NO. 11-400

In the
Supreme Court of the United States

STATES OF FLORIDA, SOUTH CAROLINA, NEBRASKA, TEXAS, UTAH, LOUISIANA, ALABAMA, COLORADO, PENNSYLVANIA, WASHINGTON, IDAHO, SOUTH DAKOTA, INDIANA, NORTH DAKOTA, MISSISSIPPI, ARIZONA, NEVADA, GEORGIA, ALASKA, OHIO, KANSAS, WYOMING, WISCONSIN, AND MAINE; BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN; AND TERRY BRANSTAD, GOVERNOR OF IOWA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The federal government's attempts to dissuade this Court from determining the constitutionality of core provisions of the Affordable Care Act reflect a startlingly broad conception of Congress's powers that would all but eliminate the Constitution's protections against federal incursions upon state sovereignty. The federal government envisions a spending power that "would tend to nullify all constitutional limitations upon legislative power," *United States v. Butler*, 297 U.S. 1, 74 (1936), by allowing Congress to threaten to withhold billions of dollars collected from state taxpayers unless a State abides by Congress's policy judgments. It envisions a commerce power under which Congress may regulate States in the same manner that it regulates private parties, without regard for interference with essential attributes of state sovereignty. Indeed, it envisions a world where States' necessity to employ individuals to carry out sovereign functions is a toehold for treating States like any other employer. And it envisions a tax power under which Congress can achieve anything outside the commerce power by simply imposing a penalty upon States that do not bend to its will.

The Constitution does not tip the balance of power so heavily in Congress's favor, but rather "preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). As more than half the Nation's States are attesting in this unprecedented action, the challenged provisions of the ACA fail that test. The States have, at a minimum, presented this Court with substantial questions whether core

provisions of the ACA effect unconstitutional incursions upon state sovereignty.

The federal government was correct about one thing in its brief in response: This Court should consider not just the constitutionality of the individual mandate, *vel non*, but also the severability question raised in the States' third question presented. But it is entirely artificial to consider how much of the ACA would survive invalidation of the individual mandate without considering the States' serious challenges to the rest of the Act. This Court should grant the States' petition in full.

1. "[I]f the Court meant what it said in [*South Dakota v. Dole*, 483 U.S. 203 (1987)]," and other cases recognizing the coercion doctrine as a limit on Congress's spending power, then 26 States have presented "a Tenth Amendment claim of the highest order." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (plurality opinion). The ACA's Medicaid expansions contravene *Dole*'s admonition that spending legislation must be voluntary "not merely in theory but in fact." *Dole*, 483 U.S. at 211–12; *see also Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

Indeed, if the ACA does not cross the line articulated in *Dole*, no Act of Congress ever will. Not only is the amount of funding at stake unprecedented, but Congress has conditioned preexisting funds on new requirements. Moreover, unlike in other spending programs, Congress made clear that the "conditions" are actually mandatory in fact by providing no other mechanism for the

Medicaid-eligible to comply with the individual mandate.

Accordingly, the situation is asymmetric. This Court could strike down the Medicaid expansion without endangering other spending programs, but approving this massive and pervasively coercive expansion would be the death knell of the coercion doctrine. Abandoning that doctrine would seem tantamount to abandoning the basic federalist structure of the Constitution. Virtually any otherwise impermissible imposition—including the individual mandate itself—could be imposed as a mere "condition" on massive federal spending programs. In all events, if the coercion doctrine is just a precatory exhortation to Congress, and not a judicially-enforceable limit, this Court should make that clear.

The federal government offers no persuasive reason to deny review of the States' claim. Indeed, it affirmatively undermines one of the Eleventh Circuit's efforts to minimize the coercive impact. It does not deny that Medicaid is the single largest federal-State spending program, accounting for more than 40% of all funding to States and more than $1 billion annually for most States. More important, it does not deny that a State will lose *all* that funding if it does not comply with the ACA. That concession is critical, as the Eleventh Circuit's mistaken belief that States will *not* lose all Medicaid funding if they refuse to comply was a "determinative" factor in its analysis. Pet.App.66, 68–69. Far from defending that attempt to sidestep the issue, the federal government quite clearly concedes, as it has throughout this litigation, that the "categories of

individuals to whom state programs must provide medical assistance" remain a requirement with which States *must* comply "[t]o be eligible for federal funds." Resp. 11.

The federal government also does not dispute the particularly coercive manner in which the ACA operates. It does not deny that the Act holds States hostage to their earlier decisions to participate in Medicaid by attaching new conditions to billions in preexisting funding that will not finance those new terms. Nor does it deny that those funds consist of tax dollars collected from States' own residents—tax dollars that would still be collected and distributed to other States, and that a State would have no realistic means of replacing, if a State were no longer eligible to participate in Medicaid. And it does not deny that Congress recognizes that States have no choice but to comply with the ACA. In short, the federal government does not dispute that this case presents the *non plus ultra* of coercion: the threatened loss of nearly half of all federal funding, including billions in preexisting funding, unless States capitulate to Congress's demands. Nonetheless, the federal government suggests there is nothing certworthy in the approval of this unprecedentedly coercive statute. That is untenable.

Rather than admit this is an ideal vehicle for resolution of a constitutional question that has confused lower courts for decades, the federal government proceeds as if this Court has already resolved that question in its favor. It repeatedly emphasizes the Court's acknowledgement that "Congress may 'fix the terms on which it shall disburse federal money to the States,'" Resp. 14

(*quoting New York v. United States*, 505 U.S. 144, 158 (1992)), but ignores this Court's admonition that Congress may not fix those terms *coercively* by attaching them to massive federal inducements that States cannot afford to decline. *See Dole*, 483 U.S. at 211. The federal government does not even mention *Steward Machine* or other cases recognizing that doctrine, let alone attempt to reconcile *Dole*'s adjudication of a coercion claim *on the merits* with its position that the doctrine is defunct.

The federal government also places great weight on lower court decisions rejecting coercion claims, sometimes dismissively. That some Courts of Appeals have treated the doctrine of *Dole* and *Steward Machine* as defunct weighs in favor of plenary review, not against. This Court has repeatedly admonished that it is the role of this Court, not the lower courts, to determine when a doctrine embraced by this Court has become outmoded or defunct. *See Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989). The States believe the doctrine of *Dole* and *Steward Machine* is vital to maintaining the federalist balance. But if this Court is inclined to jettison that doctrine, it should do so only after plenary review, not by permitting the doctrine to wither on the vine through neglect by lower courts.

Although the federal government emphasizes some of the same factors relied upon by the Eleventh Circuit, it fails to explain why those factors have any bearing on whether the ACA's Medicaid expansions are coercive or whether this Court should consider that question. The federal government stresses that Congress "reserved the 'right to alter, amend, or

repeal'" provisions of Medicaid. Resp. 12 (*quoting* 42 U.S.C. § 1304). But that is a non sequitur; notice that coercion may follow does not lessen the coercion. An extortionist who provides ample forewarning of his collection schedule may thereby maximize collections, but does not lessen the extortionate nature of his demands. In all events, Congress neither did nor could reserve the right to make *unconstitutional* amendments. Instead, section 1304 merely notifies States that Congress may "make such alterations and amendments *as come within the just scope of legislative power*." *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 53 (1986) (emphasis added).

The federal government also follows the Eleventh Circuit's lead in emphasizing that it initially will pay most costs associated with the ACA's new terms. Once again, this misses the point. The States continue to contend that the federal government has dramatically understated those costs, but if all Congress had done was condition new money on new conditions, States could make a meaningful choice. That is not how the ACA works. Congress attached the new conditions not just to new money but to billions in *preexisting* Medicaid funding. Congress did so precisely because it knew States could not afford the loss of nearly half of all federal funding, and would therefore capitulate to its demands. It is that decision that renders the ACA "more akin to forbidden regulation than to permissible condition," *Riley*, 106 F.3d at 570, in violation of core federalism principles inherent in the Constitution. *See Butler*, 297 U.S. at 71 ("The power

to confer or withhold unlimited benefits is the power to coerce or destroy.").

In all events, there will be time enough to explore the contours of the coercion doctrine if the Court grants review. For present purposes, it is enough that the Court has steadfastly rejected any conception of the spending power that "would tend to nullify all constitutional limitations upon legislative power." *Id.* at 74. Even if the Court were inclined to adopt the federal government's breathtakingly broad position "that Congress *should* be able to place any and all conditions it wants on the money it gives to the states, [this] Court must be the one" to jettison decades of precedent reiterating that the spending power is not an "instrument for total subversion of the governmental powers reserved to the individual states," *id.* Pet.App.65-66.

2. "Impermissible interference with state sovereignty is not within the enumerated powers of the National Government." *Bond*, 131 S. Ct. at 2366. While enforcing the limits on those enumerated powers is not always easy, the temptation for Congress to ignore those limits is too strong, and federalism "plays too vital a role in securing freedom for [the Court] to admit inability to intervene when [Congress] has tipped the scales too far." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). Contrary to this Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), there is no exception for legislation that treats States like any other employer. This Court has recognized as much in its Eleventh Amendment jurisprudence. *See Bd. of Tr. of Univ. of Ala. v.*

Garrett, 531 U.S. 356, 374 (2001). The Court should reconsider *Garcia* and "again assume its constitutional responsibility," 469 U.S. at 589 (O'Connor, J., dissenting), to hold unconstitutional those federal regulations that impermissibly interfere with state sovereignty.

The federal government does not and cannot refute that *Garcia* "radically departs from long-settled constitutional values and ignores the role of judicial review in our system of government." *Id.* at 561 (Powell, J., dissenting). *Garcia*'s holding reflects an unduly narrow vision of the judiciary's role in protecting state sovereignty, under which "States must find their protection from congressional regulation through the national political process" alone, rather than via judicial review as well. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). That vision cannot be reconciled with more recent decisions striking down congressional overreaching in regulating States. *See, e.g.*, *New York*, 505 U.S. at 177 (invalidating federal regulation of States as "inconsistent with the federal structure of our Government established by the Constitution"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating federal regulation of States as "incompatible with our constitutional system of dual sovereignty"); *Garrett*, 531 U.S. at 374 (invalidating effort to treat States like any other employer for purposes of the ADA as inconsistent with Eleventh and Fourteenth Amendments).

The federal government instead points to *Reno v. Condon*, 528 U.S. 141 (2000), as evidence that *Garcia* has not been overruled. But that is the whole problem. *Garcia* continues to govern, but it is out of

step with the Court's efforts to enforce the Constitution's structural guarantees in a host of contexts, and not simply leave matters to the political process. The argument that the Court's subsequent rejection of *Garcia*'s reasoning provides a reason to overrule it was neither pressed nor passed upon in *Condon*. That argument is being raised now—by over half the Nation's States—and the issue is ripe for consideration. Indeed, there are far better reasons to overrule *Garcia* now than there were to overrule *National League of Cities v. Usery*, 426 U.S. 833 (1976), back in *Garcia*.

The federal government identifies no persuasive reason not to do so in this case. Its reliance on the Anti-Injunction Act ("AIA") is inapposite, as the AIA does not apply to States and does not bar challenges to the employer mandates for the same reasons that it does not bar challenges to the individual mandate. *See Liberty Univ. v. Geithner*, —— F.3d ——, 2011 WL 3962915, at *26 (4th Cir. Sept. 8, 2011) (Davis, J., dissenting) (concluding that AIA does not bar challenges to individual or employer mandates). Although the federal government highlights minor linguistic differences in the penalty provisions that accompany the individual and employer mandates, Resp. 19 n.9, the States are challenging the mandates, not the penalties, and the two are distinct. Indeed, the difference between the two is particularly important when it comes to the employer mandates' application to States, because a State would not lightly disobey federal law, irrespective of the penalty, and it is an odd version of cooperative federalism that would force a State to

disobey a federal law to have any avenue to challenge it.

For that reason and others articulated in the States' response in *HHS v. Florida*, No. 11-398 (at 14–15), the AIA should not be construed to reach States. Its bar against suits brought "by any person" must be read against the "longstanding presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 780 (2000); *see also United States v. United Mine Workers*, 330 U.S. 258, 275 (1947). Although the federal government notes that the AIA's original version did not use the term "person," that is doubly irrelevant. The Court never held that former version applicable to States. Nor could the equally general language of the earlier AIA be read to reach States in light of this Court's recognition that, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002); *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004). The point is not that "person" is a term that distinctly *excludes* States, but rather that general language should not be lightly construed to *include* States, especially when the consequence would be to lump States together with non-sovereigns in ways that ignore "the integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364.

In that sense, the federal government's reading of the AIA suffers the same basic defect as its view of the Commerce Clause and *Garcia*. The federal

government sees no reason for Congress to treat States differently from any other taxpayer or employer. But that disregards the Constitution's structural protections of States' unique status and residual sovereignty.

The federal government's alternative argument that the employer mandates can be justified by Congress's taxing power only underscores the appropriateness of reviewing the constitutionality of the individual mandate and the employer mandates as applied to the States in the same case. The federal government has made essentially the same arguments as to the individual mandate. *Compare* Resp. 25, *with* Pet. 27–29, *HHS v. Fla.*, No. 11-398. The States cannot be faulted for not anticipating and refuting those arguments as to the employer mandates below, as the federal government was content to rest its defense on *Garcia*. In all events, the Eleventh Circuit rejected those arguments as to the individual mandate.

Finally, it makes sense to consider the two issues together because there is a common problem with both aspects of the ACA. Given the breadth of Congress's power under this Court's modern Commerce Clause jurisprudence, one of the only ways an individual can avoid the regulatory reach of the federal government is to refrain from engaging in commerce. The individual mandate is problematic precisely because it eliminates that option. States face a similar dilemma under the employer mandates. Private employers have the theoretical option of withdrawing from the market. States do not have the option of abandoning their sovereign functions altogether, and sovereignty cannot be

exercised without employees. Congress should not be able to put States to the choice of succumbing to the employer mandates or abandoning their sovereign functions. To the extent *Garcia* permits Congress to do so, it should be overruled.

3. The States vigorously dispute many of the federal government's assertions (at 26–33) as to severability, but the federal government has one thing correct: The States' third question presented concerning severability merits independent consideration and should be granted. On this, there is no dispute. But it makes little sense to decide which, if any, of the ACA's constitutional provisions can survive absent its unconstitutional ones without considering the serious constitutional challenges raised by the States' first two questions. The logical course is to consider all of the States' constitutional objections to the ACA, and then decide which of the Act's remaining provisions can survive.

CONCLUSION

The Court should grant the petition in full.

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