No. 14-992

IN THE

SUPREME COURT OF THE UNITED STATES

MARY C. MAYHEW, in her capacity as Commissioner of the Maine Department of Health and Human Services,

Petitioner,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services and JANET T. MILLS, in her capacity as Attorney General of Maine,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Section 2001(b) of the Patient Protection and Affordable Care Act ("ACA") requires any State paying Medicaid to 19- and 20-year-olds as of the ACA's enactment to continue to do so on the same terms until 2019 or lose all its federal Medicaid funding. When the ACA took effect, Maine was performing a promise to cover 19- and 20-year-olds through December 31, 2010 in exchange for increased Medicaid reimbursement, as part of the federal stimulus program. In 2012, Maine proposed to cease such coverage. The Secretary ruled that § 2001(b) prohibited the change, and the First Circuit affirmed over Maine's constitutional objections. Accordingly, the questions presented for review are:

1. Whether §2001(b) exceeds Congress's power under the Spending Clause and intrudes on the sovereignty reserved to Maine under the Tenth Amendment.

2. Whether § 2001(b) as applies to Maine is an unconstitutional retroactive change to the conditions on Maine's participation in the federal stimulus program.

3. Whether Maine's unequal access to the Medicaid program by virtue of § 2001(b)'s requirement that Maine cover individuals that other states are not required to cover needs justification as an infringement of Maine's equal sovereignty and, if so, whether promoting the transition to a regime based on the ACA's unconstitutional mandatory Medicaid expansion is adequate justification.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the *Cato Supreme Court Review*. This case concerns Cato because it shows how the government is attempting to coerce states despite this Court's ruling in *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566 (2012) *("NFIB").* This unconstitutional coercion prevents states from creating and maintaining well-functioning health insurance markets.

SUMMARY OF THE ARGUMENT

This case considers the implementation of the Affordable Care Act ("ACA") in a way that threatens state sovereignty and creates inequality among the states in administering Medicaid programs. It raises obvious federalism questions, but also one of significant policy importance: Medicaid makes up about 25 percent of each state's annual spending and the outcome of this case will implicate continued federal contributions to states' Medicaid programs.

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[1] Rule 37 statements: All parties were timely notified and have consented to the filing of this brief. Counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

The ACA has effected drastic changes in states' roles in health care administration. Questions regarding both its constitutionality and implementation have already been presented to this Court, but disposition of those questions has only given rise to new interpretive disputes. In particular, the controlling opinion in *NFIB v. Sebelius* contained broad language rejecting mandatory Medicaid expansion, but the Secretary of Health and Human Services construed the Court's language narrowly and applied it only to part of the expansion. As a result, states have been presented with conflicting information about their obligations under § 2001(b) of the ACA.

This Court must resolve this dispute to enable lawmakers to make informed decisions about establishing exchanges or accepting Medicaid expansion. Thirty-four states have declined to establish exchanges, but future legal developments could increase political pressure on lawmakers to reconsider their positions. Understanding whether states are already exempt from Medicaid's maintenance-of-effort ("MOE") mandate could be an important factor in weighing the costs and benefits of that action.

Likewise, about half of the states have rejected enhanced Medicaid funding with the understanding that the increased federal match rate will not apply to populations covered by the MOE provisions. Should the Court hold that the government's implementation of § 2001(b) is unconstitutional under *NFIB*'s coercion rationale, states may reconsider their position on Medicaid expansion in light of changed financial positions.

In sum, this Court should grant cert. in this case because, without a definitive ruling here, it will be impossible for states to make informed decisions regarding their roles in implementing the ACA.

ARGUMENT

I. THE OUTCOME OF THIS CASE COULD HAVE A SUBSTANTIAL IMPACT ON STATE BUDGETS

This case is of significant and pressing importance because, whatever the ultimate ruling, it will affect a substantial portion of every state budget.

A. Medicaid Is a Significant Budget Item in All 50 States

Medicaid is a means-tested entitlement program for low-income Americans that is funded and administered through a state-federal partnership. 42 U.S.C §1396 et seq. In FY 2013, before the ACA's Medicaid expansion took effect in participating states, total Medicaid spending was $413.7 billion (not including administrative costs), or about 24.5 percent of state spending—with the federal government contributing about 57 percent of that amount. Nat'l Assoc. of State Budget Officers, *State Expenditure Report: Examining Fiscal 2012-2014 State Spending* ("NASBO").[2] The federal contribution to the "old" Medicaid program—the funds threatened by the MOE requirement at issue here—thus amounts to nearly 14 percent of the average state's

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[2] Available at http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20(Fiscal%202012-2014)S.pdf (last visited Mar. 19, 2015).

budget. In *NFIB*, the Court indicated that a threat to federal grants that made up even 10 percent of a state's budget amounted to a "gun to the head" of state legislatures. 132 S. Ct. at 2604. That gun is now even bigger.

B. All 50 States Are Subject to the ACA's Maintenance-of-Effort Requirement as a Result of Covering One or More Optional Medicaid Populations

The threat of revoking federal Medicaid funding for all Medicaid populations from states that do not comply with the ACA's §2001(b) MOE requirements is a potent one, as every single state offered at least one optional population Medicaid eligibility in 2010, when the law went into effect. National Conference of State Legislatures, *Medicaid and CHIP Eligibility Table by State* ("NCSL").[3] Many states had recently temporarily expanded their optional Medicaid eligibility levels as a result of the American Recovery & Reinvestment Act §§ 500(a)(2), 5001(f), 123 Stat. 496, 499-500. States that accepted this temporary program are still responsible for covering the populations subject to the MOE requirements, even after the program and its enhanced funding have expired. ACA § 2001(b)(2), 124 Stat. 275.

Every state in the nation also has either a Children's Health Insurance Program ("CHIP") or integrated Medicaid program that expands access to children above the federally mandated minimum income level. NCSL, *supra*. Because they offer

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[3] Available at http://www.ncsl.org/research/health/medicaid-eligibility-table-by-state-state-activit.aspx (last visited Mar. 19, 2015).

coverage to these optional populations, every state in the nation is subject to the extended children's MOE provisions effective until October 2019—regardless of participation in Medicaid expansion or exchanges.

II. FEDERAL INTERPRETATIONS OF THE ACA CONFLICT WITH *NFIB V. SEBELIUS*

In *NFIB v. Sebelius* this Court struck down the ACA's Medicaid expansion requirements. The exact language of the opinion differs from the regulatory guidance offered by the HHS Secretary, causing confusion among state Medicaid directors attempting to understand their obligations under the law.

A. In *NFIB*, This Court Clearly Identified Populations Under the Newly Mandated Minimum Coverage Categories as Part of the New Medicaid Program

In its decision in *NFIB*, the Court differentiated the "current" or pre-ACA Medicaid program from the new, unconstitutionally coercive program—based on the populations the two programs seek to cover and how that coverage is paid for. The Court stated that "[t]he current Medicaid program requires States to cover only certain discrete categories of needy individuals . . . there is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage." *NFIB*, 132 S. Ct. at 2601. The Court was clear that expanding mandatory Medicaid eligibility beyond these "discrete categories of needy individuals" constituted a dramatic increase of state obligations under Medicaid. *Id*.

B. The HHS Secretary Sowed Confusion with a Narrow Interpretation of *NFIB*

Despite the language provided by the Court, Secretary Sebelius interpreted the Court's reasoning more narrowly and determined that the distinction between individuals covered by the old and new programs is not whether coverage for those individuals was *mandatory* under the federally mandated minimum before passage of the ACA, but whether they were *actually eligible* before the ACA under state-specific expansions. Kathleen Sebelius, Letter to the Governors, Jul. 10, 2012.[4]

Limiting the scope of the Court's ruling to individuals "who were not previously eligible for Medicaid" effectively removed the § 2001(b) MOE requirements from the purview of the Court's decision. In her letter to the governors dated July 10, 2012—just days after *NFIB v. Sebelius* was decided—the Secretary ignored what was facially a clear-cut decision and instead plunged Medicaid administrators into a renewed state of confusion. *Id*.

III. THIS QUESTION MUST BE SETTLED PROMPTLY TO ENABLE STATES TO MAKE INFORMED DECISIONS ABOUT ESTABLISHING EXCHANGES AND EXPANDING MEDICAID

State lawmakers and administrators are constantly making budgetary decisions that affect their states' entire populations. In the immediate

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[4] Available at https://kaiserhealthnews.files.wordpress.com/2012/07/secretary-sebelius-letter-to-the-governors-071012.pdf.

future, however, many states will be making decisions about their participation in the implementation of the ACA—particularly whether to establish a state-based exchange or expand their Medicaid programs. The upcoming decision in *King v. Burwell*, among many other legal developments, could create new political pressures that will make prompt resolution of this case all the more necessary.

A. The Applicability of the ACA's Maintenance-of-Effort Requirement Will Influence State Lawmakers' Decisions on Whether to Establish Exchanges—Regardless of How This Court Rules in *King v. Burwell*

All 34 states that have declined or failed to establish state-based health insurance exchanges continue to be liable for the full scope of the MOE requirement until the HHS Secretary has certified that "an exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act is fully operational." ACA § 2001(b)(1), 124 Stat. 275. This is one of the conditional benefits Congress tied to state participation in establishing ACA-compliant exchanges.

In *King v. Burwell* (No. 14-114), the plaintiffs argue that the availability of premium tax subsidies to citizens of a state was another conditional benefit of establishing an exchange, and that those benefits are not available absent an exchange established by the state, rather than by the Secretary of HHS.

1. A ruling for the plaintiffs in *King* would put pressure on states to establish exchanges in order to secure subsidies for their citizens.

In weighing whether establishing an exchange is something a particular state should undertake, it will be necessary for lawmakers to have a clear understanding of the financial impact the decision to establish could have on the state treasury. With the current conflict in guidance between the Court and HHS Secretary, it is unclear whether establishing a state-based exchange would free states from some of the MOE requirements imposed by §2001(b) of the ACA—or if that burden should have been lifted in response to *NFIB*.

2. A ruling for the government in *King* would not dispose of the questions at hand.

On the other hand, a *King* ruling in favor of the government on the issues presented in this cert. petition would still be necessary to determine whether the MOE provisions in §2001(b), codified as 42 U.S.C. § 1396a(gg)(2), are valid and will continue to apply until October 2019. If the government's position in *King* holds, the Secretary's current interpretation of § 2001(b) would make its interpretation a moot question as applied to 42 U.S.C. § 1396a(gg)(1), but the controversy around 42 U.S.C. § 1396a(gg)(2) would remain unsettled. The confusion surrounding the conflicting interpretations of the Court's opinion in *NFIB* would be resolved by this Court's consideration and resolution of the questions raised here.

B. The Applicability of the MOE Requirement Will Influence State Lawmakers' Decisions on Whether to Accept the ACA's Medicaid Expansion

States that have not expanded Medicaid face considerable and continued pressure to do so. In most cases, those states are already facing annual budget shortfalls driven by Medicaid expenditures which, prior to the ACA, averaged around 12 percent, but now exceed 20 percent of total state expenditures. NASBO, *supra*.

If this Court rules that the ACA's MOE provisions are unconstitutional because they coerce the states as articulated in *NFIB*, state Medicaid budgets would be significantly affected. If states are relieved of the obligation to continue to provide Medicaid coverage for populations that could potentially find coverage elsewhere—either through exchanges with the help of subsidies or through employer-sponsored insurance—the savings to state budgets could sway states' decisions regarding Medicaid expansion.

CONCLUSION

It is incumbent upon the Court to answer important federal questions, particularly when those questions arise out of a conflict between the state and federal governments attempting to implement a federal law that utilizes coercive tactics. Without a definitive understanding of the obligations imposed by the ACA, it will be impossible for state lawmakers to be confident that any decision they make regarding that law's implementation will not be upended by a subsequent executive-branch decision.

In this particular case, the rapidly changing legal and administrative landscape surrounding ACA implementation could create pressure for states to make rapid decisions with long-term consequences. It is necessary for everyone involved to have as much concrete and correct information as possible when making these decisions to preserve state autonomy and financial solvency.

This Court must take up and decide this case so all concerned parties can have clear legal guidance upon which to make health care policy decisions.

Respectfully submitted,

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