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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will continue
4 argument this afternoon in Case 11-400, Florida v. The
5 Department of Health and Human Services.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

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

11 The constitutionality of the Act's massive
12 expansion of Medicaid depends on the answer to two
13 related questions. First, is the expansion coercive?
14 And, second, does that coercion matter?

15 JUSTICE KAGAN: Mr. Clement, can I ask you
16 a -- just a matter of clarification? Would you be
17 making the same argument if, instead of the Federal
18 Government picking up 90 percent of the cost, the
19 Federal Government picked up 100 percent of the cost?

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

23 JUSTICE KAGAN: The exact same argument.
24 So -- so, that really reduces to the question of why is
25 a big gift from the Federal Government a matter of

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

8 MR. CLEMENT: Well, Justice Kagan, let me --
9 I mean, I eventually want to make the point where, even
10 if you had a standalone program that just gave
11 100 percent, just 100 percent boatload, nothing but boatload --

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

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

15 JUSTICE KAGAN: Yes, you do make that argument
16 in your brief, just a standalone program, a boatload of
17 money, no extraneous conditions, no matching funds, is
18 coercive?

19 MR. CLEMENT: It is. But before I make that
20 point, can I simply say that you built into your
21 question the idea that there are no -- no conditions.
22 And, of course, when you first asked, it was what about
23 the same program with 100 percent matching on the newly
24 eligible mandatory individuals, which is how the statute
25 refers to them. And that would have a very big

1 condition. And the very big condition is that the
2 States, in order to get that new money, they would have
3 to agree not only to the new conditions, but the
4 government here is -- the Congress is leveraging their
5 entire prior participation --

6 JUSTICE KAGAN: Let me give you a
7 hypothetical, Mr. Clement.

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

9 JUSTICE KAGAN: Now, suppose I'm an
10 employer, and I see somebody I really like, and I want
11 to hire that person. And I say I'm going to give you
12 \$10 million a year to come work for me. And the person
13 says, well, I -- you know, I've never been offered
14 anywhere approaching \$10 million a year. Of course, I'm
15 going to say yes to that.

16 Now, we would both be agreed that that's not
17 coercive, right?

18 MR. CLEMENT: Well, I guess I'd want to know
19 where the money came from --

20 (Laughter.)

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

23 JUSTICE KAGAN: Wow. Wow.

24 I'm offering you \$10 million a year to come
25 work for me, and you're saying that this is anything but

1 a great choice?

2 MR. CLEMENT: Sure. If I told you,
3 actually, it came from my own bank account. And that's
4 what's really going on here, in part --

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

6 MR. CLEMENT: -- and that's why it's not
7 simply a matter of saying --

8 JUSTICE KAGAN: Mr. Clement, can that
9 possibly be? When a taxpayer pays taxes to the Federal
10 Government, the person is acting as a citizen of the
11 United States. When a taxpayer pays taxes to New York,
12 a person is acting as a citizen of New York. And New
13 York could no more tell the Federal Government what to
14 do with the Federal Government's money than the Federal
15 Government can tell New York what to do with the monies
16 that New York is collecting.

17 MR. CLEMENT: Right. And if New York and
18 the United States figured out a way to tax individuals
19 at greater than 100 percent of their income, then maybe
20 you could just say it's two separate sovereigns, two
21 separate taxes. But, we all know that in the real
22 world, that to the extent the Federal Government
23 continues to increase taxes, that decreases the ability
24 of the States to tax their own citizenry, and it's a
25 real tradeoff.

1 JUSTICE SOTOMAYOR: Is that a limit on the
2 Federal Government's power to tax?

3 MR. CLEMENT: What's that?

4 JUSTICE SOTOMAYOR: Are you suggesting that
5 at a certain point, the States would have a claim
6 against the Federal Government raising their taxes
7 because somehow, the States will feel coerced to lower
8 their tax rate?

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

13 JUSTICE SOTOMAYOR: Now, counsel, what
14 percentage does it become coercive? Meaning, as I look
15 at the figures I've seen from amici, there are some
16 States for whom the percentage of Medicaid funding to
17 their budget is close to 40 percent, but there are
18 others that are less than 10 percent.

19 And you say, across the board this is
20 coercive because no State, even at 10 percent, can give
21 it up. What -- what's the percentage of big gift that
22 the Federal Government can give? And -- because what
23 you're saying to me is, for a bankrupt State, there's no
24 gift the Federal Government could give them ever,
25 because it can only give them money without

1 conditions --

2 MR. CLEMENT: No, Justice Sotomayor --

3 JUSTICE SOTOMAYOR: -- no matter how poorly
4 the State is run, no matter how much the Federal
5 Government doesn't want to subsidize abortions or
6 doesn't want to subsidize some other State obligation,
7 the Federal Government can't give them 100 percent of
8 their needs.

9 MR. CLEMENT: And -- and Justice Sotomayor,
10 I'm really saying the opposite, which is not that every
11 gift is coercive, no matter what the amount, no matter
12 how small. I'm saying essentially the opposite, which
13 is there has to be some limit. There has to be some
14 limit on coercion.

15 And the reason is quite simple, because this
16 Court's entire spending power jurisprudence is premised
17 on the notion that spending power is different, and that
18 Congress can do things pursuant to the spending power
19 that it can't do pursuant to its other enumerated powers
20 precisely because the programs are voluntary. And if
21 you relax that assumption that the programs are
22 voluntary, and you're saying they're coercion, then you
23 can't have the spending power jurisprudence that's different.

24 JUSTICE SOTOMAYOR: So, what makes them
25 coercive; that the State doesn't want to face its voters

1 and say, instead of taking 10, 20, 30, 40 percent of the
2 government's offer of our budget and paying for it
3 ourselves and giving up money for some other function?
4 That's what makes it coercive --

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

6 JUSTICE SOTOMAYOR: -- that the State is
7 unwilling to say that?

8 MR. CLEMENT: Well, maybe -- maybe I can
9 talk about what makes it coercive by talking about the
10 actual statute at issue here and focusing on what I
11 think are the three hallmarks of this statute that make
12 it uniquely coercive.

13 One of them is the fact that this statute is
14 tied to the decidedly nonvoluntary individual mandate.
15 And that makes this unique, but it makes it significant,
16 I think.

17 I'll continue. I thought you had a
18 question. I'm sorry.

19 The second factor, of course, is the fact
20 that Congress here made a distinct and conscious
21 decision to tie the State's willingness to accept these
22 new funds, not just to the new funds, but to their
23 entire participation in the statute, even though the
24 coverage for these newly eligible individuals is
25 segregated from the rest of the program. And this is

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

3 JUSTICE GINSBURG: Isn't that true of every
4 Medicaid increase, that each time -- I mean, and this
5 started quite many years ago, and Congress has added
6 more people and given more benefits -- and every time,
7 the condition is, if you want the Medicaid program, this
8 is the program. Take it or leave it.

9 MR. CLEMENT: No, Justice Ginsburg, this is
10 distinct in two different directions. One is, in some
11 of the prior expansions of the program, but not all,
12 Congress has made covering newly eligible individuals
13 totally voluntary. If the States want to cover the
14 newly eligible individuals, they'll get additional
15 money; but if they don't, they don't risk any of their
16 existing participation programs.

17 The 1972 program was a paradigm of that. It
18 created this 209(b) option for States to participate.
19 This Court talked about it in the Gray Panthers case.

20 There were other expansions that have taken
21 place, such as the 1984 expansions, where they didn't
22 give States that option. But here's the second
23 dimension in which this is distinct, which is here,
24 Congress has created a separate part of the program for
25 the newly eligible mandatory individuals. That's what

1 they called them.

2 And those individuals are treated separately
3 from the rest of the program going forward forever.
4 They are going to be reimbursed at a different rate from
5 everybody who was covered under the preexisting program.

6 Now, in light of that separation by Congress
7 itself of the newly eligible individuals from the rest
8 of the program, it's very hard to understand Congress's
9 decision to say, look, if you don't want to cover these
10 newly eligible individuals, you don't just not get the
11 new money, you don't get any of the money under the --

12 JUSTICE BREYER: Where does it say that?

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

14 MR. CLEMENT: It says it at -- well, it --
15 where does it say what, Justice Breyer?

16 JUSTICE BREYER: What you just said. You
17 said Congress said, if you don't take the new money to
18 cover the new individuals, you don't get any of the old
19 money that covers the old individuals.

20 That's what I heard you say.

21 MR. CLEMENT: Right. And then --

22 JUSTICE BREYER: And where does it say that?

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

25 JUSTICE BREYER: Where?

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

3 JUSTICE BREYER: Where is it in your brief?

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

5 JUSTICE BREYER: In the blue brief?

6 MR. CLEMENT: Blue brief.

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

8 MR. CLEMENT: And -- and this makes not the
9 point about the funding cutoff. This makes the point
10 just that these newly eligible individuals are really
11 treated separately --

12 JUSTICE BREYER: Okay --

13 MR. CLEMENT: -- forevermore.

14 JUSTICE BREYER: I want the part about the
15 funding cutoff.

16 MR. CLEMENT: Right. And there,
17 Justice Breyer --

18 JUSTICE BREYER: And that cite section is
19 what?

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

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

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

24 JUSTICE BREYER: And I'll tell you what I
25 have, what I have in front of me, what it says.

1 MR. CLEMENT: Right.

2 JUSTICE BREYER: And it's been in the
3 statute since 1965.

4 MR. CLEMENT: Exactly.

5 JUSTICE BREYER: And the cite I have is
6 42 U.S.C. Section 1396(c).

7 So are we talking about the same thing?

8 MR. CLEMENT: I -- if that's the -- if that
9 is the provision that gives the Secretary --

10 JUSTICE BREYER: Yes. Okay.

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

12 JUSTICE BREYER: And here's what it says at
13 the end.

14 MR. CLEMENT: -- the authority to cut off
15 participation in the program, yes.

16 JUSTICE BREYER: It says, "The Secretary
17 shall notify the State agency" -- this is if they don't
18 comply -- "that further payments will not be made to the
19 State, or in his discretion, that payments will be
20 limited to categories under or parts of the State plan
21 not affected by such failure, which it repeats until the
22 Secretary is satisfied that he shall limit payments to
23 categories under or parts of the State plan not affected
24 by such failure."

25 So reading that in your favor, I read that

1 to say it's up to the Secretary whether, should a State
2 refuse to fund the new people, the Secretary will cut
3 off funding for the new people, as it's obvious the
4 State doesn't want it, and whether the Secretary can go
5 further. I also should think -- I could not find one
6 case where the Secretary ever did go further, but I also
7 would think that the Secretary could not go further
8 where going further would be an unreasonable thing to
9 do -- since government action is governed by the
10 Administrative Procedure Act, since it's governed by the
11 general principle, it must always be reasonable.

12 So I want to know where this idea came from
13 that should State X say I don't want the new money, that
14 the Secretary would or could cut off the old money?

15 MR. CLEMENT: And Justice Breyer, here's
16 where it comes from, which is from the very beginning of
17 this litigation, we've pointed out that what's coercive
18 is not the absolute guarantee that the Secretary could
19 cut off every penny, but the fact that she could.

20 JUSTICE BREYER: All right. Now, let me
21 relieve you of that concern, and tell me how I --
22 whether I have -- that a basic principle of
23 administrative law -- indeed, all law -- is that the
24 government must act reasonably. And should a Secretary
25 cut off more money than the Secretary could show was

1 justified by being causally related to the State's
2 refusal to take the new money, you would march into
3 court with your clients and say, Judge, the Secretary
4 here is acting unreasonably. And I believe there is
5 implicit in this statute, as there is explicit in the
6 ADA, that any such cutoff decision must be reasonable.

7 Now, does that relieve you of your fear?

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

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

12 (Laughter.)

13 MR. CLEMENT: Well, but here's the reason.
14 Here's the reason -- Justice Breyer, it doesn't.

15 One is -- I mean, I don't know the opinion
16 to cite for that proposition.

17 Second is, I've been -- we've been making in
18 this litigation since the very beginning this basic
19 point, the government has had opportunities at every
20 level of this system, and I suppose they'll have an
21 opportunity today to say: Fear not, States. If you
22 don't want to take the new conditions, all you will lose
23 is the new money. And when we --

24 JUSTICE BREYER: What I said -- I said
25 because it could be, you know, given the complexity of

1 the Act, that there is some money that would be saved in
2 the program if the States take the new money, and if
3 they don't take the new money, there is money that is
4 being spent that wouldn't otherwise be spent. There
5 could be some pile like that.

6 It might be that the Secretary could show it
7 was reasonable to take that money away from the States,
8 too --

9 JUSTICE SCALIA: Mr. Clement --

10 JUSTICE BREYER: -- but my point is, you
11 have to show reasonableness before you can act.

12 JUSTICE SCALIA: -- do -- do you agree -- do
13 you agree that the government has to act reasonably?

14 MR. CLEMENT: You know --

15 JUSTICE SCALIA: Do -- do we strike down
16 unreasonable statutes? My God!

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

19 JUSTICE SCALIA: The Executive has to act
20 reasonably, that's certain, in implementing a statute;
21 but if the statute says, in so many words, that the
22 Secretary can strike the whole -- funding for the whole
23 program, that's the law, unreasonable or not, isn't it?

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

1 JUSTICE BREYER: Yeah, but I have a
2 number -- all right.

3 MR. CLEMENT: And if I could just add one
4 thing just to the discussion, is the point that, you
5 know, this is not all hypothetical. I mean, in -- there
6 was a record in the district court, and there is an
7 Exhibit 33 to our motion for summary judgment. It's
8 not -- it's not in the joint appendix. We can lodge it
9 with the Court if they'd -- if you'd like.

10 But it's a letter that's in the record in
11 this litigation, and it's a letter from the Secretary to
12 Arizona, when Arizona floated the idea that it would
13 like to withdraw from the CHIP program, which is a
14 relatively small part of the whole program.

15 And what Arizona was told by the Secretary
16 is that if you withdraw from the CHIP program, you risk
17 losing \$7.8 billion, the entirety of your Medicaid
18 participation. So, this is not something that we've
19 conjured up --

20 JUSTICE BREYER: All right --

21 JUSTICE KAGAN: Mr. Clement, let's let
22 this --

23 JUSTICE BREYER: To make you feel a little
24 better, I want to pursue this for 1 more minute.

25 There are cases, and many, of which

1 Justice Scalia knows as well, which use -- Holly Hill,
2 uses the same word as this statute: "In the Secretary's
3 discretion." And in those cases, this Court has said
4 that doesn't mean the Secretary can do anything that he
5 or she wants, but rather, they are limited to what is
6 not arbitrary, capricious, and abuse of discretion, in
7 interpreting statutes, in applying those statutes, et
8 cetera.

9 End of my argument. End of my question.

10 Respond as you wish.

11 (Laughter.)

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

19 And think about what that is --

20 JUSTICE SOTOMAYOR: May I ask you a
21 question, Mr. Clement? Do you think that the Federal
22 Government couldn't, if it chose -- Congress -- say:
23 The system doesn't work. We're just simply going to
24 rehaul it. It's not consistent with how -- what we want
25 to accomplish. We're just going to do away with the

1 system and start a new health care plan of some sort.
2 And, States, you can take the new plan, you can leave
3 them. We're going to give out 20 percent less, maybe
4 20 percent more, depending on what Congress chooses.

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

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

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

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

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

1 other services they provide. That's a political choice
2 of whether they choose to do that or not.

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

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

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

23 JUSTICE GINSBURG: Mr. Clement, may I -- may
24 I ask you -- question another line?

25 You represent, what, 26 States?

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

3 JUSTICE GINSBURG: And we're also told that
4 there are other States that like this expansion, and
5 they are very glad to have it.

6 The relief that you're seeking is to say the
7 whole expansion is no good, never mind that there are
8 States that say we don't feel coerced, we think this is
9 good.

10 You are -- you're saying that because you
11 represent a sizeable number of States, you can destroy
12 this whole program, even though there may be as many
13 States that want it, that don't feel coerced, that
14 say -- think this is a good thing?

15 MR. CLEMENT: Justice Ginsburg, that's
16 right, but that shouldn't be a terrible concern, because
17 if Congress wants to do what it did in 1972 and pass a
18 statute that makes the expansion voluntary, every State
19 that thinks that this is a great deal can sign up.

20 What's telling here, though, is 26 States
21 who think that this is a bad deal for them actually are
22 also saying that they have no choice but to take this
23 because they can't afford to have their entire
24 participation in this 45-year-old program wiped out, and
25 they have to go back to square one and figure out how

1 they're going to deal with the visually impaired in
2 their State, the disabled in their State -- of course --

3 JUSTICE SCALIA: Mr. Clement, I didn't take
4 the time to figure this out, but maybe you did. Is
5 there any chance that all 26 States opposing it have
6 Republican governors, and all of the States supporting
7 it have Democratic governors?

8 Is that possible?

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

11 JUSTICE SCALIA: Yes. Yes.

12 (Laughter.)

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

1 want.

2 Why doesn't your theory -- if your theory is
3 any good, why doesn't it work anytime something --
4 someone receives something that's too good to give up?

5 MR. CLEMENT: Well, Justice Ginsburg,
6 there's two reasons that might be different. One is,
7 this whole line of coercion only applies -- is only
8 relevant, really, when Congress tries to do something
9 through the spending power it couldn't do directly.

10 So if Congress tried to impose Title IX
11 directly, I guess the question for this Court would be
12 whether or not Section 5 of the Fourteenth Amendment
13 allowed Congress to do that. I imagine you might think
14 that it did, and I imagine some of your colleagues might
15 take issue with that, but that's -- that's the nature of
16 the question.

17 So, one way around that would be, if
18 Congress can do it directly, you don't even have to ask
19 whether there's something special about the spending
20 power. That's how this Court resolved, for example, the
21 FAIR case about funding to -- to colleges.

22 JUSTICE GINSBURG: Where on your -- I'm
23 trying to understand your coercion theory. I know that
24 there are cases of ours that have said there's a line
25 between pressure and coercion, but we have never had, in

1 the history of this country or the Court, any Federal
2 program struck down because it was so good that it
3 becomes coercive to be in it.

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

12 JUSTICE GINSBURG: Let's take -- let's take
13 public colleges.

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

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

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

1 you asked, well, you know, I mean, where's the case that
2 says that we've crossed that line? And this is that
3 case, I would respectfully say --

4 JUSTICE BREYER: And isn't the covenant
5 going to apply, as well, to the 1980 extension to
6 children 0 to 6 years old, 1990 requiring the extension
7 for children up to 18? All those prior extensions, to
8 me, seem just as big in amount, just about as big in the
9 number of people coming on the rolls, and they all are
10 governed by precisely the same statute that you're
11 complaining of here, which has been in the law since
12 '65.

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

19 The one major difference is the size of the
20 program. I mean, the expansion of Medicaid since 1984
21 is really breathtaking. Medicaid, circa 1984, the
22 Federal spending to the States was a shade over
23 \$21 billion. Right now, it's \$250 billion, and that's
24 before the expansion under this statute.

25 JUSTICE KAGAN: Well, if you are right,

1 Mr. Clement, doesn't that mean that Medicaid is
2 unconstitutional now?

3 MR. CLEMENT: Not necessarily,
4 Justice Kagan. And, again, it's because we're not here
5 with a one trick pony. And this -- one of the
6 factors -- we point you to three factors that make this
7 statute uniquely coercive. One of them is the sheer
8 size of this program.

9 And, you know, if you want a -- if you want
10 a gauge on the size of this program, the best place to
11 look is the government's own number. Footnote 6, page 10
12 of their brief.

13 JUSTICE KAGAN: So, when does a program
14 become too big? I'd want you to -- give me a dollar
15 number.

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

18 JUSTICE KAGAN: I thought \$1 trillion --

19 JUSTICE BREYER: I'll tell you this number,
20 which I did look up, that the amount, approximately, if
21 you look into it -- as a percentage of GDP, it's big,
22 but it was before this somewhere about 2-point-something
23 percent, fairly low, of GDP. It'll go up to something a
24 little bit over 3 percent of GDP. And now go look at
25 the comparable numbers, which I did look at, with the

1 expansion that we're talking about before.

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

7 If I'm right on those numbers or even
8 roughly right -- I don't guarantee them -- then would
9 you have to say, well, indeed, Medicaid has been
10 unconstitutional since 1964.

11 And if not, why not?

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

15 JUSTICE SCALIA: What are your second and
16 third? I'm on pins and needles to hear your second --
17 (Laughter.)

18 MR. CLEMENT: Yes, exactly.

19 Well, one is the sheer size. Two is the
20 fact that this statute uniquely is tied to an individual
21 mandate which is decidedly nonvoluntary. And three is
22 the fact that they've leveraged the prior participation
23 in the program, notwithstanding that they've broken this
24 out as a separately segregated fund going forward, which
25 is not to prove --

1 JUSTICE KAGAN: So, on the third -- on the
2 third, suppose you have the current program and Congress
3 wakes up tomorrow and says we think that there's too
4 much fraud and abuse in the program, and we're going to
5 put some new conditions on how the States use this money
6 so we can prevent fraud and abuse, and we're going to
7 tie it to everything that's been there initially.

8 Unconstitutional?

9 MR. CLEMENT: No, I think that is
10 constitutional because I think that's something that
11 Congress could do directly. It wouldn't have to limit
12 that to the spending program. And I think 18 U.S.C. 666
13 is -- is a statute -- you know, it may -- it's in the
14 criminal code. It may be tied to spending, but I think
15 that's -- that's a provision that I don't think its
16 constitutionality's called into question.

17 JUSTICE KAGAN: I guess I don't get the
18 idea. I mean, Congress can legislate fraud and abuse
19 restrictions in Medicaid, and Congress can legislate
20 coverage expansions in Medicaid.

21 MR. CLEMENT: Well, Justice Kagan, I think
22 there's a difference, but if I'm wrong about that and
23 the consequence is that Congress has to break Medicaid
24 down into remotely manageable pieces as opposed to
25 \$3.3 trillion over 10 years before the expansion, I

1 don't think that would be the end of the world. But I
2 really would ask you to focus on specifically what's
3 going on here, which is they take these newly eligible
4 people -- and that's a massive change in the way the
5 program works.

6 These are people who are healthy, childless
7 adults who are not covered in many States. They say,
8 okay, we're going to make you cover those. We're going
9 to have a separate program for how you get reimbursed
10 for that. You get reimbursed differently from all the
11 previously eligible individuals. But if you don't take
12 our money, we're going to take away your participation
13 in the program for the visually impaired and the
14 disabled.

15 If I may reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Well, I'm -- I'm not
17 sure my colleagues have exhausted their questions.
18 So --

19 JUSTICE SOTOMAYOR: I guess my greatest
20 fear, Mr. Clement, with your argument is the following:
21 The bigger the problem, the more resources it needs.
22 We're going to tie the hands of the Federal Government
23 in choosing how to structure a cooperative relationship
24 with the States. We're going to say to the Federal
25 Government, the bigger the problem, the less your powers

1 are, because once you give that much money, you can't
2 structure the program the way you want. It's our money,
3 Federal Government. We're going to have to run the
4 program ourself to protect all our interests.

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

6 MR. CLEMENT: Well, if you --

7 JUSTICE SOTOMAYOR: The uninsured are a
8 problem for States only because they, too, politically,
9 just like the Federal Government, can't let the poor
10 die. And so, to the extent they don't want to do that,
11 it's because they feel accountable to their citizenry.
12 And so, if they want to do it their way, they have to
13 spend the money to do it their way, if they don't want
14 to do it the Federal way.

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

19 MR. CLEMENT: Well, Justice Sotomayor, a
20 couple of points. One is, I actually think that sort of
21 misdescribes what happened with Medicaid. I mean,
22 States were, as you suggest, providing for the poor and
23 the visually impaired and the disabled even before
24 Medicaid came along. Then all of a sudden, States --
25 the Federal Government said, look, we'd like to help you

1 with that, and we're going to give you money
2 voluntarily. And then over time, they give more money
3 with more conditions. And now they decide they're going
4 to totally expand the program, and they say that you
5 have to give up even your prior program, where we --
6 first came in and offered you cooperation, we're now
7 going to say you have to give that up if you don't take
8 our new conditions.

9 Secondarily, I do think that our principle
10 is not that when you get past a certain level, it
11 automatically becomes coercive per se. But I do think
12 when you get a program and you're basically telling
13 States that, look, we're going to take away
14 \$3.3 trillion over the next 10 years, that at that
15 point, it's okay to insist that Congress be a little
16 more careful that it not be so aggressively coercive as
17 it was in this statute.

18 And I would simply say that -- we're not
19 here to tell you that this is going to be an area where
20 it's going to be very easy to draw the line. We're just
21 telling you that it's exceptionally important to draw
22 that line, and this is a case where it ought to be easy
23 to establish a beachhead, say that coercion matters, say
24 there's three factors of this particular statute that
25 make it as obviously coercive as any piece of

1 legislation that you've ever seen, and then you will
2 have effectively instructed Congress that there are
3 limits, and you will have laid down some administrable
4 rules.

5 JUSTICE SCALIA: Mr. Clement, the Chief has
6 said I can ask this.

7 CHIEF JUSTICE ROBERTS: He doesn't always
8 check first.

9 (Laughter.)

10 JUSTICE SCALIA: As -- as I recall your --
11 your theory, it is that to determine whether something
12 is coercive, you look to only one side, how much you're
13 threatened with losing or offered to receive. And the
14 other side doesn't matter.

15 I don't think that's realistic. I mean, I
16 think, you know, the -- the old Jack Benny thing, your
17 money or your life, and, you know, he says, "I'm
18 thinking, I'm thinking." It's -- it's funny, because
19 it's no choice. You know? Your life? Again, it's just
20 money. It's an easy choice. No coercion, right? I
21 mean -- right?

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

24 Now, is it -- is it coercive in both
25 situations?

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

2 (Laughter.)

3 JUSTICE SCALIA: Really?

4 JUSTICE BREYER: Knew you would say that.

5 JUSTICE SCALIA: It's a tough choice.

6 And -- and --

7 JUSTICE KENNEDY: I thought you were going
8 to say this statute is your money and your life.

9 (Laughter.)

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

11 JUSTICE BREYER: Which way?

12 MR. CLEMENT: I might have missed something,
13 but both of those seem to be --

14 (Laughter.)

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

17 JUSTICE SCALIA: No, no, no. To say -- to
18 say you're -- when you say you're coerced, it means
19 you've been -- you've been given an offer you can't
20 refuse. Okay? You can't refuse your money or your
21 life. But your life or your wife's, I could refuse that
22 one.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: Mr. Clement, he's not
25 going home tonight.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: No, let's leave the
3 wife out of it.

4 MR. CLEMENT: I was going to say,
5 Mrs. Clement's not going to --

6 JUSTICE SCALIA: No, I'm talking about my
7 life. I'd say take mine, you know?

8 (Laughter.)

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

11 JUSTICE SCALIA: How could we use that
12 example?

13 Forget about it.

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: That's enough
16 frivolity for a while.

17 But I want to make sure I understand where
18 the meaningfulness of the choice is taken away. Is it
19 the amount that's being offered, that it's just so much
20 money, of course you can't turn it down, or is it the
21 amount that's going to be taken away if you don't take
22 what they're offering?

23 MR. CLEMENT: It's both, Your Honor. And I
24 think that that's -- I mean, there really is -- there
25 really is, you know, three strings in this bow. I mean,

1 one is the sheer amount of money here makes it very,
2 very difficult to refuse, because it's not money that,
3 you know, that's come from some -- you know, China or
4 from -- you know, the - the - the export tariffs like in
5 the old day. It's coming from the taxpayers. So,
6 that's part of it.

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

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

22 MR. CLEMENT: With all due respect,
23 Mr. Chief Justice, I don't think we can say that, you
24 know, the States have gotten pretty dependent, so let's
25 call this whole federalism thing off. And I just think

1 it's too important, because, again, the consequence --
2 if you think about it -- if -- the consequence of saying
3 that we're not going to police the coercion line here
4 shouldn't be that well, you know, it's just too hard, so
5 we'll give the Federal Congress unlimited spending
6 power.

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

11 Now, we're not asking you to go that far.
12 We're simply saying that, look, your spending power
13 cases absolutely depend on there being a line between
14 coercion --

15 JUSTICE SOTOMAYOR: But could you tell me --

16 MR. CLEMENT: -- and voluntary action.

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

23 And you said that could be coercion. All
24 right? Doesn't the amount of burden that the State
25 undertakes to meet the Federal obligation count in this

1 equation at all?

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

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

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

20 JUSTICE SOTOMAYOR: You don't really want to
21 go back to that point, do you?

22 MR. CLEMENT: Well, then I'll make that
23 argument on behalf of Texas.

24 (Laughter.)

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

1 my argument depends on, and that's the critical thing.
2 It's one aspect of what makes this statute uniquely
3 coercive.

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

12 JUSTICE KENNEDY: If the inevitable
13 consequence of your position was that the Federal
14 Government could just do this on its own, the Federal
15 Government could have Medicaid, Medicare, and these
16 insurance regulations -- assuming that's true -- then
17 how are the interests of federalism concerned? How are
18 the interests of federalism concerned if, in Florida or
19 Texas or some of the other objecting States, there are
20 huge Federal bureaucracies doing what this bill allows
21 the State bureaucracies to do?

22 I know you've thought about that. I'd just
23 like your answer.

24 MR. CLEMENT: I have, and I would like to
25 elaborate, but the one-word answer is "accountability."

1 If the Federal Government decides to spend
2 money through Federal instrumentalities, and the citizen
3 is hacked off about it, they can bring a Federal
4 complaint to a Federal official working in a Federal
5 agency.

6 And what makes this so pernicious is that
7 the Federal Government knows that the citizenry is not
8 going to take lightly the idea that there are huge, new
9 Federal bureaucracies popping up across the country.
10 And so, they get the benefit of administering this
11 program through State officials, but then it makes it
12 very confusing for the citizen who doesn't like this.
13 Do they complain to the State official because it's
14 being administered by a State official in a State
15 building? Or do they --

16 JUSTICE KAGAN: But, Mr. Clement --

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

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

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

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

3 And I absolutely take your point,
4 Justice Kagan. Cooperative federalism is a beautiful
5 thing. Mandatory federalism has very little to
6 recommend it, because it poses exactly --

7 JUSTICE KAGAN: Cooperative federalism --

8 MR. CLEMENT: -- the kind of
9 accountability --

10 JUSTICE KAGAN: -- does not mean that there
11 are no Federal mandates and no Federal restrictions
12 involved in a program that uses 90 percent here,
13 100 percent Federal money. It means there's flexibility
14 built into the program subject to certain rules that the
15 Federal Government has about how it wishes its money to
16 be used.

17 It's like giving a gift certificate. If I
18 give you a gift certificate for one store, you can't use
19 it for other stores. But still, you can use it for all
20 kinds of different things.

21 MR. CLEMENT: But -- I absolutely agree that
22 if it's cooperative federalism and the States have
23 choices, then that is perfectly okay. But when --
24 that's why voluntariness in coercion is so important.
25 Because if you force a State to participate in a Federal

1 program, then -- I mean, as long as it's voluntary, then
2 a State official shouldn't complain if a citizen
3 complains to the State about the way the State's
4 administering a Federal program that it volunteered to
5 participate in. But at the point it becomes coercive,
6 then it's not fair to tell the citizen to complain to
7 the State official, they had no choice.

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Clement.

18 General Verrilli.

19 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
20 ON BEHALF OF THE RESPONDENTS

21 GENERAL VERRILLI: Mr. Chief Justice, and
22 may it please the Court:

23 The Affordable Care Act's Medicaid expansion
24 provisions will provide millions of Americans with the
25 opportunity to have access to essential health care that

1 they cannot now afford. It is an exercise of the
2 Spending Clause power that complies with all of the
3 limits set forth in this Court's decision in Dole, and
4 the States do not contend otherwise. The States are
5 asking this Court to do something unprecedented, which
6 is to declare this an impermissibly coercive exercise
7 of power.

8 JUSTICE SCALIA: What do you think we --

9 GENERAL VERRILLI: -- of power --

10 JUSTICE SCALIA: -- meant in -- in those --
11 those dicta in -- in several prior cases, where we've
12 said that the Federal Government cannot be coercive
13 through the Spending Clause? What -- what do you think
14 we were -- give -- give us a hypothetical.

15 GENERAL VERRILLI: Yes. First, if I could
16 just try to be a little more precise about it,
17 Justice Scalia, I think the -- what the Court said in
18 Steward Machine and in Dole is that it's possible that
19 you might envision a situation in which there's
20 coercion.

21 JUSTICE SCALIA: Okay.

22 GENERAL VERRILLI: And the courts didn't say
23 much more, but I can think of something.

24 One example I could think of that might
25 serve as a limit would be a Coyle-type situation, in

1 which the condition attached was a -- worked a
2 fundamental transformation in the structure of State
3 government in a situation in which the State didn't have
4 a choice but to accept it. But -- and so --

5 JUSTICE SCALIA: But anything else, so long
6 as you --

7 GENERAL VERRILLI: Well, but I think --

8 JUSTICE SCALIA: -- you have to have --
9 you're talking about situations where they have to
10 locate their statehouse in some other city --

11 GENERAL VERRILLI: Or a unicameral
12 legislature, or something like that.

13 JUSTICE SCALIA: -- and they have no choice.
14 But short of that, they can make the State do anything
15 at all?

16 GENERAL VERRILLI: Well, no. Dole -- the
17 Dole conditions are real. The germaneness condition in
18 Dole is real, for example. And so -- so those --

19 CHIEF JUSTICE ROBERTS: But none of those
20 have addressed the coercion question.

21 GENERAL VERRILLI: Right.

22 CHIEF JUSTICE ROBERTS: So, do you think it
23 would be all right for the Federal Government to say,
24 same program: States, you can take this or you can
25 leave it, but if you don't take it, you lose every last

1 dollar of Federal funding for every program?

2 GENERAL VERRILLI: I think that would raise
3 a germaneness issue, Mr. Chief Justice, but it's not
4 what we --

5 CHIEF JUSTICE ROBERTS: But there's no
6 coercion question at all?

7 GENERAL VERRILLI: -- have here.

8 Well, but I think -- I think -- I think
9 they're related. I think that the germaneness inquiry
10 in Dole really gets at coercion in some circumstances,
11 and that's why I think they are related. But we don't
12 have that here.

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

14 CHIEF JUSTICE ROBERTS: No, I know we don't
15 have that here. How does germaneness get -- get
16 to coercion?

17 GENERAL VERRILLI: Well, because it gets to
18 be harder to see what --

19 CHIEF JUSTICE ROBERTS: That's germaneness;
20 there's no --

21 GENERAL VERRILLI: -- what the connection is
22 between getting you to do A and the money you're getting
23 for --

24 CHIEF JUSTICE ROBERTS: So, it fails because
25 it's not germane. But you're saying it would not fail

1 because it was coercive?

2 GENERAL VERRILLI: Well, I think that -- as
3 I said, I think they're really trying to get at the same
4 thing. And I -- but I do think it's quite different
5 here. And I -- I would like to, if I could, take up
6 each of the --

7 CHIEF JUSTICE ROBERTS: No, no. I know
8 it's -- I know it's different here. I'm just trying to
9 understand if you accept the fact or regard it as true
10 that there is a coercion limit, or that once the Federal
11 Government -- once you're taking Federal Government
12 money, the Federal Government money -- can take it back,
13 and that doesn't affect the voluntariness of your
14 choice?

15 Because it does seem like a serious problem.
16 We're assuming, under the Spending Clause the Federal
17 Government cannot do this. Under the Constitution it
18 cannot do this. But if it gets the State to agree to
19 it, well then it can.

20 And the concern is, if you can say, if you
21 don't agree to this you lose all your money, whether
22 that's really saying the -- the limitation in the
23 Constitution is -- is largely meaningless.

24 GENERAL VERRILLI: Well, but I -- but I
25 don't think that this is a case that presents that

1 question, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: No, no, I know. I'm
3 just -- I know this -- I don't know if I'll grant it to
4 you or not, but let's assume it's not this case.

5 Do you recognize any limitation on that
6 concern?

7 GENERAL VERRILLI: Well, I think the Court
8 has said, in Steward Machine and Dole, that this is
9 something that needs to be considered in an appropriate
10 case, and we acknowledge that. But I do think it's so
11 dependent on the circumstances that it's very hard to
12 say in the abstract with respect to a particular program
13 that there is a --

14 JUSTICE SCALIA: You can't imagine a case in
15 which it is both germane and yet coercive, is what
16 you're saying. There is no such case as far as you
17 know.

18 GENERAL VERRILLI: Well, I'm -- I'm not
19 prepared to -- to say right here that I can -- that --
20 I'm not prepared to give that decision.

21 JUSTICE SCALIA: I wouldn't think that
22 that's a surprise question. I mean, you know --

23 GENERAL VERRILLI: Well, I -- Congress has
24 authority to act and --

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

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

2 (Laughter.)

3 GENERAL VERRILLI: But I do think -- but I
4 do think -- I really do think that it's important to
5 look at this -- an issue like this, if you're going to
6 consider it, it's got to be considered in the factual
7 context --

8 JUSTICE ALITO: Well, let me give --

9 GENERAL VERRILLI: -- in which it arises.

10 JUSTICE ALITO: -- you a factual context.

11 Let's say Congress says this to the States: We -- we've
12 got great news for you. We know that your expenditures
13 on education are a huge financial burden, so we're going
14 to take that completely off your shoulders. We are
15 going to impose a special Federal education tax which
16 will raise exactly the same amount of money as all of
17 the States now spend on education, and then we are going
18 to give you a grant that is equal to what you spent on
19 education last year.

20 Now, this is a great offer and we think you
21 will take it, but of course, if you take it, it's going
22 to have some conditions because we're going to set rules
23 on teacher tenure, on collective bargaining, on
24 curriculum, on textbooks, class size, school calendar,
25 and many other things. So, take it or leave it.

1 If you take it, you have to follow our rules
2 on all of these things. If you leave it, well, then
3 you're going to have to fine -- you are going to have to
4 tax your citizens, they're going to have to pay the
5 Federal education tax. But on top of that, you're going
6 to have to tax them for all of the money that you're now
7 spending on education, plus all of the Federal funds
8 that you were previously given.

9 Would that be -- would that reach the
10 point -- would that be the point where financial
11 inducement turns into coercion?

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

13 JUSTICE ALITO: No?

14 GENERAL VERRILLI: -- because they do -- the
15 States do have a choice there, especially as a -- as a
16 going-in proposition. I mean, the argument the States
17 are making here is not that they're -- that -- this is
18 not a going-in proposition. Their -- their argument is
19 that they're -- they are in a position where they don't
20 have a choice because of everything that's happened
21 before. But --

22 JUSTICE ALITO: You might be right. But if
23 that's the case, then there's nothing left --

24 GENERAL VERRILLI: Well, but as a --

25 JUSTICE ALITO: -- of federalism.

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

11 JUSTICE SCALIA: I would have thought there
12 was a serious political strain -- constraint on the
13 individual mandate, too, but that didn't work.

14 What you call serious political constraints
15 sometimes don't work.

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

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

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

19 CHIEF JUSTICE ROBERTS: Could you give me
20 some assurance? We heard the question about whether or
21 not the Secretary would use this authority to the extent
22 available. Are there circumstances where you are willing
23 to say that that would not be permissible? I'm thinking
24 of the Arizona letter, for example. I mean, if I had
25 the authority and I was in that position, I would use it

1 all the time. You might -- you want some little change
2 made? Well, guess what, I can take away all your money
3 if you don't make it. I win.

4 Every time, it seems that that would be the
5 case.

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

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

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

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

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

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

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

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

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

9 JUSTICE SCALIA: Of course not.

10 CHIEF JUSTICE ROBERTS: Of course, no State
11 is going say, okay, go ahead, make my day, take it away.
12 They're going to -- they're going to give in.

13 GENERAL VERRILLI: If we could go to the
14 situation we have here, Mr. Chief Justice, this -- with
15 respect to the Medicaid expansion, the States' argument
16 is, as they've said it in their briefs, they
17 articulated a little bit different this morning -- this
18 afternoon. But as they said it in their briefs was it's
19 not what you stand to gain, but what you stand to lose.

20 But I think an important thing in evaluating
21 that argument in this context is fully 60 percent of
22 Medicaid expenditures in this country are based on
23 optional choices. And I don't mean by that the optional
24 choices of the States to stay in the program in '84 or
25 '88 or '89. But -- but States are given choices to

1 expand the beneficiaries beyond the Federal minimum and
2 to expand services beyond the Federal minimum.

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

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

1 Wisconsin did. So, that is a -- that's a provision I
2 think that does a significant degree less than my
3 friends on the other side have suggested in terms of --
4 in terms of its effect, and its effect beyond that is
5 just temporary.

6 But I do think with respect to the -- the
7 first of their three arguments for coercion, the sheer
8 size argument, that it's very difficult to see how that
9 is going to work, because if the question is about what
10 you stand to lose rather than what you stand to gain,
11 then it seems to me that it doesn't matter whether the
12 Medicaid expansion is substantial or whether it's
13 modest, or whether there's any expansion at all. The
14 States, for example -- the Federal Government, for
15 example, could decide that under the -- under the
16 current system, too much money has ended up flowing to
17 nursing home care and that money would be better serving
18 the general welfare if it were directed at infants and
19 children.

20 But if the Federal Government said we're
21 going to redirect the spending priorities of the Federal
22 money that we're offering to you, the States could say,
23 well, geez, we don't like that; we'd like to keep
24 spending the money the way we were, and we have no
25 choice, because this has gotten too big for us to exit.

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

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

6 GENERAL VERRILLI: Well --

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

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

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

20 And as I read that, that gives the Secretary
21 the authority to cut off all the money that the States'
22 refusal to accept the condition means they shouldn't
23 have. But nothing there says they can go beyond that
24 and cut off unrelated money. Now, there is a sentence,
25 says maybe they could do that. But I thought they had

1 to exercise that within reason.

2 GENERAL VERRILLI: Right. Well --

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

6 GENERAL VERRILLI: Well --

7 JUSTICE BREYER: Is there -- I could find no
8 instance where they went beyond the funds that were
9 related to the thing that the State refused to do or
10 things affected by that. I would like you to tell me,
11 when you looked into it, that what I thought of in this
12 isolation chamber here is actually true. Or whether
13 they have gone around threatening people that we will
14 cut off totally unrelated funds.

15 What is the situation?

16 GENERAL VERRILLI: I think the situation is
17 generally as you've described it, but I do want to be
18 careful in saying I don't think it would be responsible
19 of me to commit now that the Secretary would exercise
20 the discretion uniformly in one way or another.

21 CHIEF JUSTICE ROBERTS: Well, but that's
22 just saying that when, you know, the analogy that has
23 been used, the gun to your head, "your money or your
24 life," you say, well, there's no evidence that anyone
25 has ever been shot.

1 GENERAL VERRILLI: But --

2 CHIEF JUSTICE ROBERTS: Well, it's because
3 you have to give up your wallet. You don't have a
4 choice.

5 GENERAL VERRILLI: But that --

6 CHIEF JUSTICE ROBERTS: And you cannot --
7 you cannot represent that the Secretary has never said:
8 And if you don't do it, we're going to take away all the
9 funds.

10 They cite the Arizona example. I suspect
11 there are others, because that is the leverage.

12 GENERAL VERRILLI: But it --

13 CHIEF JUSTICE ROBERTS: I'm not saying
14 there's anything wrong with it.

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

17 CHIEF JUSTICE ROBERTS: Wait a second. It's
18 not -- it's not coercion -- well, I guess that's what
19 the case is. It's not coercion --

20 GENERAL VERRILLI: It's not coercion.

21 CHIEF JUSTICE ROBERTS: -- to say I'm going
22 to take away all your funds, no matter how minor the
23 infringement?

24 GENERAL VERRILLI: But, of course --

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

1 And all I asked in my question was I didn't ask you to
2 commit the Secretary to anything. I wanted to know what
3 the facts are.

4 GENERAL VERRILLI: I --

5 JUSTICE BREYER: I wanted to know what you
6 found in researching this case. I wanted you, in other
7 words, to answer the question the Chief Justice has: Is
8 it a common thing that that happens, that this unrelated
9 threat is made? Or isn't it?

10 GENERAL VERRILLI: It's -- my understanding
11 is that these situations are usually worked out back and
12 forth between the States and the Federal Government.
13 And I think that most --

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

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

17 JUSTICE SCALIA: And who wins?

18 GENERAL VERRILLI: Well, I think -- that's
19 what I think is the problem here, Justice Scalia, is it
20 seems to me we're operating under a conception that
21 isn't right.

22 The reason we've had all these Medicaid
23 expansions, and the reason, it seems to me, why we are
24 where we are now and why 60 percent of what's being
25 spent on Medicaid is based on voluntary decisions by the

1 States to expand beyond what Federal law requires, is
2 because this is a good program and it works. And the
3 States generally like what it accomplishes.

4 JUSTICE KAGAN: And, General Verrilli --

5 JUSTICE ALITO: And General Verrilli, is this --
6 is this discussion realistic? The objective of the
7 Affordable Care Act is to provide near universal health
8 care.

9 Now, suppose that all of the 26 States that
10 are parties to this case were to say, well, we're not
11 going to -- we're not going to abide by the new
12 conditions. Then, there would be a huge portion -- a
13 big portion of the population that would not have health
14 care.

15 And it's a realistic possibility that the
16 Secretary is going to say, well, okay, fine, you know,
17 we're going to cut off your new funds, but we're not
18 going to cut off your old funds, and just let that
19 condition sit there?

20 GENERAL VERRILLI: Well, just as I can't
21 make a commitment that the authority wouldn't be
22 exercised, I'm not going to make a commitment that it
23 would be exercised. But I do think that that -- to try
24 and move away from the first of their arguments, the
25 sheer size argument, to the second one, which is that

1 it's coercive by virtue of its relationship to the
2 Affordable Care Act, I really think that that's a
3 misconception, and I'd like to be able to take a minute
4 and walk through and explain why that is.

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

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

21 GENERAL VERRILLI: That's correct,
22 Justice Kagan. That is no --

23 CHIEF JUSTICE ROBERTS: No, what the --

24 GENERAL VERRILLI: I'm sorry --

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

1 GENERAL VERRILLI: That's another way of
2 trying to say what I was trying to say to Justice Scalia
3 earlier, is that the States and the Federal Government
4 share a common objective here, which is to get health
5 care to the needy. And, in the vast majority of
6 instances, they work together to make that happen.

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

14 And no one is suggesting that people want to
15 cut health care, but they have different views about how
16 to implement policy in this area.

17 And the concern is that the Secretary has
18 the total and complete say because the Secretary has the
19 authority under this provision to say you lose
20 everything. No one has suggested in the normal course
21 that will happen, but so long as the Federal Government
22 has that power, it seems to be a significant intrusion
23 on the sovereign interests of the State.

24 Now, I'm not -- it may be something they
25 gave up many decades ago when they decided to live off

1 Federal funds, but I don't think you can deny that it's
2 a significant authority that we're giving the Federal
3 Government to say you can take away everything if the
4 States don't buy into the next program.

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

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

20 I thought such a thing would not happen.
21 And I thought if it tried to happen, that it's governed
22 by the APA, and the person with the eyeglasses would say
23 it's arbitrary, capricious, abuse of discretion. And
24 that's so even though the statute says it's in the
25 discretion of the Secretary.

1 But Mr. -- your colleague and brother says
2 no, I'm wrong about the law there, and, moreover, they
3 would do it. That's what I'm hearing now.

4 GENERAL VERRILLI: No. I --

5 JUSTICE BREYER: That they would do it, and
6 they do do it, and -- et cetera. So, I'd like a little
7 clarification.

8 GENERAL VERRILLI: In the situation
9 described in your hypothetical, Justice Breyer, I think
10 it's -- the Secretary of Health and Human Services would
11 never do it. But what I'm saying is, with respect to
12 the Medicaid expansion in this case --

13 JUSTICE SCALIA: Could never do it or
14 wouldn't?

15 GENERAL VERRILLI: Would never do it.

16 JUSTICE SCALIA: It's your prediction.
17 Okay.

18 GENERAL VERRILLI: Well, and I think that it
19 would have to satisfy the Administrative Procedure Act,
20 and that's a real constraint. What I'm not -- what I
21 don't feel able to do here is to say with respect to
22 this Medicaid expansion --

23 JUSTICE SCALIA: Are you willing to
24 acknowledge that the Administrative Procedure Act is a
25 limitation on the Secretary's ability to cut off all the

1 funds; she can't do it if it -- if that would be
2 unreasonable? Are you willing to accept that? I
3 wouldn't if I were you.

4 GENERAL VERRILLI: So --

5 (Laughter.)

6 GENERAL VERRILLI: What I'm -- what I'm
7 trying to do here is to -- is to suggest that the
8 Secretary does have discretion under the statute, and
9 that that -- and that's not --

10 JUSTICE SCALIA: Indeed, part of the
11 discretion is to cut off all of the funds. That's what
12 the statute says, and I think --.

13 GENERAL VERRILLI: And it is possible, and
14 I'm not willing to give that away. But that doesn't
15 make this --

16 JUSTICE KAGAN: But, General Verrilli,
17 you're not willing to give away whether the APA would
18 bar that, but the APA surely has to apply to a
19 discretionary act of the Secretary.

20 GENERAL VERRILLI: I agree with that,
21 Justice Kagan, but --

22 JUSTICE BREYER: What's making you
23 reluctant?

24 GENERAL VERRILLI: I'm not trying to be --
25 I'm not trying to be reluctant. I understand how -- how

1 this works. I'm trying to be careful about the
2 authority of the Secretary of Health and Human Services
3 and how it will apply in the future.

4 JUSTICE SCALIA: I wouldn't worry a lot if I
5 were you. I don't know of any case that, where the
6 Secretary's discretion explicitly includes a certain
7 act, we have held that, nevertheless, that act cannot be
8 performed unless we think it reasonable. I don't know
9 any case like that.

10 GENERAL VERRILLI: Holly Hill.

11 JUSTICE SCALIA: Yes, when there's just a
12 general grant of discretion, it has to be exercised
13 reasonably. But maybe Justice Breyer knows such a case.

14 JUSTICE BREYER: Yes, I do.

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

16 (Laughter.)

17 GENERAL VERRILLI: If I could go back to the
18 sheer size idea, there are, I think, another couple of
19 points that are important in thinking about whether
20 that's a principle courts could ever apply.

21 Once you get into that business -- in
22 addition to the problem I identified earlier, that it
23 basically means that Congress has frozen in place now,
24 based on the size of the program, you've got this
25 additional issue of having to make a judgment about in

1 what circumstances will -- will the loss of the Federal
2 funding be so significant that you would count it
3 as being coercive.

4 JUSTICE KENNEDY: I suppose one test could
5 be -- I just don't see that it would be very workable --
6 is whether or not it's so big that accountability is
7 lost, that it is not clear to the citizen that the State
8 or the Federal Government is administering the program,
9 even though it's a State administrator.

10 GENERAL VERRILLI: Well, but I think -- I
11 think this going to come from a --

12 JUSTICE KENNEDY: And I think that's
13 unworkable.

14 GENERAL VERRILLI: This is going to come
15 from a withdrawal situation. Their argument's about
16 it's what you stand to lose, and with respect to
17 withdrawal -- I mean -- so, does it depend on -- is it
18 an absolute or a relative number with respect to how
19 much of the State budget? Is it a situation where you
20 have to make a calculation about how hard would it be
21 for that State to make up in State tax revenues the
22 Federal revenue they would lose? Does that depend on
23 whether it's a high tax State or a low tax State? It
24 just seems to me -- and then, what is the political
25 climate in that State? It seems to me like --

1 JUSTICE KENNEDY: In your view -- in your
2 view, does federalism require that there be a relatively
3 clear line of accountability for political acts?

4 GENERAL VERRILLI: Yes, of course, it does,
5 Justice Kennedy. But, here --

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

8 GENERAL VERRILLI: You know, here, the
9 coercion test, as it's been discussed, I think, for
10 example, in Justice O'Connor's dissent in Dole and in
11 some of the other literature, does address federalism
12 concerns in the sense of the Federal Government using
13 Federal funding in one area to try to get States to act
14 in an area where the Federal Government may not have
15 Article I authority.

16 JUSTICE KENNEDY: Yes.

17 GENERAL VERRILLI: But, as Your Honor
18 suggested earlier, this is a situation in which, while
19 it is certainly true that the Federal Government
20 couldn't require the States, as the Chief Justice
21 indicated, to carry out this program, the Federal
22 Government could, as Your Honor suggested, expand
23 Medicare and do it itself.

24 JUSTICE KENNEDY: But do you agree that
25 there still is inherent, implicit in the idea of

1 federalism, necessary for the idea of federalism, that
2 there be a clear line of accountability so the citizen
3 knows that it's the Federal or the State government who
4 should be held responsible for their program?

5 GENERAL VERRILLI: Certainly, but I
6 think the problem here is --

7 JUSTICE KENNEDY: And does coercion relate
8 to that, or is that a separate --

9 GENERAL VERRILLI: Yes, but I think --

10 JUSTICE KENNEDY: -- is that a separate
11 doctrine?

12 GENERAL VERRILLI: Well, I think it relates
13 to it in the opposite way that my friends on the other
14 side would like it to, in that I think their argument is
15 that it would subject us to such a high degree of
16 political accountability at the State level to withdraw
17 ourselves from the program, that it's an unpalatable
18 choice for us, and that's where the coercive effect
19 comes from. And that's why I think coercion --

20 JUSTICE KENNEDY: Well, but I think the
21 answer would be that the State wants to preserve its
22 integrity, its identity, its responsibility in the
23 Federal system.

24 GENERAL VERRILLI: And it may -- and, of
25 course, it may do so, and it can make --

1 JUSTICE SCALIA: May it do so?

2 Doesn't the question come down to this --
3 maybe you can answer this "yes." But isn't the question
4 simply: Is it conceivable to you, as it was evidently
5 not to Congress, that any State would turn down this
6 offer, that they can't refuse? Is it conceivable to you
7 that any State would have said no to this program?
8 Congress didn't think that, because some of its other
9 provisions are based on the assumption that every single
10 State will be in this thing.

11 GENERAL VERRILLI: I think --

12 JUSTICE SCALIA: Now, do you -- can you
13 conceive of a State saying no? And -- and if you can't,
14 that sounds like coercion to me.

15 GENERAL VERRILLI: I think -- I think
16 Congress predicted that States would stay in this
17 program, but the -- prediction is not coercion. And the
18 reason Congress predicted it, I think, Justice Scalia,
19 is because the Federal Government is paying 90-plus
20 percent of the costs. It increases State costs by 21
21 percent.

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

25 GENERAL VERRILLI: Prediction is not

1 coercion. I disagree, Justice Scalia. That's just an
2 assumption, and if it proves to be wrong, then Congress
3 has time to recalibrate. And beyond that, I do think --
4 I just want to go back to the -- the other part of Your
5 Honor's point -- that with respect to the relationship
6 between Medicaid and the -- and the Act and particularly
7 the minimum coverage provision, my friend Mr. Clement
8 has suggested that you can infer coercion because, with
9 respect to the population to which the provision
10 applies, if there's no Medicaid, there's no other way
11 for them to satisfy the requirement.

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

14 First of all, with respect to anybody at
15 100 percent of the poverty line or above, there is an
16 alternative in the statute. It's the exchanges with tax
17 credits and with subsidies to insurance companies. So,
18 with respect to that, the part of the population at
19 100 percent of poverty to 133 percent of poverty, the --
20 the statute actually has an alternative for them.

21 For people below 100 percent of poverty, it
22 is true that there is no insurance alternative. But by
23 the same token, there is no penalty that is going to be
24 imposed on anybody in that group.

25 To begin with, right now, the level of

1 100 percent of poverty is \$10,800. The -- the
2 requirement for filing a Federal income tax return is
3 \$9500. So, anybody below \$9500, no penalty, because
4 they don't have to file an income tax return. The
5 sliver of people between \$9500 and \$10,800 -- the
6 question there is, are they going to be able to find
7 health insurance that will cost them less than 8 percent
8 of their income? And so --

9 JUSTICE ALITO: Well, I'm not following this
10 argument. Take the poorest of the poor. If there is no
11 Medicaid program, then they're not going to get health
12 care. Isn't that right?

13 GENERAL VERRILLI: Yes, that's true. But
14 this --

15 JUSTICE ALITO: And so, Congress obviously
16 assumed -- it thought it was inconceivable that any
17 State would reject this offer, because the objective of
18 the Affordable Care Act is to provide near-universal
19 care, and Medicaid is the way to provide care for at
20 least the poorest of the poor. So, it just didn't occur
21 to them that this was a possibility. When --

22 GENERAL VERRILLI: Well, I --

23 JUSTICE ALITO: When that's the case, how
24 can that not be coercion?

25 GENERAL VERRILLI: Well, it --

1 JUSTICE ALITO: Unless it's just a gift.
2 Unless it's just purely a gift.

3 And it comes back to the question of whether
4 you think it makes a difference that the money -- a lot
5 of the money to pay for this is going to come out of the
6 same taxpayers that the States have to tax to get their
7 money.

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

19 Yes, it was reasonable for Congress to
20 predict in this circumstance that the States were going
21 to take this money, because -- because it is an
22 extremely generous offer of funds: 90-plus percent of
23 the funding. States can -- can expand their Medicaid
24 coverage to more than 20 percent of their population for
25 an increase of only 1 percent --

1 CHIEF JUSTICE ROBERTS: If it's such a good
2 deal --

3 GENERAL VERRILLI: -- of their funding.

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

6 GENERAL VERRILLI: Well, the -- the --

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

10 GENERAL VERRILLI: Yes, but that's --

11 CHIEF JUSTICE ROBERTS: We're not going
12 to --

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

19 CHIEF JUSTICE ROBERTS: You have another
20 15 minutes -- at least.

21 GENERAL VERRILLI: Lucky me. Lucky me.

22 (Laughter.)

23 JUSTICE KENNEDY: But the -- but the point
24 is -- but the point is --

25 JUSTICE SOTOMAYOR: Can we go back --

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

5 GENERAL VERRILLI: Well, I guess I --

6 JUSTICE KENNEDY: And it's substantial.

7 GENERAL VERRILLI: I would go back, Justice
8 Kennedy, to the --

9 JUSTICE KENNEDY: I recognize the problem
10 with that test.

11 GENERAL VERRILLI: I would go back to the
12 fact that 60 percent of the Medicaid spending is now
13 optional. It's -- it's a result of choices that States
14 have made that - it's expanded the - their own applications.

15 JUSTICE KENNEDY: Even though they're now
16 frozen in, per our earlier discussion, to a large extent.

17 GENERAL VERRILLI: Well, no, to a much more
18 modest extent was my point, Justice Kennedy. For
19 example, optional services where a huge amount of money
20 is spent -- more than \$100 billion annually -- the
21 largest component of that is nursing home services.
22 That remains optional. It's -- right now, once the
23 minimum -- once the maintenance-of-effort provision
24 remains in place, States have the flexibility to reduce
25 that -- those numbers.

1 States have considerable flexibility now and
2 going forward with respect to the way that money is
3 spent. And I do think in terms of evaluating whether
4 this expansion should be considered coercive, it's got
5 to be evaluated against the backdrop of the fact that
6 the States are generally -- are generally taking
7 advantage of the opportunities of this statute to
8 greatly expand the amount of money that the Federal
9 Government spends and the amount of money that they
10 spend to try to make the -- the lives of their citizens
11 better. I think it's very --

12 JUSTICE KENNEDY: Of course, they have to do
13 so by hiring a very substantial number of more
14 employees. There will be State employees. There'll be
15 substantial State administrative expenses that are not
16 reimbursed.

17 GENERAL VERRILLI: Well, but -- I would take
18 issue with that, Justice Kennedy. Part of the
19 Affordable Care Act is that it -- it provides for new
20 streamlined eligibility processes to get people into the
21 system at a -- at a much faster and cheaper rate. There
22 are going to be costs to set that up. But under the
23 statute, the Federal Government is going to pay
24 90 percent of those costs, the short-term set-up costs.

25 And then all of the projections that we have

1 seen suggest that the medium- to long-term costs, once
2 these changes are in place, are going to be dramatically
3 lower for the States --

4 CHIEF JUSTICE ROBERTS: Well, what --

5 GENERAL VERRILLI: -- on the administrative
6 side.

7 CHIEF JUSTICE ROBERTS: Obviously, the
8 Federal Government isn't bound to that. And what if,
9 after the 90 percent, they say, well, now -- from now
10 on, for the States -- we're going to pay 70 percent?
11 What happens then? Where does that extra money come from?

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

16 CHIEF JUSTICE ROBERTS: There's no -- they
17 can just bail out as soon -- whenever the government
18 reduces the amount of the percentage --

19 GENERAL VERRILLI: Well --

20 CHIEF JUSTICE ROBERTS: -- that it's willing
21 to pay, the States can say that's -- that's --

22 GENERAL VERRILLI: I'm not saying it would
23 be an easy choice, Mr. Chief Justice --

24 JUSTICE SCALIA: They'd have to bail out of
25 Medicaid, you're talking about --

1 GENERAL VERRILLI: The States would have
2 to --

3 JUSTICE SCALIA: -- not just -- yes.

4 GENERAL VERRILLI: The States would have to --
5 right. That would be --

6 CHIEF JUSTICE ROBERTS: Oh.

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

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

21 GENERAL VERRILLI: But that would be true,
22 Mr. Chief Justice, whether this Medicaid expansion
23 occurred or not. So --

24 CHIEF JUSTICE ROBERTS: I know, but you've
25 been emphasizing that the Federal Government is going to

1 pay 90 percent of this, 90 percent of this. And it's
2 not something you can take to the bank, because the next
3 day or the next fiscal year, they can decide we're going
4 to pay a lot less, and you, States, are still on the
5 hook, because you don't -- you say it's not an easy
6 choice. We can say -- ask whether it's coercion.
7 You're not going to be able to bail out of Medicaid.
8 You just have to pay more because we're going to pay
9 less.

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

19 JUSTICE SOTOMAYOR: General, I'm trying
20 to --

21 GENERAL VERRILLI: -- to withdraw.

22 JUSTICE SOTOMAYOR: -- go back to that
23 because Justice Kennedy asked you whether there's -- I
24 think he said it's coercion if no one can be politically
25 accountable. I'm not sure how that could be practically

1 politically accountable, because almost every gift -- if
2 the terms are attractive, it would be an unattractive
3 political alternative to turn it down.

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

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

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

15 GENERAL VERRILLI: Well, the citizens of the
16 State, but that's the citizens of the State acting --

17 JUSTICE SOTOMAYOR: Exactly. That's the
18 whole point; that's their choice, right?

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

1 has expanded, because it's providing an essential
2 service for millions of needy citizens in these States.
3 It's providing access to health care that they would not
4 otherwise have.

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

8 GENERAL VERRILLI: Or lose a percentage of
9 your highway funds.

10 CHIEF JUSTICE ROBERTS: Do you remember the
11 percentage?

12 GENERAL VERRILLI: Seven percent, yes.

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

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

25 JUSTICE SOTOMAYOR: Well, they made a choice

1 with the stimulus bill, didn't they? Some governors
2 rejected the stimulus bill --

3 GENERAL VERRILLI: That's -- that's correct,
4 Justice Sotomayor. And --

5 JUSTICE SOTOMAYOR: -- and some of -- some
6 of their congressional or legislative processes
7 overturned that.

8 GENERAL VERRILLI: That's right.

9 JUSTICE SOTOMAYOR: In others, they
10 supported it. The percentages were smaller, but it's
11 always the preference of the voters as to what they
12 want, isn't it?

13 GENERAL VERRILLI: That's -- that is
14 correct.

15 CHIEF JUSTICE ROBERTS: What was the threat
16 in the stimulus bill? What would the State lose?

17 GENERAL VERRILLI: That answer I don't know,
18 Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Would anything be
20 taken away, or would it just lose the opportunity to get
21 the money?

22 GENERAL VERRILLI: I don't know the answer
23 to that. I don't know the answer to that.

24 But if I may just say in conclusion that --
25 I'd like to take half a step back here. That this

1 provision, the Medicaid expansion that we're talking
2 about this afternoon and the provisions we talked about
3 yesterday, we've been talking about them in terms of
4 their effect as measures that solve problems, problems
5 in the economic marketplace, that have resulted in
6 millions of people not having health care because they
7 can't afford insurance.

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

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

25 In a very fundamental way, this Medicaid

1 expansion, as well as the provisions we discussed
2 yesterday, secure of the blessings of liberty. And I
3 think that that is important as the Court is considering
4 these issues that that be kept in mind. The -- the
5 Congress struggled with the issue of how to deal with
6 this profound problem of 40 million people without
7 health care for many years, and it made a judgment, and
8 its judgment is one that is, I think, in conformity with
9 what lots of experts' thought, was the best complex of
10 options to handle this problem.

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

22 And I would urge this Court to respect that
23 judgment and ask that the Affordable Care Act, in its
24 entirety, be upheld. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 Mr. Clement, you have 5 minutes.

2 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

3 ON BEHALF OF THE PETITIONERS

4 MR. CLEMENT: Thank you, Mr. Chief Justice
5 and may it please the Court:

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

14 I also don't think this is a discretion that
15 the Secretary would ever be able to exercise. And the
16 reason is we disagree on the details, but the Solicitor
17 General and I agree that, over the years, Congress has
18 had different approaches to expanding Medicare.

19 Sometimes, as in 1972, it makes the
20 expansion voluntary. That's also, by the way, what
21 happened with the stimulus funds, which were voluntary
22 funds. You didn't lose all your Medicaid funds, which
23 is why 17 States could say no.

24 Sometimes, they take the voluntary approach.
25 Sometimes, as in 1984, they take the mandatory approach.

1 If the Secretary exercised the discretion to say, you
2 know what, it really isn't reasonable for you to have to
3 give up your funding for the visually impaired and the
4 disabled, just to cover these newly eligible people, so
5 we will make it voluntary; we'll make that
6 discretionary -- that would essentially be creating --
7 converting a 1984 amendment approach to a 1972 amendment
8 approach, and I just don't think that is the kind of
9 discretion that the Secretary has, with all due respect.

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

19 Here, if you don't take this offer that
20 we're giving you, your tax dollars will fund the other
21 49 States, and you'll get nothing.

22 But, of course, this situation is much more
23 coercive, even than your hypothetical, because it is
24 tied directly to the mandate. It's also tied to
25 the participation in the pre-existing program. So, it's

1 as if there was yet another program for post-secondary
2 education; they gave them exactly your option --
3 option -- and then they also said, oh, and by the way,
4 you not only not get these funds, but you lose the
5 post-secondary funds as well.

6 It's really hard to understand tying the
7 pre-existing participation in the program as anything
8 other than coercive.

9 The Solicitor General makes a lot of the
10 fact that there are optional benefits under this
11 program. Well, guess what? After the Medicaid
12 expansion, there will be a lot less opportunity for the
13 States to exercise those options, because one of the
14 things that the expansion does -- precisely because the
15 expansion is designed to convert Medicaid into a program
16 that satisfies the requirement of the minimum essential
17 coverage of the individual mandate, things that used to
18 be voluntary will no longer be voluntary.

19 The perfect example is prescription
20 coverage. That's a big part of the benefits that some
21 States, but not all, provide voluntarily now. It will
22 no longer be voluntary after the expansion because the
23 Federal Government has deemed prescription drugs to be
24 part of the minimal essential health coverage that
25 everybody in this country must have under the mandate.

1 So, that option that the State has is being removed by
2 the expansion itself.

3 The Chief Justice made the point --

4 JUSTICE GINSBURG: Mr. Clement, may I ask
5 one question about your bottom line in this case? It
6 sounds to me like everything you said would be to the
7 effect of, if Congress continued to do things on a
8 voluntary basis, so with adding these new eligibles,
9 and say, States, you can have it or not, you can
10 preserve the program as it existed before, you can opt
11 into this.

12 But you're not asking the Court as relief to
13 say, well, that's how we -- that's how we cure the
14 constitutional infirmity; we say this has to be on a
15 voluntary basis. Instead, you are arguing that this
16 whole Medicaid -- the addition, that the whole expansion
17 has to be nullified and, moreover, the entire Health
18 Care Act. Instead of having the easy repair, you say
19 that if we accept your position, everything falls.

20 MR. CLEMENT: Well, Justice Ginsburg, if we
21 can start with the common ground that there's a need for
22 a repair because there is a coercion doctrine and this
23 statute is coercion, then we're into the question of
24 remedy. And we do think -- we do take the position that
25 you describe in the remedy, but we would be certainly

1 happy if we got something here, and we got a recognition
2 that the coercion doctrine exists; this is coercive; and
3 we get the remedy that you suggest in the alternative.

4 Let me just finish by saying that I
5 certainly appreciate what the Solicitor General says,
6 that when you support a policy, you think that the
7 policy spreads the blessings of liberty. But I would
8 respectfully suggest that it's a very funny conception
9 of liberty that forces somebody to purchase an insurance
10 policy whether they want it or not.

11 And it's a very strange conception of
12 federalism that says that we can simply give the States
13 an offer that they can't refuse, and through the
14 spending power, which is premised on the notion that
15 Congress can do more -- because it's voluntary, we can
16 force the States to do whatever we tell them to. That
17 is a direct threat to our federalism.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Clement. And thank you, General Verrilli, Mr.
21 Kneedler, Mr. Carvin, Mr. Katsas, and in particular, of
22 course, Mr. Long and Mr. Farr.

23 The case is submitted.

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

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