**No. 11-400**

**IN THE**
**Supreme Court of the United States**

FLORIDA, ET AL.,

*Petitioners,*

v.

DEPARTMENT OF HEALTH AND HUMAN SERVS., ET AL.,

*Respondents.*

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

# BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS and INDIVIDUAL PHYSICIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

## (MEDICAID ISSUE)


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## QUESTION PRESENTED

Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress' spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?

## TABLE OF CONTENTS

**Pages**

## TABLE OF AUTHORITIES

**Pages**

**Cases**



**Constitution**

**Articles of Confederation**



**Statutes**



**Legislative Materials**

**Articles and Book**

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## INTERESTS OF *AMICI CURIAE*[1]

*Amici curiae* ("*Amici*") are individual physicians and a national association of physicians. *Amici* file this brief to assist the Court in defining and resolving the Medicaid Expansion issue, one of four issues for which this Court has directed the parties, and any interested *amicus curiae*, to brief. Order dated, December 8, 2011 ("Briefing Order").[2]

[1] This brief is filed with the written consent of all parties. Those consents are filed with the Clerk of this Court. Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici*, members of *Amici*, or *Amici*'s counsel make a monetary contribution to the preparation or submission of this brief.

[2] The Court has also directed briefing regarding the following issues: (1) the constitutionality of the individual mandate; (2) the applicability of the Anti-Injunction Act; and (3) severability.

Since 1943, *Amicus* The Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action against several Respondents which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, Case No. 1:10-cv-0499-ABJ (D.D.C.).

*Amicus* Leah S. McCormack, M.D., privately practices dermatology in New York City, New York. She earned certification from the American Board of Dermatology and is a fellow of the American Academy of Dermatology. She is the immediate Past-President of the Medical Society of the State of New York.

*Amicus* Guenter L. Spanknebel, M.D., privately practiced gastroenterology. He is a Past-President of the Massachusetts Medical Society and is currently chair of its History Committee. He has served as a Trustee of the Health Foundation of Central Massachusetts and on the faculties of the medical schools at Tufts University and the University of Massachusetts.

*Amicus* Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the

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Briefing Order. On January 6, 2012, *Amici* filed a brief in support of Petitioners regarding severability ("Severability Brief").

Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

*Amicus* Mark J. Hauser, M.D., privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

*Amicus* Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

*Amici* have followed attempts in recent years to enact health care reform legislation. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have monitored the introduction, passage and early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("HCERA" or "Reconciliation Act").

For the reasons set forth below, *Amici* believe that the Medicaid Expansion Provisions of ACA ("MXPs") do not fall within the scope of congressional powers enumerated in the Constitution. As explained in *Amici's* Severability Brief, should the Court find the MXPs unconstitutional, ACA should be declared unconstitutional in its entirety.

In addition, *Amici* respectfully ask the Court to reconsider its approach to analyzing federally compelled state spending. This brief is submitted to provide the Court with greater clarity on that issue.

## ARGUMENT

### I. THE MEDICAID EXPANSION PROVISIONS UNCONSTITUTIONALLY BURDEN STATES' FINANCES, VIOLATE THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT FOR THE STATES, AND BREACH THE FIDUCIARY DUTY OWED BY THE FEDERAL GOVERNMENT TO THE STATES

It is axiomatic that our "Nation cannot plunder its own treasury without putting its Constitution and its survival in peril." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). One corollary to this principle is that our Nation cannot plunder the treasuries of its political subdivisions, *i.e.* the States, without putting the existence of the States in jeopardy. The Constitution explicitly recognizes the continued vitality of the individual States. Not only does the term "State" appear in every Article of the Constitution and a majority of the Amendments to the Constitution, but the continued existence of each State as an independent and vibrant republic is virtually assured by the Guarantee Clause,[3] U.S. CONST. art. IV, sec. 4, and the supermajority requirement to amend the Constitution, U.S. CONST. art. V.

The strings attached to the Medicaid Expansion Provisions of ACA are onerous. Each State will have to spend considerably more money to fund Medicaid

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[3] In *New York v. United States*, 505 U.S. 144, 183-86 (1992), Justice O'Connor suggested that the Guarantee Clause did not always present a non-justiciable political question. Because ACA threatens the States' fiscal viability, this case presents a justiciable controversy.

to prevent it from losing its federal Medicaid grant completely. Such a Hobson's choice is no choice at all. Regardless of the choice each State makes, that State's spending will increase. As a State's spending increases, either its taxes or its debt or both must increase. In any case, the burden is on the taxpayers of that State to pay for those increases without the affirmative decision of the State's Legislature and Governor. State spending is to be increased by a federal fiat. This is the very antithesis of a republican form of government and is, therefore, prohibited by the Constitution. Examined in this light, the MXPs are not merely pre-conditions to the disbursement of funds but rather an assault on the sovereignty of the States and the rights of their citizens - as state citizens.

This argument is all the more powerful if the Court considers that the mandate to increase Medicaid spending will further deteriorate the already precarious financial condition of many States. *See* United States Government Accountability Office,[4] *STATE AND LOCAL GOVERNMENTS: Fiscal Pressures Could Have Implications for Future Delivery of Intergovernmental Programs*, GAO Report No. 10-899 (July 2010) ("*GAO Report 10-899*"). According to the GAO, the "primary driver of the fiscal pressure confronting the state and local sector is the continued growth in health-related costs. State and local expenditures on Medicaid and the cost of health insurance for state and local retirees are expected to grow more than GDP." *Id*. at 7.

The GAO has also reported that state and local governments face considerable additional fiscal

[4] Hereinafter "GAO".

pressure from pensions offered to their employees. *Id*. at 30. Only a few days ago, Senator Hatch, the Ranking Member of the Senate Committee on Finance, reported that the aggregate underfunding of state and local defined benefit pension plans may exceed $4 trillion.[5] United States Senate Committee on Finance, *State and Local Government Defined Benefit Pension Plans: The Pension Debt Crisis that Threatens America*, 112th Cong., 2d Sess. (January 2012) ("*Hatch Report*"). He said: "[t]he potential effect of state and municipal pension debt on state insolvency or default is significant, and such an event is a possible contagion that could infect even responsible jurisdictions." *Id*. at 3.

Considering that many view Medicaid as a federal-state partnership, *GAO Report 10-899* at 28-29, it is not unreasonable for this Court to examine the MXPs in that light. The GAO explained:

> Given the nature of the partnership among levels of government in providing services to the public and the economic interrelationships among levels of government, understanding patterns in state and local government expenditures and revenues is crucial for identifying and analyzing potential fiscal pressures for the sector. ***The federal government partners with state and local governments to achieve national priorities through implementation of a variety of programs. Such programs range from Medicaid***, a joint federal-state program that finances health care for certain categories of

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[5] This number exceeds the aggregate municipal bond debt of $2.9 trillion. *Hatch Report* at 1.

> low-income individuals, to disaster recovery, … The interconnectedness which defines intergovernmental programs requires that all levels of government remain aware of and ready to respond to fiscal pressures.

*Id*. at 28-29 (emphasis added).

Assuming *arguendo* that the Court adopts such a partnership theory, it becomes clear that the federal government breached its fiduciary duties to its partners for the following reasons: (1) by imposing onerous conditions on its partners, *i.e.* the states; Brief of State Petitioners on Medicaid 7-13 in *States of Florida et al. v. United States Dept. of Health and Human Services et al.* (Docket No. 11-400) (Jan. 10, 2012); (2) by failing to obtain an unqualified opinion from the federal government's own financial auditors, GAO, *Press Release: Significant Financial Management and Fiscal Challenges Reflected in the U.S. Government's 2011 Financial Report* 1 (Dec. 23, 2011) (hereinafter "*GAO Press Release*") ("The [GAO] cannot render an opinion on the 2011 consolidated financial statements of the federal government, because of widespread material internal control weaknesses, significant uncertainties, and other limitations.");[6] and (3) by failing to consider that,

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[6] In addition to receiving a qualified opinion, both the Comptroller General and the Secretary of the Treasury acknowledged the long-term fiscal pressures upon the federal government. Comptroller General Dodaro stated: "The comprehensive fiscal projections presented in the 2011 *Financial Report* show that – absent policy changes – the federal government continues to face an unsustainable long-term fiscal path." *GAO Press Release* at 2. In a cover letter to the 2011 *Financial Report of the United States Government (*hereinafter "*2011 Financial Report*"), Secretary Geithner also acknowledged the federal fiscal condition. He

under the Constitution, Congress lacks authority to spend beyond the end of its own term. *See* Point III, *infra*.

## II. THE TEXT, STRUCTURE AND HISTORY OF ARTICLE I, SECTION 8 CONFIRM THAT THE PHRASE "PROVIDE FOR THE ... GENERAL WELFARE" IS A LIMITATION ON THE TAXING POWER AND NOT THE SOURCE OF AN INDEPENDENT POWER TO SPEND

In revisiting *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court might consider that the text, structure, spirit and history of the Constitution indicate that the "power to spend" is not an enumerated power of Congress, but rather a

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stated: "This report provides another sobering picture of our long-term fiscal challenges. Our actual and projected deficits are too high ...." *Id*. *See also* Peter G. Peterson, *Running on Empty* (2004). Former Secretary of Commerce Peterson addressed our fiscal problems both morally and philosophically. He said: "I thought the philosophical issue was whether a modern, media-driven democracy that focuses on immediate crises could respond effectively to a very different kind of threat – a silent, slow-motion, long-term crisis like entitlements." *Id*. at xxiii. Secretary Peterson also considered it immoral to pass huge debts on to our children. In economic terms, he explained,

> When [structural] deficits are incurred in order to fund a rising transfer of resources from young to old, they also constitute an injustice against future generations.
>
> Economically, the problem with deficits is that they absorb national savings and crowd out productive investments ...
>
> A century ago, America's net national savings rate was the highest in the developed world. Fifty years ago, it was somewhere in the middle. Today it is the lowest.

*Id*. at 40, 44.

constraint or condition upon the power of Congress to raise revenues.

We begin with the text of the Constitution. Article I, Section 8, Clause 1 provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and ***provide for the*** common Defence and ***general Welfare*** of the United States; but all Duties, Imposts and Excises, shall be uniform throughout the United States …." U.S. CONST. art. I, sec. 8, cl. 1 ("Revenue Clause") (emphasis added). Whether called the "Spending Clause" or the "General Welfare Clause," the alleged source of congressional authority is the highlighted language above. Its appellation is irrelevant.

To begin with, the Constitution does not once use the word "spend" or "spending".

Second, each of the powers enumerated in Article I, Section 8 begins with the capitalization of the word "To".[7] That means, a capitalized "To" signals the enumerated power. Indeed, nowhere else in the remainder of the Constitution is the word "to" capitalized.

Third, only a semicolon separates the powers enumerated in Article I, Section 8. U.S. CONST. art. I, sec. 8. *See* The Federalist, No. 41, 263 (Madison) (Clinton Rossiter, ed. 1961).

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[7] Each of the eighteen clauses enumerating the powers of Congress also has the same grammatical structure. They begin with the infinitive form of an action verb followed by an object of that action verb. *See e.g.* U.S. CONST. art. I, sec. 8, cl. 9 ("To constitute Tribunals inferior to the [S]upreme Court") (The verb is "To constitute." The object of that verb is "Tribunals inferior to the Supreme Court").

Fourth, because the powers enumerated in Article I, Section 8, form a single sentence, Congress is limited to those lawmaking powers.[8]

Fifth, the language "to … provide for the … general Welfare" and the placement of that language after the language "To lay and collect Taxes, Duties, Imposts and Excises" is indicative of a limitation on the allowable purposes for the exercise of congressional power to raise revenue. To argue otherwise would mean: (1) that the ends would justify means outside of the enumerated powers; and (2) that the remainder of the enumerated powers are superfluous.

Sixth, where more than one action verb was used to define an enumerated power within a single clause of article I, section 8, the Framers found it unnecessary to insert a second "To" or "to" before such additional action verb. *See e.g.*, U.S. CONST. art. I, sec. 8, cl. 13 ("***To provide and maintain*** a Navy") (emphasis added). Thus, a single use of the word "To" was distributed to each enumerated power within a single clause. In clause 1, however, a second "to" was used without being capitalized. That second "to" appears to be distributed over the phrases: "***pay*** the Debts," U.S. CONST. art. I, sec. 8, cl. 1 (emphasis

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[8] Congress has other non-lawmaking powers including, but not limited to the following: (1) the power of the House of Representatives to impeach, U.S. CONST. art. I, sec. 2, cl. 5; (2) the power of the Senate to try impeachments, U.S. CONST. art. I, sec. 3, cl. 6; (3) the power of each chamber to make its own rules of proceeding, U.S. CONST. art. I, sec. 5, cl. 2; (4) the power of the Senate to ratify treaties, U.S. CONST. art. II, sec. 2, cl. 2; (5) the power of the Senate to confirm ambassadors and members of this Court, U.S. CONST. art. II, sec. 2, cl. 2; and (6) the power to propose amendments to the Constitution, U.S. CONST. art. V.

added), "***provide*** for the common Defence," *id*. (emphasis added), and "***provide*** for the … general Welfare." *Id*. (emphasis added). Therefore, if the language "general Welfare" is the source of the so-called congressional "spending power" then the language "pay the Debts" and "provide for the common Defence" would also provide independent sources of congressional power. However, those phrases do not establish other congressional powers because those phrases would clearly make numerous other provisions of the Constitution superfluous.

With respect to the phrase "to pay the Debts," the second clause of Article I, section 8, separately gives Congress the power to borrow in the future, U.S. CONST. Art. I, sec. 8, cl. 2, and the first clause of Article VI assumes debts incurred prior to the ratification of the Constitution. U.S. CONST. art. VI, cl. 1. Furthermore, Section 4 of the Fourteenth Amendment covers debts incurred for the payment of bounties and pensions for services rendered in suppressing insurrection or rebellion against the United States. U.S. CONST. amend. XIV, sec. 4. With respect to the phrase "to … provide for the common Defence," the lack of an independent power is more apparent. That phrase would render superfluous and possibly meaningless the eleventh through sixteenth Clauses of Article I, Section 8. U.S. CONST. art. I, sec. 8, cls. 11, 12, 13, 14, 15, and 16.

Finally, the word "general" explicitly qualifies the word "Welfare" and provides an additional limitation on any alleged "spending power." One commentator has pointed out: "Congress … has only the power to spend for the 'general' welfare and not for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states

and therefore might be said to enhance 'general' welfare in the aggregate." John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chapman L. Rev. 63, 65 (2001) ("*Eastman*"). Professor Eastman explained:

> In order to understand fully the meaning that the framers attributed to this "general welfare" limitation, it is perhaps best to begin with the document from which the clause was derived. The "general welfare" language of Article I, Section 8 is drawn from two clauses in the Articles of Confederation that were commonly understood as imposing restrictions on the Confederation Congress.

*Id*. at 72. Specifically, Article III of the Articles of Confederation provided that the States "'entered into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and *general welfare* ....'" *Id*. at 78 (quoting Articles of Confederation art. III, emphasis added by Professor Eastman). The eighth article of the Articles of Confederation similarly provided:

> "All charges of war and all other expenses, that shall be incurred for the common defence or general welfare, and allowed by the United States, in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each State ...."

*Eastman*, 4 Chapman L. Rev. at 78 (quoting Articles of Confederation art. VIII, added emphasis omitted). Regarding the debate over the Constitution's ratification, James Madison later noted that "the language of Article I, Section 8 was drawn from these

provisions of the Articles of Confederation, where it was never thought to give to the Confederation Congress a power to legislate in all cases whatsoever." *Eastman*, 4 Chapman L. Rev. at 78 (footnote and internal quotation marks omitted).

In construing the Revenue Clause and the phrase "to … provide for the … general Welfare" within the Revenue Clause, there is no better guide for this Court than James Madison, who authored many of the Federalist Papers. During a 1792 congressional debate, James Madison explained what he meant in Federalist No. 41. He said:

> "I, sir, have always conceived – I believe those who proposed the Constitution conceived, and it is still more fully known, and more material to observe that those who ratified the Constitution conceived – that this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms….
>
> It will follow, in the first place, that if the terms be taken in the broad sense they maintain, the particular powers afterwards so carefully and distinctly enumerated would be without any meaning, and must go for nothing. It would be absurd to say, first, that Congress may do what they please, and then that they may do this or that particular thing…. ***In fact, the meaning of the general terms in question must either be sought in the subsequent enumeration which limits and***

> ***details them, or they convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all***."

*Eastman*, 4 Chapman L. Rev. at 80 (quoting 3 ANNALS OF CONG., House of Representatives, 2d Cong., 2d Sess. 386-87 (1792), emphasis added and internet citation omitted). Thus, in construing the Revenue Clause, the phrase "to … provide for the … general Welfare" further defines and limits the power "To lay and collect …"; it does not enumerate another power.

## III. THE PRESENTMENT AND BICAMERAL CLAUSES PROHIBIT THE 111TH CONGRESS FROM SPENDING ON "AUTO-PILOT" BEYOND THE END OF ITS TERM BECAUSE SUCH SPENDING WITHHOLDS LEGISLATIVE POWER FROM FUTURE CONGRESSES AND VETO POWER FROM FUTURE PRESIDENTS

The Medicaid Expansion Provisions put federal and state spending on "auto-pilot" for years to come and thereby violate the Constitution's Separation of Powers Doctrine for several reasons. First, they take the spending decision from some future Congress and transfer it to the Congress that enacted the spending legislation. Essentially, they leave future Congresses with less than all legislative powers and future Presidents with less than all their veto powers. Furthermore, future spending compels future Congresses to appropriate more money from the Treasury than they might otherwise decide to do.

As this Court has recognized, "The Constitution's division of power among the three branches is

violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. at 182. In other words, the "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *Id.*

Here, however, the encroachment is more subtle and perhaps more dangerous. The 111th Congress and the President consented to spending on behalf of their successors. That is, under the MXPs, Congress and the President enlarged their own spending power by encroaching upon the legislative and veto powers of future Congresses and Presidents, respectively.

There can be no doubt that our Framers sought to diffuse power to prevent tyranny. Not only did they incorporate a Separation of Powers doctrine and the concept of federalism into the Constitution, but they provided a temporal constraint on the legislative mandate. The words of the Constitution and George Washington are clear on this point.[9]

Justice O'Connor explained the Constitution's diffusion of powers as follows:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the

[9] It should not be overlooked that in addition to being our Nation's first President, George Washington also presided over the 1787 Convention that proposed the Constitution for ratification.

> protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S., at 458.

*New York v. United States*, 505 U.S. at 181-182.

Turning to the power of Congress, the Constitution provides various constraints. It is well-established that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Those powers are constrained by the Constitution's procedural requirements, *see e.g.* U.S. CONST. art. I, sec. 7, cl. 2, and substantive requirements, *see e.g.* U.S. CONST. art. I, sec. 9. Another constraint is provided by the temporal limit on the legislative franchise, *i.e.*, an end in the term of office for which each member of the House and each member of the Senate was elected.

The temporal constraint comes from the words of the Constitution itself. The President and members of the Senate and members of the House of Representatives represent different geographic constituencies, have different times and modes of

election, and have different requirements for holding office. U.S. CONST. art. I, secs. 2 & 3; U.S. CONST. art. II, sec. 1; and U.S. CONST. amend. XVII. The Constitution further diffuses power by limiting the terms of the President and members of the Senate and the House and by making the terms of different lengths. Senators are elected for six years. U.S. CONST. art. I, sec. 3, cls. 1&2; U.S. CONST. amend. XVII. The President is elected for four years. U.S. CONST. art. II, sec. 1, cl. 1. Members of the House of Representatives are elected for two years. U.S. CONST. art. I, sec. 2, cl. 1. Thus, the authority of each Representative, each Senator, and the President expires at the end of his or her term in office, respectively. Exercising any legislative authority beyond that point unconstitutionally transfers power from the People to choose their own representatives.

As George Washington explained the temporal constraint: "'The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and ***for a certain limited period***, to representatives of their own chusing; and whenever it is executed contrary to their Interest, … their Servants can, and undoubtedly will be, recalled.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 814 n.26 (1995) (internal citation omitted, emphasis added).

A commentator expressed the temporal constraint in real estate terms, *i.e.*, the holding of an elective office is a "temporary lease" from the nation's citizens. Alan B. Morrison, *A Non-Power Looks at the Separation of Powers*, 79 Geo. L. J. 281, 282 (1990). Expressed in real estate terms, the Constitution does not permit holdover tenancies by members of Congress or the President. By spending beyond the

expiration of its term, the 111th Congress has become a "holdover" Congress.

## CONCLUSION

For the foregoing reasons, the Medicaid Expansion Provisions are unconstitutional.

Respectfully submitted,

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