Ohio Senate
Senate Building
1 Capitol Square
Columbus, Ohio 43215
(614) 466-8068

Committees:
Public Utilities, *Chair*
Criminal Justice, *Vice-Chair*
Commerce and Labor
State Government Oversight and Reform
Transportation
Finance - General Government Subcommittee

Bill Seitz
State Senator
8th District

March 20, 2013

John S. Prout
President and Chief Executive Officer
TriHealth
619 Oak Street
Cincinnati, Ohio 45206

Dear Mr. Prout,

Thank you for your March 6 letter. I will respond to your three points in reverse order.

I see your point; 83% of something beats 100% of nothing. But I would submit that you would be better off still if Congress restored the disproportionate share payments that they so hastily withdrew when they passed the ACA, and if Congress repealed or substantially modified EMTALA so hospitals could use their own good judgment to send non-emergency cases to non-emergency facilities. Too, I recognize that part of your charitable mission is to care for the vulnerable; separating out which portion of your uncompensated care falls in that basket, versus which falls in the 17% Medicaid shortfall and/or the loss of DSH and/or EMTALA requirements, is really the question, and I fear some of the gloom and doom numbers that I've heard actually represent lumping all these causes together. But that is not my main concern.

I also do not doubt that at the State level, Medicaid expansion would have a positive impact on the economy and on the State budget, in the near term. I am less sanguine that the expansion would lead to healthier populations, as Medicaid has been around for a long time and there are plenty of studies that suggest that it has not led to better health outcomes. After nearly 50 years of the program's existence, if it in fact led to healthier State populations, and thence to higher household spending and increased employment, we would be seeing a reduction in Medicaid spending, not the increase that we have seen, and we would not be mired in a deep recession with high unemployment. The dependency society has not served us well, if you ask me. But that is not my main concern, either.

My main concern is that I read the Supreme Court's opinion and the language of the ACA—not a sentence of which was stricken or modified by that decision—differently than you do. Since our last correspondence, I have read the Bricker & Eckler memo commissioned by the Ohio Hospital Association, and laboriously studied the Supreme Court's opinion. Attached is my analysis. Essentially, I conclude that:

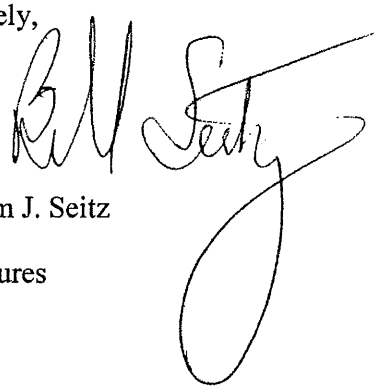
1. The Supreme Court gave States a one-time option to refuse to expand Medicaid (as required by the ACA) without penalty, but it did not allow States who chose to expand, despite the Court's opinion, to opt-out later. It did not countenance States' rights to play "the hokey pokey" with Medicaid expansion, signing up when the money was good and backing out without penalty when circumstances changed.
2. The Supreme Court's opinion was that the Federal government could not coerce States into accepting Medicaid expansion on penalty of the threatened loss of <u>all</u> pre-existing Medicaid funding, but it did <u>not</u> say that the Federal government could not impose <u>some</u> financial penalty on states that refuse to expand, much less did the opinion say that the Federal government could not impose penalties on those who tried to opt-out after initially opting-in. Even the loss of <u>some</u> pre-existing Medicaid is too big a risk for me in good conscience to take.

My conclusion is shared by the editorial page of the <u>Wall Street Journal</u> (see enclosed), who was uncharitably blunt in its assessment of the Bricker memorandum.

Therefore, my new proposal is that Ohio accept the Medicaid expansion, to become effective at such time as Congress passes a law that explicitly permits States to later opt-out with no penalty other than the loss, <u>in futuro</u>, of the higher Medicaid match offered under the ACA. This is a huge concession on my part as I still believe it is unsustainable Federal spending that will further mire the country in unsustainable national debt, and I also know that even if Congress passed such a law, it could later repeal it. However, coupling my proposal with the "circuitbreaker" or "trigger" clause that the Governor placed in the Executive Branch budget would give us the strongest possible ground to argue that a Congress that later welched on the deal would have broken the "contractual nature" of Federal-State grant programs. Another alternative that bears investigation is whether we could seek a Section 1115 waiver under our existing Medicaid state plan to allow a 3-year demonstration project that would automatically sunset when the 100% ACA Federal match expires. If this alternative avoids the problems detailed in the attached, I would consider it.

I urge you to share this with your colleagues and I would be happy to discuss this further. I am not unsympathetic to the difficulty in which President Obama and the United States Congress have placed our Ohio hospitals, but we must come up with a solution that protects Ohio's long-term budget and Ohio's taxpayers.

Sincerely,



William J. Seitz

Enclosures

MEMORANDUM

TO: Interested Parties

FROM: Senator Seitz

DATE: March 18, 2013

RE: Medicaid Expansion After *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012)

In *NFIB v. Sebelius*, the Supreme Court considered the constitutionality of the Affordable Care Act ("ACA") insofar as it required persons to purchase insurance or else pay a penalty (the "Individual Mandate" issues) and insofar as it required all states to expand Medicaid eligibility or risk losing their pre-existing federal Medicaid grants (the "Medicaid Expansion" issue). As Justice Scalia (joined by Justices Alito, Kennedy and Thomas) noted in their opinion, "the two pillars of the [ACA] are the Individual Mandate and the expansion of coverage under Medicaid."[1] This paper will address only the Court's opinions on Medicaid expansion.

There were three such opinions that bear close reading. Chief Justice Roberts, joined on this point by Justices Breyer and Kagan, wrote the lead opinion. Justice Scalia, joined on this point by Justices Alito, Kennedy, and Thomas, wrote an opinion. Justice Ginsburg, joined on this point by Justice Sotomayor, wrote an opinion. Seven of the nine Justices agreed that Congress lacked the constitutional power to deprive the states of a meaningful choice whether or not to accept Medicaid expansion (Roberts, Breyer, Kagan, Scalia, Alito, Kennedy, and Thomas); the other two (Ginsburg and Sotomayor) dissented on this point and would have held that Congress could

[1] Significantly, (for an Administration that claims to oppose Obamacare) the Administration's support for Medicaid expansion in Ohio upholds one of the "two pillars" of that Act.

require states either to expand Medicaid or lose all previous existing funding. Significantly, however, of the seven Justices that found Medicaid expansion unconstitutional, four of them would also have ruled that therefore, the Medicaid expansion in the ACA must be wholly invalidated; but the Court did not so rule.

Rather, a strange five member coalition consisting of Roberts, Breyer, Kagan, Ginsburg, and Sotomayor ruled instead in favor of the federal government's proposal to preserve the Medicaid expansion such that "states would receive the additional Medicaid funds if they expand eligibility, but states will keep their pre-existing Medicaid funds if they do not expand eligibility." 132 S. Ct. at 2667 (Scalia Opinion). As Justices Scalia, Alito, Kennedy and Thomas noted in their dissent on this point, "the government's remedy, now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen" because now, none of the other provisions of Medicaid are invalidated, only "the authorization for the cut-off of all Medicaid funds" contained in 42 USC §1396(c) is unconstitutional as applied to the initial decision of a state to expand or not. As the dissenters noted, the other five Justices had held that "§1396(c) can be judicially revised, to say what it does not say."

As we dissect the meaning of the *NFIB* case, as applied to a question that it did not directly address – namely, whether a state that now accepts the Medicaid expansion can later opt-out without incurring any further penalty under the Medicaid program – it is therefore important to remember that the five-person Court majority on this point includes the Chief Justice and the four members of the Court appointed by Presidents Clinton and Obama, at least two of whom expressly found that there was no

constitutional infirmity in the federal government requiring states to expand Medicaid or risk loss of pre-existing funding in the first place. The fact that that five-person majority left intact the entirety of the ACA and the entirety of all the statutes governing the pre-existing Medicaid program is a very important fact to keep in mind as we consider how a future Court might answer the new question about opting-out without penalty after initially opting-in.

It is also critical to keep in mind what was before the Supreme Court in *NFIB*. As Justice Roberts put it, "the States also contend that Medicaid expansion exceeds Congress' authority under the Spending Clause. They claim that Congress is coercing the states to adopt the changes it wants by threatening to withhold State Medicaid grants, unless the states accept the new expanded funding and comply with the conditions that come with it. This, they argue, violates the basic principle that the federal government may not compel the states to enact or administer a federal regulatory program." 132 S. Ct. at 2606. In other words, the only claim before the Court was that the states were not being given a meaningful choice on the front end whether or not to accept the money.

Reasonable minds might differ as to whether *NFIB* forever precludes the federal government from cutting off all pre-existing Medicaid funding from states that choose to opt in to the Medicaid expansion and later opt out. Possibly, one could argue that the draconian penalty of eliminating all pre-existing Medicaid funding would still be viewed as too coercive by whatever Supreme Court were to consider that question at that time. However, there is absolutely no doubt that the federal government could impose penalties falling short of a complete withholding of pre-existing Medicaid funds if

a state were to opt in to the Medicaid expansion and then seek to opt out. This much is clear from each of the three main opinions in *NFIB*. Any fair reading of those three opinions would indicate that if the federal government were to elect to penalize withdrawing states with the loss of 5%, 10%, or even 20% of its pre-existing Medicaid money, that would not run afoul of any constitutional principle. Therefore, should federal reimbursement for the Medicaid expansion drop below 90%, for example, and Ohio then exercise its option to invoke the "circuit breaker" and cease participation in the expansion, there is absolutely no doubt that Congress could penalize Ohio by reducing its pre-existing Medicaid funding, if not eliminating it all together. This would be true whether or not Ohio passed any "circuit breaker" declaring its intention to opt out without incurring any penalty. One need only read *South Dakota v. Dole*, 483 U.S. 203 (1987), *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), and *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985) to prove that such a penalty would apply.

Because the Supreme Court opinions in *NFIB* are quite lengthy, I present below excerpts from each of the three lead opinions so that the reader may judge for himself or herself the limits of the decision.

I. Opinion From Chief Justice Roberts

"The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take.". . . .

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized . . . Spending Clause legislation as much in the nature of

a contract'". The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the "*contract*". . . . .

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. . . .

It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid.*, the legislation runs contrary to our system of federalism. . . . .

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.*, at 169, 112 S.Ct. . . . .

Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. . . . .

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts v. Mellon*, 262 U.S. 447, 482, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it. . . . .

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended – safe interstate travel." 483 U.S., at 208, 107 S.Ct. 2793. At the same time the condition was not a restriction on how the highway funds – set aside for specific highway improvements and maintenance efforts – were to be used.

We accordingly asked whether "the financial inducement offered by Congress" was so coercive as to pass the point at which pressure turns into compulsion'". . . . . By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because

Congress was offering only "relatively mild encouragement to the States." *Dole*, 483 U.S., at 211, 107 S.Ct. 2793. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%" of her highway funds. . . . In consequence, "we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power."

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement" – it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." 42 U.S.C. § 1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. . . . It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's desired policy "not merely in theory but in fact." . . . . The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. [FN12]

> [FN12] Justice GINSBURG observes that state Medicaid spending will increase by only 0.8 percent after the expansion. Post, at 2632. That not only ignores increased state administrative expenses, but also assumes that the Federal Government will continue to fund the expansion at the current statutory specified levels. It is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States. More importantly, the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. "Your money or your life" is a coercive proposition, whether you have a single dollar in your pocket or $500. . . . .

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of the statute. 42 U.S.C. § 1304. So it does. But "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.". . . . A State confronted with statutory language reserving the right to "alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. See, e.g., Social Security Amendments of 1972, 86 Stat. 1381-1382, 1465 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, §4601, 104 Stat. 1388-166 (extending eligibility, and conditioning old and new funds).

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. . . . .

Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. . . .

As we have explained, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Pennhurst*, supra, at 25, 101 S.Ct. 1531. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically. . . .

The Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. 301 U.S., at 591, 57 S.Ct. 883. The Court found it "[e{nough for present purposes that wherever the line may be, this statute is within it." *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. . . .

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold all "further [Medicaid] payments. . . to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. § 1396c. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. . . .

Today's holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act. . . . .

The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset. . . .

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may

offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act. . . . ."

II. Opinion From Justice Ginsburg

"The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. . . . .

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. 42 U.S.C. § 1304. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. See 42 CFR § 430.12(c)(i) (2011). And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

THE CHIEF JUSTICE acknowledges that Congress may condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," *ante*, at 2603 – 2604, but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in THE CHIEF JUSTICE's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, THE CHIEF JUSTICE maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. THE CHIEF JUSTICE therefore – *for the first time ever* – finds an exercise of Congress's spending power unconstitutionally coercive. . . .

Expansion has been characteristic of the Medicaid program. Akin to the ACA in 2010, the Medicaid Act as passed in 1965 augmented existing federal grant programs jointly administered with the States. . . .

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6

at the same income levels, and children ages 6 to 18 with family incomes up to 100% of the poverty level. . . .

These amendments added millions to the Medicaid-eligible population. . . .

Between 1966 and 1990, annual federal Medicaid spending grew from $631.6 million to $42.6 billion; state spending rose to $31 billion over the same period. . . . . And between 1990 and 2010, federal spending increased to $269.5 billion. . . . Enlargement of the population and services covered by Medicaid, in short, has been the trend. . . .

The Spending Clause authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." Art. I, § 8, cl. 1. To ensure that federal funds granted to the States are spent "to 'provide for the ... general Welfare' in the manner Congress intended," *ante*, at 2602, Congress must of course have authority to impose limitations on the State's use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. . . . . In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program. See, e.g., *Harris*, 448 U.S., at 201, 100 S.Ct. 2671 ("[O]nce a State elects to participate [in Medicaid], it must comply with the requirements of [the Medicaid Act].); . . . .

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.

Yes, there are federalism-based limits on the use of Congress' conditional spending power. . . .

In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion.'" . . . Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion. . . .

In *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985), the Secretary of Education sought to recoup Title I funds based on the State's noncompliance, from 1970 to 1972, with a 1978 amendment to Title I. Relying on *Pennhurst*, we rejected the Secretary's attempt to recover funds based on the State's alleged violation of a rule that did not exist when the State accepted and spent the funds. . . . .

> When amendment of an existing grant program has no such retroactive effect, however, we have upheld Congress's instruction. In *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985), the Secretary

sued to recapture Title I funds based on the Commonwealth's 1974 violation of a spending condition Congress added to Title I in 1970. Rejecting Kentucky's argument pinned to *Pennhurst*, we held that the Commonwealth suffered no surprise after accepting the federal funds. Kentucky was therefore obliged to return the money. . . . .

In any event, from the start, the Medicaid Act puts States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of {Medicaid]," the statute has read since 1965, "is hereby reserved to the Congress." 42 U.S.C. § 1304. . . .

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51-52, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), is guiding here. As enacted in 1935, the Social Security Act did not cover state employees. *Id.*, at 44, 106 S.Ct. 2390. In response to pressure from States that wanted coverage for their employees, Congress, in 1950, amended the Act to allow States to opt into the program. *Id.*, at 45, 106 S.Ct. 2390. The statutory provision giving States this option expressly permitted them to withdraw from the program. *Ibid.*

Beginning in the late 1970's, States increasingly exercised the option to withdraw . . . . Concerned that withdrawals were threatening the integrity of Social Security, Congress repealed the termination provision. Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape. *Id.*, at 48, 106 S. Ct. 2390. California objected, arguing that the change impermissibly deprived it of a right to withdraw from Social Security. *Id.*, at 49-50, 106 S.Ct. 2390. We unanimously rejected California's argument. *Id.*, at 51-53, 106 S.Ct. 2390. By including in the Act "a clause expressly reserving to it '[t]the right to alter, amend, or repeal any provision' of the Act," we held, Congress put States on notice that the Act "created no contractual rights." Id., at 51-52, 106 S. Ct. 2390. The States therefore had no law-based ground on which to complain about the amendment, despite the significant character of the change.

THE CHIEF JUSTICE nevertheless would rewrite § 1304 to countenance only the "right to alter *somewhat*," or "amend, *but not too much*." . . . . As *Bowen* indicates, no State could reasonably have read § 1304 as reserving to Congress authority to make adjustments only if modestly sized.

In fact, no State proceeded on that understanding. In compliance with Medicaid regulations, each State expressly undertook to abide by future Medicaid changes. . . . .

THE CHIEF JUSTICE insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." Ante, at 2605. But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? . . . . In short, given this Court's construction of § 1304's language in *Bowen*, and the enlargement of Medicaid in

the years since 1965, a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor. . . .

When future Spending Clause challenges arrive, as they likely will in the wake of today's decisions, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Ante, at 2602. Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State – or State – budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? . . . .

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. . . . .

Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently amended. 42 U.S.C. § 1396c. THE CHIEF JUSTICE, however holds that the Constitution precludes the Secretary from withholding "existing" Medicaid funds based on States' refusal to comply with the expanded Medicaid program. . . . .

But in view of THE CHIEF JUSTICE's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. . . . .

THE CHIEF JUSTICE is undoubtedly right to conclude that Congress may offer States funds "to expand the availability of health care, and require[d] that States accepting such funds comply with the conditions on their use." . . . ."

III. Opinion From Justice Scalia

"We now consider respondents' second challenge to the constitutionality of the ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termination of all the State's Medicaid funding. For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures. . . . .

The States challenging the constitutionality of the ACA's Medicaid Expansion contend that, for these practical reasons, the Act really does not give them any choice at all. As proof of this, they point to the goal and the structure of the ACA. The goal of the Act is to provide near-universal medical coverage, 42 U.S.C. §

18091(2)(D), and without 100% State participation in the Medicaid program, attainment of this goal would be thwarted. . . . .

In response to this argument, the Government contends that any congressional assumption about uniform state participation was based on the simple fact that the offer of federal funds associated with the expanded coverage is such a generous gift that no State would want to turn it down.

To evaluate these arguments, we consider the extent of the Federal Government's power to spend money and to attach conditions to money granted to the States. . . .

One way in which Congress may spend to promote the general welfare is by making grants to the States. Monetary grants, so-called grants-in-aid, became more frequent during the 1930's . . . As of 2010, federal outlays to state and local governments came to over $608 billion or 37.5% of state and local government expenditures.

When Congress makes grants to the States, it customarily attaches conditions, and this Court has long held that the Constitution generally permits Congress to do this. . . .

This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. . . .

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. See, e.g. *Dole, supra*, at 207-208, 107 S.Ct. 2793; *id.*, at 207, 107 S. Ct. 2793 (spending power is "subject to several general restrictions articulated in our cases.") For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. See *Pennhurst, supra,* at 17, 1010 S.Ct. 1531. Conditions must also be related "to the federal interest in particular national projects or programs," . . . and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," . . . . Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." . . .

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. . . . . And just as a contract is voidable if coerced, "[t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the State *voluntarily* and knowingly accepts the terms of the 'contract.'". . . .

Once it is recognized that spending-power legislation cannot coerce state participation, two questions remain; (1) What is the meaning of coercion in this context?

(2) Is the ACA's expanded Medicaid coverage coercive? We now turn to those questions.

The answer to the first of these questions – the meaning of coercion in the present context – is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. And as our decision in *South Dakota v. Dole* makes clear, theoretical voluntariness is not enough.

In *South Dakota v. Dole*, we considered whether the spending power permitted Congress to condition 5% of the State's federal highway funds on the State's adoption of a minimum drinking age of 21 years. South Dakota argued that the program was impermissibly coercive, but we disagreed, reasoning that "Congress ha[d] directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds." 483 U.S., at 2111, 107 S.Ct. 2793. . . .

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude the legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule. . . . .

For these reasons, the offer that the ACA makes to the States – go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding – is quite unlike anything that we have seen in a prior spending-power case. In *South Dakota v. Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21-year-old drinking age was approximately $614.7 million – or about 0.19% of all state expenditures combined. . . Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the states, or approximately $233 billion. . . . Withholding $614.7 million, equalling only 0.19% of all State expenditures combined, is aptly characterized as "relatively mild encouragement," but threatening to withhold $233 billion, equaling 21.86% of all state expenditures combined, is a different matter. . . .

The Federal Government does not dispute the inference that Congress anticipated 100% state participation, but it argues that this assumption was based on the fact that ACA's offer was an "exceedingly generous" gift. . . .

This characterization of the ACA's offer raises obvious questions. If that offer is "exceedingly generous," as the Federal Government maintains, why have more than half the states brought this lawsuit, contending that the offer is coercive? And why

did Congress find it necessary to threaten that any State refusing to accept this "exceedingly generous" gift would risk losing all Medicaid funds? Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion. Congress took such an approach in some earlier amendments to Medicaid, separating new coverage requirements and funding from the rest of the program so that only new funding was conditioned on new eligibility extensions. See, *e.g.*, Social Security Amendments of 1972, 86 Stat. 1465.

Congress' decision to do otherwise here reflects its understanding that the ACA offer is not an "exceedingly generous" gift that no State in its right mind would decline. Instead, acceptance of the offer will impose very substantial costs on participating States. It is true that the Federal Government will bear most of the initial costs associated with the Medicaid Expansion, first paying 100% of the costs of covering newly eligible individuals between 2014 and 2016.42 U.S.C. § 1396(y). But that is just part of the picture. Participating States will be forced to shoulder substantial costs as well, because after 2019 the Federal Government will cover only 90% of the costs associated with the Expansion, see ibid., with state spending projected to increase by at least $20 billion by 2020 as consequence. . . . . And these costs may increase in the future because of the very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover. This would leave the States to bear an increasingly large percentage of the bill. . . . .

Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes – in two cursory sentences at the very end of its brief – preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion. . . . .To make the Medicaid Expansion optional despite the ACA's structure and design 'would be to make a new law, not to enforce an old one. This is no part of our duty.' . . . .

Worse, the Government's proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other states. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. . . .

The Court today opts for permitting the cut-off of only incremental Medicaid funding, but it might just as well have permitted, say, the cut-off of funds that represent no more than *x* percent of the State's budget. The Court severs nothing, but simply revises § 1396c to read as the Court would desire. . . . . "

IV. CONCLUSIONS

1. All three opinions recognized Congress's power to attach strings and conditions to their grant programs.

2. All three opinions recognized that in *South Dakota v. Dole*, the Court permitted Congress to penalize states by taking away 5% of their pre-existing grants if they did not comply with a subsequent federal directive to do as Congress ordered.

3. All three opinions recognize that Congress's power to penalize states for failing to follow new federal orders lies somewhere between taking away 5% of the states' pre-existing federal grants and taking away all of them. None of the three opinions chose to draw where that line rests, leaving it yet to be determined.

4. While two of the three opinions recognized that states may not be forced to accept federal grants by a Congressional threat to cut off all funding if the state refused the grant, all three opinions recognize that the result is different when states have been presented with a real choice either to accept the money (and the strings that come with it) or to reject the offered money (and keep what they already have). The Court has now given states that choice as to Medicaid Expansion, but has not invalidated any of the federal statutes that allow the federal government to penalize states for failing to follow Medicaid rules and that allow Congress to alter, amend, repeal, or replace any of the Medicaid or ACA rules in the future.

5. In both the Roberts and Scalia opinions, it is recognized that "It is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States" after enacting a grant program (Roberts Opinion) and that the states' "costs may increase in the future because of the

very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover", thus leaving "the States to bear an increasingly large percentage of the bill." (Scalia opinion). The Ginsburg opinion recognized this too, and concluded that therefore, the states could be forced to expand Medicaid at the outset, on penalty of losing all of their Medicaid money if they refuse. These findings are in the nature of a clear warning that states that nonetheless choose to expand Medicaid, now that the Court has given them a penalty-free initial option not to, do so with assumption of the risk that the terms might change (to the states' disadvantage) down the road. See, Roberts Opinion: "the States are separate and independent sovereigns. Sometimes they have to act like it . . . . The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means that States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate . . . . Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset" (underlining stresses the one-time nature of the option that the Court gave the states.) See, also, Scalia opinion: "When federal legislation gives the States a real choice to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship . . . . and just as a contract is voidable if coerced, the legitimacy of Congress' power . . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'." States that now accept the "contract" do so fully forewarned by the Supreme Court that Congress "was entitled to make adjustments to the Medicaid program as it developed"

and "has in fact done so, sometimes conditioning only the new funding, other times both old and new" (Roberts opinion) and also fully forewarned by the Scalia dissent that while the majority "today opts for permitting the cut-off of only incremental Medicaid funding, it might just as well have permitted, say, the cut-off of funds that represent no more than x percent of the State's budget." Thus, to the extent that the *NFIB* majority was concerned that states had been unfairly and retroactively surprised when the ACA's Medicaid expansion was made effectively mandatory through the threat to pull all pre-existing Medicaid funding, the States have now been warned, by the Court itself, that acceptance of the expansion funds may come with subsequently – imposed strings or penalties on those who attempt to opt-out after first opting in.

6. While the opinions do not directly address whether a state could opt into the Medicaid expansion and then opt-out without penalty, the Supreme Court has previously held that Congress could forbid a state from withdrawing from a previously-voluntary federal program. As Justice Ginsburg's opinion explains, in the 1986 *Bowen* case, "Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape" and when "California objected, arguing that the change impermissively deprived it of a [formerly express] right to withdraw from Social Security . . . . We unanimously rejected California's argument". (Ginsburg opinion).

7. Even if *NFIB* prevents the federal government from cutting off 100% of a state's Medicaid funds to states that later tried to opt out of Medicaid expansion after opting in, can Ohio afford to lose 30%, 20%, or even 10% of those pre-existing funds? That the answer is plainly "no" means that the risk of "knowingly and voluntarily" signing

up for the expansion is too great to assume unless Congress itself were to rewrite the statute to expressly allow a state to opt-out on a penalty-free basis.

MEMORANDUM

TO: Representative Lou Terhar

FROM: Senator Seitz

DATE: February 25, 2013

RE: Medicaid Expansion

A more detailed analysis of *NFIB v. Sebelius* ("NFIB") and prior cases is on its way, but let this summary identify the flaws in the Bricker memorandum that you sent me:

1. The memo admits that NFIB "does not specifically address whether a state that initially chooses to expand its Medicaid program . . . may later decide to 'opt-out' of covering that Group"; given this admission, how can they say that the concern about whether states can sunset the expansion without incurring penalties is "unwarranted"?

2. They say "it is important to remember that state participation in the Medicaid program is voluntary." True. But if you opt-out, you are subject to losing your federal money under 42 USC §1396(c), a provision that predates the ACA and that remains on the books following the NFIB decision without modification from Congress.

3. They say that CMS (a federal agency) has issued post-NFIB guidance that said "a state may choose whether and when to expand, and, if a state covers the expansion group, it may decide later to drop the coverage." True, but this does not say that a state that decides later to drop the coverage cannot be penalized for doing so. Dropping out, and dropping out without penalty, are two different things. In any event,

bureaucrats cannot change the wording of the statutes and nothing in either the pre-existing Medicaid law or the ACA allows states to drop out without penalty.[1]

4. They say "it is difficult to imagine, given the political and public repercussions", that the feds "would threaten to shut down a State's Medicaid program by withdrawing original Medicaid funding based upon the decision of the State to limit the individuals eligible for that program to the pre-ACA categories." This conveniently overlooks three things:

(a) the feds did just that to Arizona in 2010;

(b) their whole argument to the Supreme Court was that they did have this power, even as applied to states that never signed up for the expansion to begin with;

(c) as detailed in the enclosed, the federal government has a long history of threatening to penalize states (and actually following through on those threats) that did not comply with the amended rules of a grant program administered by the federal government.

5. They say that what the Court did in NFIB "was to essentially separate the ACA Medicaid expansion from the current Medicaid program for enforcement purposes", and this is really the pivot of their whole argument. But, the Court made that separation only as applied to the initial decision of states to decline to participate (as that was the only question before the Court), and only as to a termination of all of the

[1] As noted by Justice Scalia in his dissenting opinion in NFIB, "Congress could have made just the new funding provided under the ACA contingent upon acceptance of the terms of the Medicaid expansion. Congress took such an approach in some earlier amendments to Medicaid, separating new coverage requirements and funding from the rest of the programs so that only new funding was conditioned on new eligibility extensions. See, e.g., Social Security Amendments of 1972, 86 Stat. 1465. Congress' decision to do otherwise here reflects its understanding that the ACA offer is not an exceedingly generous gift that no State in its right mind would decline. Instead, acceptance of the offer will impose very substantial costs on participating States . . . and these costs may increase in the future because of the very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover."

state's Medicaid funding. It never addressed the situation if a state had initially accepted the money and then tried to back out without penalty, or if the penalty applied to such a state was something less draconian than a total termination of funds. A long line of prior cases, and statements made throughout the NFIB case itself, establish that this would be constitutionally permissible. Thus, even if the Bricker memo is correct that the Supreme Court separated the ACA Medicaid expansion from the current Medicaid program for enforcement purposes, such that a state could not be threatened with the loss of all its pre-existing Medicaid funds, that would not preclude the imposition of other, less draconian penalties on a state that initially opted-in and then opted-out.