No. 11-400

In the

Supreme Court of the United States

STATES OF FLORIDA, et al.,

Petitioners,

v.

U.S. 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

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, PACIFIC LEGAL FOUNDATION, AND MATT SISSEL IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

TIMOTHY SANDEFUR
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
tsandefur@pacificlegal.org

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
(714) 628-2587
jeastman@chapman.edu

Counsel for Amici Curiae

QUESTION PRESENTED

1. Against the backdrop of a federal spending program the constitutionality of which is both dubious and untested, 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's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?

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INTEREST OF AMICI CURIAE[1]

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527 (2011); *Bond v. United States*, 131 S.Ct. 2355 (2011); *Reisch v. Sisney*, No. 09-953, *cert. denied*, 130 S.Ct. 3323 (2010); *Rapanos v. United States*, 547 U.S. 715 (2006); *GDF Realty Investments, Ltd. v. Norton*, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

denied, 541 U.S. 1006 (2004); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Schaffer v. O'Neill*, No. 01-94, *cert. denied,* 534 U.S. 992 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

Amicus Pacific Legal Foundation ("PLF") is widely recognized as the largest and oldest nonprofit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. PLF has participated as amicus curiae in several lawsuits challenging the constitutionality of the Patient Protection and Affordable Care Act (PPACA), including *Virginia ex rel. Cucinelli v. Sebelius* (No. 11-420, pending); *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir., pending); and *Coons v. Geithener*, No. CV-10-1714 (D. Ariz., pending). In addition, PLF attorneys represent amicus Matthew Sissel, a citizen of Iowa, and decorated Iraq War veteran and small business owner, who is the plaintiff in a lawsuit challenging the constitutionality of PPACA, *Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10 cv 01263 RJL (D.D.C., filed July 26, 2010).

SUMMARY OF ARGUMENT

Talk about the proverbial camel's nose under the tent! What began with the small step of upholding a federal program to stop the "spread" of great depression-era unemployment from State to State has now metastasized into a wholesale usurpation of the police power, that power to regulate the health and safety of the people which this Court has correctly and repeatedly recognized is reserved to the States. Just as the Commerce Clause power has outer lim-

its—and we fully endorse both the holding of the Eleventh Circuit below on that score and the claim in the parallel petitions of the States and the National Federation of Independent Business that the circuit split that has developed on that issue warrants this Court's review[2]—the Spending Clause also has limits that warrant this Court's consideration. *United States v. Butler*, 297 U.S. 1 (1936). But the increasing tendency of the courts to effectively treat Spending Clause issues as non-justiciable political questions has facilitated Congress's spending addiction, to the point that a graph of the extraordinary, rapid and exponential rise in the national debt in recent years makes the infamous global warming "hockey stick" graph look positively modest.[3]

Our nation's Founders never envisioned unfettered spending by the Congress, and when the political branches prove incapable of policing themselves, it is the solemn duty of this Court to check their constitutional excesses. A wholesale revisiting of the New Deal precedents that approved digging of the

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[2] As a result, we support both the State Petitioners' Petition for a Writ of Certiorari in No. 11-400 and the NFIB's Petition for a Writ of Certiorari in No. 11-393.

[3] *Compare* Michael E. Mann and Raymond S. Bradley, *Northern Hemisphere Temperatures During the Past Millenium: Inferences, Uncertainties, and Limitations*, American Geophysical Union, Geophysical Research Letters, v. 3.1 (Feb. 14, 1994), *available at* http://www.ncdc.noaa.gov/paleo/pubs/millennium-camera.pdf (last visited Oct. 30, 2011), *with* Chart, U.S. Federal Debt from FY 1900 to FY 2016, *available at* http://www.usgovernmentspending.com/spending_chart_1900_2016USk_13s1li0181151_613cs_H0f_US_Federal_Debt (last visited Oct. 30, 2011).

unconstitutional spending hole in which we find ourselves is not now required, but we at least must stop digging. The massive expansion in the assertion of federal authority upon which rests the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("PPACA"), begs for a response from this Court to reestablish the most basic of constitutional premises, that ours is a national government of limited, delegated power.

The States' challenge under *South Dakota v. Dole*, 483 U.S. 203 (1987), to the coerciveness of the federal spending conditions would be a good place to start. By developing a "coercion" jurisprudence that focuses less on the amount of the money at stake—although it is hard to imagine a scenario less problematic under that calculus than the current one—and more on federalism and the nexus with permissible constitutional ends, this Court could begin to reconcile current spending practice with its holding in *Butler* and with the admonition in *United States v. Lopez*, 514 U.S. 549, 557 (1995), that there must be "outer limits" on congressional authority.

ARGUMENT

I. THIS CASE PRESENTS THE OPPORTUNITY TO REAFFIRM THAT THE SPENDING CLAUSE, LIKE THE COMMERCE CLAUSE, HAS OUTER LIMITS.

A. Spending Clause Jurisprudence Since *Butler* Has Not Paid Sufficient Heed to the "Outer Limits" of Constitutional Authority.

The history of Spending Clause jurisprudence since this Court decided *United States v. Butler* in 1936 is a perfect example of a "camel's nose" argument that actually proves to be true rather than fallacious.[4] First, Title III of the Social Security Act of 1935, 42 U.S.C. § 501 *et seq.*, was upheld by this Court in 1937 (after external pressure threatened the Court's composition and independence[5]) because it was limited to unemployment benefits, and unemployment was "[s]preading from state to state," thus necessitating a national solution. *Charles C. Ste-*

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[4] There are many iterations of the "camel's nose in the tent" story, some using it to describe negative consequences that come about incrementally, others using the story to describe the logical fallacy of some slippery slope arguments. Although the version of the story found at http://www.thewisdomjournal.com/Blog/the-verbal-cheap-shot-artist-part-ten-the-camels-nose/ is of the latter sort, we quote from it in the text which follows because of the richness of its narrative, simply noting that sometimes, as here, the slippery slope really does exist. *See generally*, Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003).

[5] *See, e.g.,* Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 202 n.1 (1994).

ward Mach. Co. v. Davis, 301 U.S. 548, 586-87 (1937) ("*Steward*"); *Helvering v. Davis*, 301 U.S. 619, 641 (1937) (*citing Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442 (1934)).

Truth be told, there was no constitutional analysis in the *Steward* opinion. The Court merely noted that "[i]t is too late today for the argument to be heard with tolerance that in a crisis so extreme [as the great depression] the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare." In support of that *ipse dixit*, the Court provided a "cf." citation to *Butler*, 297 U.S. at 65, 66, which just the year before had *struck down* the Agricultural Adjustment Act, 48 Stat. 31 (May 12, 1933), as going beyond the authority of the general welfare clause because it did not further a purpose entrusted to the national government.[6] *Butler*, 297 U.S., at 78. How "unemployment" is any more a purpose entrusted to the national government than "agriculture," the *Steward* Court did not say.

"Master, can I just put my nose into the tent to warm up?" said the camel to his Bedouin master, who begrudgingly agreed.

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[6] The Court also cited *Helvering v. Davis*, 301 U.S. 619, 672 (1937), decided the same day, but *Helvering* itself adds nothing to the analysis, merely stating that the question of the constitutionality of the retirement provisions of the Social Security Act was similar to that of the unemployment provisions, already decided in the *Steward* case. Rarely has there been greater circularity of reasoning in the pages of the U.S. Reports.

The same day, the Court extended the ruling from unemployment to retirement benefits, citing as authority the aforementioned *Butler* and, circularly, *Steward*. Here is the full extent of the analysis: "Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. . . . But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it." *Helvering*, 301 U.S. at 641. No difference between being unemployed because one was laid off and "unemployed" because one had retired? Despite the obvious difference between the two, Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*,?? was also upheld.

"Master, can I just put my forelegs into the tent? They're freezing," the camel successfully pleaded.

Thirty years later, Congress decided to enter the health care arena, another realm that had traditionally been viewed as exclusively within the sovereign authority of the States. So pervasive had become the view that the General Welfare Clause provided no limits on Congress, *Butler* to the contrary notwithstanding, that the 1965 Medicare and Medicaid Amendments to the Social Security Act[7] do not appear to have ever faced a constitutional challenge. If providing both unemployment benefits and old age

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[7] Social Security Amendments of 1965, Pub. L. No. 89-97, §§ 102(a), 121(a), 1965 U.S.C.C.A.N. (79 Stat. 286, 291, 343) 305, 311, 370 (amended 1967) (codified as amended at 42 U.S.C. §§ 1395c to 1395w-4, 1396 to 1396v).

pensions was permissible because taking care of the needy was in the *general* welfare rather than the concern of the individual states, then providing health care benefits for the poor (Medicaid) and aged (Medicare) must also be permissible, the original rationale that unemployment was "spreading" from one state to another having long since been forgotten.

And the camel said, "I have to put my back legs in as well, otherwise they will freeze and we won't be able to travel in the morning."

We know how the camel story ends. The Bedouin master awakes in the middle of the night, completely outside the tent in the cold. As will we, if the camel is not stopped.

B. Basic Separation of Powers Principles Require This Court's Enforcement of Constitutional Limits on Spending Authority.

The Congress itself has a solemn duty to exercise power only within the limits of its constitutionally delegated authority. U.S. Const. Art. VI, cl. 3 ("The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution"). But, quite correctly recognizing that power tends not to police itself very well, our Founders provided a constitutional system in which legislative power could be checked by the other branches of government as well. *See, e.g.,* The Federalist No. 51, at 320 (Madison) (C. Rossiter, ed., 1961) (noting that the Constitution was designed so that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"); The Federalist No. 78, at 467 (Hamilton) ("the courts

were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority").

For more than a half century, Presidents performed that check admirably, through an effective use of the veto power. *See, e.g.,* Veto Message of President Madison, 30 ANNALS OF CONG., Senate, 14th Cong., 2nd Sess. 211 (1817); Veto Message of President Monroe, 39 ANNALS OF CONG., House of Representatives, 17th Cong., 1st Sess. 1838 (1822); Veto Message of President Jackson, 28 H.R. JOURNAL 29 (1834); Veto Message of President Buchanan (Feb. 24, 1859), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3079 (James D. Richardson ed., 1897). And another three quarters of a century after that, this Court did as well, invalidating a congressional spending program in *Butler* that did not further powers delegated to the national government. *See generally, e.g.*, John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chap. L. Rev. 63 (2001); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1 (2003); David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1 (1994).

Although *Butler* remains valid precedent, it is almost uniformly ignored in the lower courts, encouraged by this Court's lackluster commitment in *South Dakota v. Dole* to enforcing the constitutional limitation that spending must be for "purposes . . . of general, not local, national, not state, benefit." Veto Message of President Monroe, 39 ANNALS OF CONG., *supra*, at 1849; *see Dole*, 483 U.S. at 207 and n.2

(noting that "courts should defer substantially to the judgment of Congress" and questioning "whether 'general welfare' is a judicially enforceable restriction at all").

Yet the limitation is real; it is ascertainable; and as this case amply demonstrates, it must be enforced lest the carefully-wrought distinction between what is national and what is local be rendered null and void. As Justice Kennedy noted in his concurring opinion in *United States v. Comstock*, 130 S.Ct. 1949, 1967 (2010), "[t]he limits on the spending power have not been much discussed, but if the relevant standard is parallel to the Commerce Clause cases, then the limits and the analytical approach in those precedents should be respected." Certiorari is therefore warranted to consider (and reject) the government's on again/off again reliance on the Constitution's tax and spend power as a source of authority for the PPACA.[8]

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[8] The Court need not reconsider its prior decisions in *Steward* and *Helvering* in order to reject the massive additional slide down the slippery slope that the PPACA represents. Or, to stick with our original metaphor, the Court can decline to welcome the camel's hind quarters into the tent without forcibly removing its front legs and nose. But if the serious constitutional analysis that we request be undertaken in the present case yields a renewed recognition that the Spending Clause contains enforceable limits on the power of the federal government and hence might call into question some aspects of the holdings in those cases, there is precedent for long periods of weaning from the unconstitutional conduct to avoid societal disruption and to accommodate reliance interests. *Compare Brown v. Board of Ed. of Topeka, Kan.*, 349 U.S. 294, 301 (1955) ("Brown II") (ordering that school segregation be ended "with all deliberate speed"), *with Green v. County Sch. Bd. of New*

II. THE COERCION PRONG OF THE *DOLE* SPENDING CLAUSE ANALYSIS MUST BE GIVEN EFFECT.

Even if this Court determines that the present case is not the appropriate vehicle for confronting the broader Spending Clause issue itself, *cf. Reisch v. Sisney*, No. 09-953, *cert. denied*, 130 S.Ct. 3323 (2010)*; Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *id.* at 727 n.2 (Thomas, J., concurring) (noting that RLUIPA may well exceed Congress' authority under either the Spending Clause or the Commerce Clause"), the States' "coercion" claim should at least be considered against the broader Spending Clause backdrop. Indeed, one of the reasons the lower courts have had difficulty applying the "coercion" prong of *Dole* is that they have focused on the size of the federal largess (either in absolute terms or as a percentage of some funding program) in order to determine whether the federal government's grant of funds, and the strings attached to them, were unduly coercive. Viewed in isolation, some courts have found it hard to fathom how any "gift" of funds can be coercive. *See, e.g.*, *Nevada v. Skinner*, 884 F.2d

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Kent County, Va., 391 U.S. 430, 438 (1968) (noting, almost 15 years later, that "'[t]he time for mere 'deliberate speed' has run out'"); *cf. Grutter v. Bollinger,* 539 U.S. 306, 310 (2003) (noting respondents' pledge that it "will terminate its use of racial preferences as soon as practicable" and expecting "that 25 years from now" such use "will no longer be necessary"). Moreover, because the States in our constitutional system remain as they always have been—separate sovereigns with the principal authority for advancing the internal health and safety of their citizens—there is little risk that health care would fall into a governmental void.

445, 448–49 (9th Cir. 1989); *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000).

But the "coercion" prong should not be viewed in isolation. It exists against a backdrop of a limited spending power, and in the context of federalism. When, as with the case of the expanded Medicare program under consideration here, the federal government grabs tax revenues from a State's own citizens, then returns some portion of those revenues to further police power purposes that fell within the State's jurisdiction in the first place, and attaches to that "gift" of federal funds some regulatory condition that the federal government could not impose directly, the transaction is inherently coercive. *See* Richard Epstein, *Bargaining With the State* 152 (1993); Lynn A. Baker, "*The Spending Power and the Federalist Revival,*" 4 Chap. L. Rev. 195, 224 (2001). As *Butler* recognized, "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *Butler*, 297 U.S. at 73.

This is particularly true where, as here, the "gift" is massive and amounts to a large percentage of the total funds the State receives from the federal government. *See Com. of Va. Dept. of Educ. v. Riley*, 86 F.3d 1337, 1355-56 (4th Cir. 1996) (Luttig, J., dissenting), *adopted as the plurality opinion of the court on reh'g en banc*, 106 F.3d 559 (4th Cir. 1997) (holding that "a Tenth Amendment claim of the highest order lies where . . . the Federal Government . . . withholds the entirety of a substantial federal grant on the ground that the State refuses to fulfill their

federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States.").

Certiorari is therefore warranted to resolve the split among the circuits over the ongoing vitality of the "coercion" prong of the *Dole* analysis, to give the doctrine enough jurisprudential heft to serve as a meaningful check on intrusive congressional action, and to place the doctrine squarely in the context of the concepts of federalism and limited, enumerated powers that need to be as much a part of the understanding of the Spending Clause as they are of the Commerce Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

TIMOTHY SANDEFUR
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
tsandefur@pacificlegal.org

JOHN EASTMAN
Counsel of Record
ANTHONY T. CASO
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(714) 628-2587
jeastman@chapman.edu

Counsel for Amici Curiae

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