIEF JUSTICE ROBERTS: I'm not saying there
14 is 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 -- But of course --

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

1 so. And all I asked in my question was I didn't ask you
2 to commit the Secretary to anything. I wanted to know
3 what 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 to, in
7 other words, to answer the question the Chief Justice
8 has: Is it a common thing, that that happens, that this
9 unrelated 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: And you are not privy to
15 what those are.

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

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 are operating under a conception that
21 isn't right. The reason we have had all these Medicaid
22 expansions and the reason seems to me why we are were
23 where we are now and why 60 percent of what's being
24 spent on Medicaid is based on voluntary decisions by the
25 States to expand beyond what Federal law requires,

1 because this is a good program and it works. And the
2 States generally like what it accomplishes --

3 JUSTICE KAGAN: And, General Verrilli --

4 JUSTICE ALITO: Is this discussion
5 realistic? The objective of the Affordable Care Act is
6 to provide near universal health care. Now suppose that
7 all of the 26 States that are parties to this case were
8 to say, well, we're not going to -- we're not going to
9 abide by the new conditions. Then there would be a huge
10 portion -- a big portion of the population that would
11 not have healthcare, and it's a realistic possibility
12 the Secretary is going to say, well, okay, fine, you
13 know. We are going to cut off your new funds but we are
14 not going to cut off your old funds and just let that
15 condition sit there.

16 GENERAL VERRILLI: Well, just as I can't
17 make a commitment that the authority wouldn't be
18 exercised, I'm not going to make a commitment that it
19 would be exercised. But I do think that that -- to try
20 and move away from the first of their argument, the
21 sheer size argument, to the second one, which is that
22 it's coercive by virtue of its relationship to the
23 Affordable Care Act. I really think that that's a
24 misconception and I would like to be able to take a
25 minute and walk through and explain why that is.

1 JUSTICE KAGAN: General Verrilli, before you
2 do that, I'm sorry, but in response to the Chief
3 Justice's question -- I mean the money or your life has
4 consequence because we are worried that that person is
5 actually going to shoot. So I think that this question
6 about are we -- what do we think the Secretary is going
7 to do is an important one.

8 And as I understand it, I mean when the
9 Secretary withdraws funds, what the Secretary is doing
10 is withdrawing funds from poor people's health care.
11 And that the Secretary is reluctant and loathe to take
12 money away from poor people's health care. And that
13 that's why these things are always worked out. It's
14 that the Secretary really doesn't want to use this
15 power. And so the Secretary sits down with the State
16 and figures out a way for the Secretary not to use the
17 power.

18 GENERAL VERRILLI: That's correct, Justice
19 Kagan. That is no --

20 CHIEF JUSTICE ROBERTS: No, what the --

21 GENERAL VERRILLI: I'm sorry --

22 CHIEF JUSTICE ROBERTS: Go ahead.

23 GENERAL VERRILLI: That's another way of
24 trying to say what I was trying to say to Justice Scalia
25 earlier is that the States and the Federal government

1 share a common objective here, which is to get health
2 care to the needy. And in the vast majority of
3 instances they work together to make that happen.

4 CHIEF JUSTICE ROBERTS: Well, but the
5 question is not obviously the States are interested in
6 the same objective and they have a disagreement or they
7 have budget realities that they have to deal with. And
8 States say, well, we are going to cut by 10 percent what
9 we reimburse this for or that for and the Federal
10 government says well, you can't.

11 And no one is suggesting that people want to
12 cut health care but they have different views about how
13 to implement policy in this area. And the concern is
14 that the Secretary has the total and complete say
15 because the Secretary has the authority under this
16 provision to say you lose everything. No one's
17 suggested in the normal course that will happen, but so
18 long as the Federal government has that power, it seems
19 to be a significant intrusion on the sovereign interests
20 of the State.

21 Now I'm not -- it may be something they gave
22 up many decades ago when they decided to live off of
23 Federal funds. But I don't think you can deny that it's
24 a significant authority that we are giving the Federal
25 government to say that you can take away everything if

1 the States don't buy into the next program.

2 GENERAL VERRILLI: Well, but what I would
3 say about that Mr. Chief Justice, is that we recognize
4 that these decisions aren't going to be easy decisions
5 in some circumstances. As a practical matter there may
6 be circumstances in which they are very difficult
7 decisions. But that's different from saying that they
8 are coercive and that's different from saying that it's
9 an unconstitutional --

10 JUSTICE BREYER: Why is it different? Why
11 is it different? I mean, I thought it might be very
12 unlikely that the State would ever say that the
13 government -- the Federal government would say here's a
14 condition that you have to have a certain kind of
15 eyeglasses for people who don't see. And by the way if
16 you don't do that we'll take away \$42 billion of
17 funding, okay?

18 I thought such a thing would not happen.
19 And I thought that if it tried to happen that it's
20 governed by the APA and the person with eyeglasses would
21 say it's arbitrary, capricious, abusive discretion. And
22 that's so, even though the statute says it's in the
23 discretion of the Secretary but Mr. -- your colleague
24 and brother says no, I'm wrong about the law there and
25 moreover they would do it. That's what I'm hearing now,

1 that they would do it and they do do it, and -- and,
2 etc. So I would like a little clarification.

3 GENERAL VERRILLI: In of the situation
4 described in your hypothetical, Justice Breyer, the
5 Secretary of health and human services would never do
6 it. But with respect.

7 JUSTICE SCALIA: Could never do it or would
8 a prediction, okay.

9 GENERAL VERRILLI: Well, I think it would
10 have to satisfy the administrative procedure, that's a
11 real constraint. When I don't what I don't feel able to
12 do here is to say with respect to this Medicaid
13 expansion.

14 JUSTICE SCALIA: Are you willing to
15 acknowledge that the Administrative Procedure Act is a
16 limitation on the secretary's ability to cut off all the
17 funds; she can't do it if it -- if that would be
18 unreasonable? Are you willing to accept that? I
19 wouldn't if I were you.

20 GENERAL VERRILLI: So what I'm trying to do
21 here is to -- is to suggest that the secretary does have
22 discretion under the statute, and that that -- and that
23 --

24 JUSTICE SCALIA: Indeed, part of the
25 discretion is to cut off all of the funds. That's what

1 the statute says.

2 GENERAL VERRILLI: -- and it is possible,
3 and I'm not willing to give that away. But that doesn't
4 make this --

5 JUSTICE KAGAN: But, General Verrilli, you
6 are not willing to give away whether the APA would bar
7 that; but, the APA surely has to apply to a
8 discretionary act of the secretary.

9 GENERAL VERRILLI: I agree with that,
10 Justice Kagan, but --

11 JUSTICE BREYER: What's making you
12 reluctant?

13 GENERAL VERRILLI: I'm not trying to be --
14 I'm not trying to be reluctant. I understand how this
15 works. I'm trying to be careful about the authority of
16 the Secretary of Health and Human Services and how it
17 will apply in the future.

18 JUSTICE SCALIA: I wouldn't worry a lot if I
19 were you. I don't know of any case that, where the
20 secretary's discretion explicitly includes a certain
21 act, we have held that, nevertheless, that act cannot be
22 performed unless we think it reasonable. I don't know
23 any case like that.

24 Yes, when there is just a general grant of
25 discretion, it has to be exercised reasonably. But

1 maybe Justice Breyer knows such a case.

2 JUSTICE BREYER: Yes, I do.

3 JUSTICE SCALIA: Give it to me.

4 GENERAL VERRILLI: If I could go back to the
5 sheer size idea, there is, I think, another couple of
6 points that are important in thinking about whether
7 that's a principle courts could ever apply.

8 Once you get into that business, in addition
9 to the problem I identified earlier, that it basically
10 means that Congress is frozen in place, based on the
11 size of the program, you have got this additional issue
12 of having to make a judgment about in what circumstances
13 will -- will the loss of the federal funding be so
14 significant that you would count it as -- coercive.

15 JUSTICE KENNEDY: I suppose one test could
16 be -- I just don't see that it would be very workable --
17 is whether or not it's so big that accountability is
18 lost, that it is not clear to the citizens that the
19 State or the Federal Government is administering the
20 program, even though it's a state administrator.

21 GENERAL VERRILLI: Well, but I think --

22 JUSTICE KENNEDY: I think that's unworkable.

23 GENERAL VERRILLI: -- this is going to come
24 from a withdrawal situation. Their argument's about
25 it's what you stand to lose and with respect to

1 withdrawal.

2 I mean, so, does it depend on -- is it an
3 absolute or a relative number with respect to how much
4 of the state budget? Is it a situation where you have
5 to make a calculation about how hard would it be for
6 that state to make up in state tax revenues the federal
7 revenue they would lose? Does that depend on whether
8 it's a high tax state or a low tax state. It just seems
9 to me -- and then, what is the political climate in that
10 state? It seems to me like --

11 JUSTICE KENNEDY: In your view, does
12 federalism require that there be a relatively clear line
13 of accountability for political acts?

14 GENERAL VERRILLI: Yes, of course, it does,
15 Justice Kennedy. But, here --

16 JUSTICE KENNEDY: Is that subsumed in the
17 coercion test, or is that an independent?

18 GENERAL VERRILLI: You know, here, the
19 coercion test, as it's been discussed, I think, for
20 example, in Justice O'Connor's dissent in Dole and in
21 some of the other literature, does address federalism
22 concerns in the sense of the Federal Government using
23 federal funding in one area to try to get states to act
24 in an area where the Federal Government may not have
25 Article I authority.

1 JUSTICE KENNEDY: Yes.

2 GENERAL VERRILLI: But, as Your Honor
3 suggested earlier, this is a situation in which, while
4 it is certainly true that the Federal Government
5 couldn't require the states, as the Chief Justice
6 indicated, to carry out this program, the federal
7 government could, as Your Honor suggested, expand
8 Medicare and do it itself.

9 JUSTICE KENNEDY: But do you think that
10 there still is inherent and implicit in the idea of
11 federalism, necessary for the idea of federalism, that
12 there be a clear line of accountability so the citizen
13 knows that it's the Federal or the State government who
14 should be held responsible for a program?

15 GENERAL VERRILLI: Certainly, but I
16 think the problem here is --

17 JUSTICE KENNEDY: And does coercion relate
18 to that, or is that a separate --

19 GENERAL VERRILLI: Yes, but I think --

20 JUSTICE KENNEDY: -- is that a separate
21 doctrine?

22 GENERAL VERRILLI: Well, I think it relates
23 to it in the opposite way that my friends on the other
24 side would like it to, in that I think their argument is
25 that it would subject us to such a high degree of

1 political accountability at the state level to withdraw
2 ourselves from the program, that it's an unpalatable
3 choice for us, and that's where the coercive effect
4 comes from. And that's why I think --

5 JUSTICE KENNEDY: Well, but I think the
6 answer would be that the state wants to preserve its
7 integrity, its identity, its responsibility in the
8 federal system.

9 GENERAL VERRILLI: And it may -- and, of
10 course, it may do so, and it can make --

11 JUSTICE SCALIA: May it do so?

12 Doesn't the question come down to this --
13 maybe you can answer this yes. But -- but isn't the
14 question simply: Is it conceivable to you, as it was
15 evidently not to Congress, that any State would turn
16 down this offer, that they can't refuse? Is it
17 conceivable to you that any State would have said no to
18 this program? Congress didn't think that, because some
19 of its other provisions are based on the assumption that
20 every single State will be in this thing.

21 Now, do you -- can you conceive of a State
22 saying no? And -- and if you can't, that sounds like
23 coercion to me.

24 GENERAL VERRILLI: I think -- I think
25 Congress predicted that States would stay in this

1 program, but the -- prediction is not coercion. And the
2 reason Congress predicted it, I think, Justice Scalia,
3 is because the Federal government is paying 90-plus
4 percent of the costs. It increases State costs --

5 JUSTICE SCALIA: So what do you predict? If
6 you predict the same, that 100 percent of the States
7 will accept it, that sounds like coercion.

8 GENERAL VERRILLI: Prediction is not
9 coercion. I disagree, Justice Scalia. That's just an
10 assumption, and if it proves to be wrong, then Congress
11 has time to recalibrate. And beyond that, I do think if
12 -- I just want to go back to the other part of Your
13 Honor's point -- that with respect to the relationship
14 between Medicaid and the Act, and particularly the
15 minimum coverage provision, my -- my friend Mr. Clement
16 has suggested that you can infer coercion because with
17 respect to the population to which the provision
18 applies, if there's no Medicaid, there's no other way
19 for them to satisfy the requirement.

20 I want to work through that for a minute if
21 I may, because it's just incorrect.

22 First of all, with respect to anybody at
23 100 percent of the poverty line or above, there is an
24 alternative in the statute. It's the exchanges with tax
25 credits and with subsidies to insurance companies. So

1 with respect to that, the part of the population at
2 100 percent of poverty to 133 percent of poverty, the --
3 the statute actually has an alternative for them.

4 For people below 100 percent of poverty, it
5 -- it is true that there is no insurance alternative.
6 But by the same token, there is no penalty that is going
7 to be imposed on anybody in that group.

8 To begin with, right now, the -- the level
9 of 100 percent of poverty is \$10,800. The -- the
10 requirement for filing a Federal income tax return is
11 \$9,500. So anybody below \$9,500, no penalty, because
12 they don't have to file an income tax return. The
13 sliver of people between \$9,500 and \$10,800, the
14 question there is are they going to be able to find
15 health insurance that will cost them less than 8 percent
16 of their income.

17 JUSTICE ALITO: Well, I'm not -- in selling
18 this argument -- take the poorest of the poor. If there
19 is no Medicaid program, then they're not going to get
20 health care. Isn't that right?

21 GENERAL VERRILLI: Yes, that's true. But
22 this --

23 JUSTICE ALITO: So Congress obviously
24 assumed -- it thought it was inconceivable that any
25 State would reject this offer, because the objective of

1 the Affordable Care Act is to provide near-universal
2 care. And Medicaid is the way to provide care for at
3 least the poorest of the poor. So it -- it just didn't
4 occur to them that this was a possibility. And when --
5 when that's the case, how can that not be coercion?
6 Unless it's just a gift. Unless it's just purely a
7 gift.

8 Then it comes back to the question of
9 whether you think it makes a difference that the
10 money -- a lot of the money to pay for this -- is going
11 to come out of the same taxpayers that the States have
12 to tax to get their money.

13 GENERAL VERRILLI: This is -- this is a --
14 this is -- these are Federal dollars that Congress has
15 offered to the States and said, we're going to make this
16 offer to you, but here's how these dollars need to be
17 spent. This is the essence of Congress's Article I
18 authority under the General Welfare Clause and the
19 Appropriations Clause. This is not some remote
20 contingency, or an effort to leverage in that regard.
21 This is how Congress is going to have the Federal
22 government's money be used if States choose to accept
23 it.

24 Yes, it was reasonable for Congress to
25 predict in this circumstance that the States were going

1 to -- to take this money, because -- because it is an
2 extremely generous offer of funds: 90-plus percent of
3 the funding. States can -- can expand their Medicaid
4 coverage to more than 20 percent of their population for
5 an increase of only 1 percent --

6 CHIEF JUSTICE ROBERTS: If it's such a good
7 deal --

8 GENERAL VERRILLI: -- of their funding.

9 CHIEF JUSTICE ROBERTS: -- why do you care?
10 If it's such a good deal, why do you need the club?

11 GENERAL VERRILLI: Well, the -- the --

12 CHIEF JUSTICE ROBERTS: It's a good deal,
13 take it. We're not going to -- if you don't take it,
14 you're just hurting yourself. We're not going to --

15 GENERAL VERRILLI: That's a judgment for
16 Congress to make about how the Federal -- how Federal
17 funds are going to be used if States choose to accept
18 them, and Congress has made that judgment. That's
19 Congress's judgment to make, and it's -- it doesn't mean
20 that it's coercive.

21 CHIEF JUSTICE ROBERTS: You have another
22 15 minutes.

23 GENERAL VERRILLI: Lucky me.

24 (Laughter.)

25 JUSTICE KENNEDY: But the -- but the point

1 is -- but the -- the point is, there's -- there's no
2 real --

3 JUSTICE SOTOMAYOR: Can we go back --

4 JUSTICE KENNEDY: There's no real -- there's
5 no realistic choice. There's no real choice. And
6 Congress does not in effect allow for an out -- opt out.
7 We just know that.

8 And it's --

9 GENERAL VERRILLI: No, I guess I --

10 JUSTICE KENNEDY: -- it's substantial.

11 GENERAL VERRILLI: I would go back, Justice
12 Kennedy --

13 JUSTICE KENNEDY: I recognize the problem
14 with that test.

15 GENERAL VERRILLI: I would go back to the
16 fact that 60 percent of the Medicaid spending is now
17 optional. It's -- it's a result of choices that States
18 have made that -- it's expanded the --

19 JUSTICE KENNEDY: Even though they're now
20 frozen in, per our earlier discussions, to a large
21 extent.

22 GENERAL VERRILLI: Well, no -- to a more --
23 much more modest extent was my point, Justice Kennedy.
24 For example, optional services where a huge amount of
25 money is spent -- more than \$100 billion annually -- the

1 largest component of that is nursing home services.
2 That remains optional. It's -- right now, once the
3 minimum -- once the maintenance provision remains in
4 place, States have the flexibility to that -- reduce
5 those numbers.

6 States have considerable flexibility now and
7 going forward with respect to the way that money is
8 spent. And I do think in terms of evaluating whether
9 this expansion should be considered coercive has got to
10 be evaluated against the backdrop of the fact that the
11 States are generally taking -- are generally taking
12 advantage of the opportunities of this statute to
13 greatly expand the amount of money that the Federal
14 government spends and the amount of money that they
15 spend to try to make the -- the lives of their citizens
16 better. I think --

17 JUSTICE KENNEDY: Of course, they have to do
18 so by hiring a very substantial number of more
19 employees. There will be State employees. There'll be
20 substantial State administrative expenses that are not
21 reimbursed.

22 GENERAL VERRILLI: Well, but -- I would take
23 issue with that, Justice Kennedy. Part of the
24 Affordable Care Act is that it -- it provides for new
25 streamlined eligibility processes to get people into the

1 system at a -- at a much faster and cheaper rate. There
2 are going to be costs to set that up. But under the
3 statute, the Federal government is going to pay
4 90 percent of those costs, the short-term set-up costs.
5 And then all of the projections that we have seen
6 suggest that the medium- to long-term costs once these
7 changes are in place are going to be dramatically lower
8 --

9 CHIEF JUSTICE ROBERTS: Well, what --

10 GENERAL VERRILLI: -- on the administrative
11 side.

12 CHIEF JUSTICE ROBERTS: Obviously, the
13 Federal government isn't bound to that. And what if,
14 after the 90 percent, they say well, now -- from now on,
15 we're going to pay 70 percent? What happens then?
16 Where does that extra money come from?

17 GENERAL VERRILLI: Well, I think -- then the
18 States would have a choice at that -- at that point
19 whether they were going to stay in the program or not.
20 But that isn't what we have here, and --

21 CHIEF JUSTICE ROBERTS: There's no -- they
22 can just bail out -- whenever the government reduces the
23 amount of the percentage that it's going to pay, the
24 States can say, that's -- that's --

25 GENERAL VERRILLI: Well, I'm not saying it

1 would be an easy choice, Mr. Chief Justice.

2 JUSTICE SCALIA: They'd have to bail out of
3 Medicaid, you're talking about. Not just there.

4 GENERAL VERRILLI: Right. That would be --

5 JUSTICE SCALIA: The option.

6 GENERAL VERRILLI: Right. That that would
7 be the option. They can leave Medicaid if they decide
8 that that isn't working for them. I'm not saying this
9 is an easy choice. I'm also not saying it would happen,
10 because the Secretary does have this discretion --

11 CHIEF JUSTICE ROBERTS: Well, the Secretary
12 has the discretion. We're talking about something else.
13 We're talking about fiscal realities, and whether or not
14 the Federal government is going to say we need to lower
15 our contribution to Medicaid and leave it up to the
16 States because we want the people to be mad at the
17 States when they have to have all these budget cuts to
18 keep it up, and not at the Federal government.

19 GENERAL VERRILLI: That would be true, Mr.
20 Chief Justice, whether this Medicaid expansion occurred
21 or not.

22 CHIEF JUSTICE ROBERTS: I know, but you've
23 been emphasizing that the Federal government is going to
24 pay 90 percent of this, 90 percent of this, and it's --
25 it's not something they can take to the bank, because

1 the next day or the next fiscal year, they can decide
2 we're going to pay a lot less. And you, States, are
3 still on the hook, because you -- you don't -- you say
4 it's not an easy choice. We can say -- ask whether it's
5 coercion. You're not going to be able to bail out of
6 Medicaid. You just have to pay more because we're going
7 to pay less.

8 GENERAL VERRILLI: Well, like I said, I -- I
9 agree that it would be a difficult choice in some
10 circumstances. But that is not to say it's coercion as
11 a legal matter or even as a practical matter. And I
12 think it would depend on what the circumstances were on
13 how -- and I think trying to think about how a court
14 would ever answer the question of whether it was
15 coercive, it was too difficult as a practical matter for
16 States --

17 JUSTICE SOTOMAYOR: General, I'm trying
18 to --

19 GENERAL VERRILLI: -- to withdraw.

20 JUSTICE SOTOMAYOR: -- go back to that.
21 Because Justice Kennedy asked you whether there is -- I
22 think he said it's -- it's coercion if no one can be
23 politically accountable. I'm not sure how that could be
24 practically politically accountable, because almost
25 every gift -- if the terms are attractive, it would be

1 an unattractive political alternative to turn it down.

2 Dole itself was one of those cases. I think
3 every State raised the drinking age to 21; correct?

4 GENERAL VERRILLI: Yes, Justice Sotomayor,
5 and this argument was raised in Dole, and the Court
6 rejected it as a --

7 JUSTICE SOTOMAYOR: I guess my point is that
8 political accountability has two components: What can I
9 do if I like something, and what can I do if I don't
10 like something. And if people really like something
11 like Medicaid, they were not going to let you drop it,
12 correct.

13 GENERAL VERRILLI: Well, the citizens of the
14 State, but that's the citizen of the State acting --

15 JUSTICE SOTOMAYOR: Exactly. That's the
16 whole point that's their choice, right?

17 GENERAL VERRILLI: -- in the capacity of the
18 citizens of the State. And I think that's why I get --
19 try to get back to the point, that's why I think this is
20 wrong to think about this as coercion, because this is a
21 program that works effectively for the citizens of the
22 State, and States' governments -- and States governments
23 think that and that's why it has expanded the way it has
24 expanded, because it's providing an essential service
25 for millions of needy citizens in these States. It's

1 providing access to health care that they would not
2 otherwise have.

3 CHIEF JUSTICE ROBERTS: You mentioned the --
4 the Dole case. Now, what was the -- the threat in that
5 case, raise your drinking age to 21 -- 21 or what?

6 GENERAL VERRILLI: Or lose a percentage of
7 your highway funds.

8 CHIEF JUSTICE ROBERTS: Do you remember the
9 percentage?

10 GENERAL VERRILLI: Seven percent, yes.

11 CHIEF JUSTICE ROBERTS: Yes. It's a pretty
12 small amount. That is really apples and oranges when
13 you are talking about lose all of your Medicaid funds or
14 lose -- I thought it was 5, but 7 -- 7 percent of your
15 highway funds.

16 GENERAL VERRILLI: It's -- I think I agree
17 with Your Honor, that it's -- that it's different, but I
18 don't think that that makes coercion as -- as a legal
19 matter. As I said, I think that this is a situation in
20 which the -- if the States -- is it -- I'm saying it
21 won't be an easy choice, but the States made the choice,
22 they have made the choice. And --

23 JUSTICE SOTOMAYOR: They made a choice with
24 the stimulus bill, didn't they? Some governors rejected
25 the stimulus bill --

1 GENERAL VERRILLI: That is -- that's
2 correct, Justice Sotomayor.

3 JUSTICE SOTOMAYOR: -- and some of -- some
4 of their congressional or legislative processes
5 overturned that --

6 GENERAL VERRILLI: That's right.

7 JUSTICE SOTOMAYOR: -- and others supported
8 it. The percentages were smaller, but it's always the
9 preference of the voters as to what they want, isn't it?

10 GENERAL VERRILLI: That is correct.

11 CHIEF JUSTICE ROBERTS: What was the threat
12 in the stimulus bill, what would the State lose?

13 GENERAL VERRILLI: That answer I don't know,
14 Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Would anything be
16 taken away or would it just lose the opportunity to get
17 the money?

18 GENERAL VERRILLI: I don't know the answer
19 to that. I don't know the answer to that.

20 But if I may just say in conclusion that --
21 I would like to take half a step back here, that this
22 provision, the Medicaid expansion that we are talking
23 about this afternoon, and the provisions we have talked
24 about yesterday, we have been talking about them in
25 terms of their effect as measures that solve problems,

1 problems in the economic marketplace, that have resulted
2 in millions of people not having health care because
3 they can't afford insurance.

4 There is an important connection, a profound
5 connection between that problem and liberty. And I do
6 think it's important that we not lose sight of that.
7 That in this population of Medicaid eligible people who
8 will receive health care that they cannot now afford
9 under this Medicaid expansion, there will be millions of
10 people with chronic conditions like diabetes and heart
11 disease, and as a result of the health care that they
12 will get, they will be unshackled from the disabilities
13 that those diseases put on them and have the opportunity
14 to enjoy the blessings of liberty.

15 And the same thing will be true for -- for a
16 husband whose wife is diagnosed with breast cancer and
17 who won't face the prospect of being forced into
18 bankruptcy to try to get care for his wife and face the
19 risk of having to raise his children alone and I can
20 multiply example after example after example.

21 In a very fundamental way this Medicaid
22 expansion, as well as the provisions we discussed
23 yesterday, secure of the blessings of liberty. And I
24 think that that is important as the Court's considering
25 these issues that that be kept in mind. The -- the

1 Congress struggled with the issue of how to deal with
2 this profound problem of 40 million people without
3 health care for many years, and it made a judgment, and
4 its judgment is one that is, I think, in conformity with
5 lots of experts thought, was the best complex of options
6 to handle this problem.

7 Maybe they were right, maybe they weren't,
8 but this is something about which the people of the
9 United States can deliberate and they can vote, and if
10 they think it needs to be changed, they can change it.
11 And I would suggest to the Court with profound respect
12 for the Court's obligation to ensure that the Federal
13 Government remains a government of enumerated powers,
14 that this is not a case in any of its aspects that calls
15 that into question. That this was a judgment of policy,
16 that democratically accountable branches of this
17 government made by their best lights, and I would
18 encourage this Court to respect that judgment and ask
19 that the Affordable Care Act, in its entirety, be
20 upheld. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, General.

22 Mr. Clement, you have 5 minutes.

23 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

24 ON BEHALF OF THE PETITIONERS

25 MR. CLEMENT: Thank you, Mr. Chief Justice

1 and may it please the Court:

2 Just a few points in rebuttal. First of all
3 we talked a lot about the sort of hallmark of coercion,
4 your money or your life, with somebody with a gun. I
5 would respectfully suggest that it is equally coercive
6 or certainly not uncoercive if I say your money or your
7 life, and by the way, I have discretion as to whether or
8 not I will shoot the gun. I don't think that eliminates
9 the coercion.

10 I also don't think this is a discretion that
11 the Secretary would ever be able to exercise. And the
12 reason is, we disagree on the details, but the Solicitor
13 General and I agree that over the years Congress has had
14 different approaches to expanding Medicare. Sometimes,
15 as in 1972, it makes the expansion voluntary; that's
16 also by the way that happened with the stimulus funds,
17 which were voluntary funds. You didn't lose all your
18 Medicaid funds, which is why 17 States could say no.

19 Sometimes they take the voluntary approach.
20 Sometimes, as in 1984, they take the mandatory approach.
21 If the Secretary exercised the discretion to say you
22 know what, it really isn't reasonable for you to have to
23 give up your funding for the visually impaired and the
24 disabled just to cover these newly eligible people, so
25 we will make it voluntary; we'll make that

1 discretionary -- that would essentially be creating --
2 converting a 1984 amendment approach to a 1972 amendment
3 approach, and I just don't think that is the kind of
4 discretion that the Secretary has, with all due respect.

5 Now moving on to the next point,
6 Justice Alito, your hypothetical I think aptly captures
7 the effect on this, based on the fact that these tax
8 dollars are being taken from the State's tax base, and
9 it's not like Steward Machine, where the Federal
10 Government would say, and oh, by the way, if you don't
11 take the option we are giving you, we are going to have
12 a Federal substitute that will go in and we will take
13 care of the unemployed in your States.

14 Here if you don't take this offer we are
15 giving you, your tax dollars will fund the other 49
16 States and you will get nothing. But of course, this
17 situation is much more coercive even than your
18 hypothetical, because it is tied directly to the
19 mandate. It's also tied to the -- to participation in
20 the preexisting program. So it is as if there was yet
21 another program for post-secondary education; they gave
22 them exactly your option -- option -- and then they also
23 said, oh, and by the way; you not only -- not get these
24 funds, but you lose the post-secondary fund as well.

25 It's really hard to understand tying the

1 preexisting participation in the program as anything
2 other than coercive. The Solicitor General makes a lot
3 of the fact that there are optional benefits under this
4 program. Well, guess what? After the Medicaid
5 expansion there will be a lot less opportunity for the
6 States to exercise those options, because one of the
7 things that the expansion does -- precisely because the
8 expansion is designed to convert Medicaid into a program
9 that satisfies the requirement of the minimum essential
10 cover of the individual mandate, things that used to be
11 voluntary will no longer be voluntary. The perfect
12 example is prescription coverage. It's a big part of
13 the benefits that some States but not all provide
14 voluntarily now. It will no longer be voluntary after
15 the expansion, because the Federal Government has deemed
16 that prescription drugs to be part of the minimal
17 essential health coverage that everybody in this country
18 must have after the mandated date. So that option that
19 the State has is being removed by the expansion itself.

20 The Chief Justice made the point --

21 JUSTICE GINSBURG: Mr. Clement, may I ask
22 one question about the bottom line in this case? It
23 sounds to me like everything you said would be to the
24 effect of, if Congress continued to do things on a
25 voluntary basis, so we are getting these new eligibles,

1 and say States, you can have it or not, you can preserve
2 the program as it existed before, you can opt into this.

3 But you are not asking the Court as relief
4 to say, well, that's how we -- we -- that's how we cure
5 the constitutional infirmity; we say this has to be on a
6 voluntary basis. Instead, you are arguing that this
7 whole Medicaid addition, that the whole expansion has to
8 be nullified; and moreover, the entire health care act.
9 Instead of having the easy repair, you say that if we
10 accept your position, everything falls.

11 MR. CLEMENT: Well, Justice Ginsburg, if we
12 can start with the common ground that there is a need
13 for repair because there is a coercion doctrine and this
14 statute is coercion, then we are into the question of
15 remedy. And we do think, we do take the position that
16 you describe in the remedy, but we would be certainly
17 happy if we got something here, and we got a recognition
18 that the coercion doctrine exists; this is coercive; and
19 we get the remedy that you suggest in the alternative.

20 Let me just finish by saying I certainly
21 appreciate what the Solicitor General says, that when
22 you support a policy, you think that the policy spreads
23 the blessings of liberty. But I would respectfully
24 suggest that it's a very funny conception of liberty
25 that forces somebody to purchase an insurance policy

1 whether they want it or not. And it's a very strange
2 conception of federalism that says that we can simply
3 give the States an offer that they can't refuse, and
4 through the spending power which is premised on the
5 notion that Congress can do more because it's voluntary,
6 we can force the States to do whatever we tell them to.
7 That is a direct threat to our federalism.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Clement. And thank you, General Verrilli, Mr. Kneedler,
11 Mr. Carvin, Mr. Katsas, and in particular, of course,
12 Mr. Long and Mr. Farr.

13 The case is submitted.

14 (Whereupon, at 2:24 p.m., the case in the
15 above-entitled matter was submitted.)

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