

## 15 Problems with State Officials' Supreme Court Argument that the ACA Medicaid Expansion is Unconstitutionally Coercive

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1. **Illusory test.** The Supreme Court has never developed, let alone applied, a “coercion” standard, and the state officials do not offer a manageable standard for determining coercion. As the Ninth Circuit has noted, “The difficulty, if not the impropriety, of making judicial judgments regarding a state’s financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.” *Nevada v. Skinner*, 884 F2d. 445, 448 (9th Cir. 1989).
2. **Ignores the purpose.** Spending clause conditions are *meant* to induce states to act. There is a difference between coercion and persuasion, and no bright line for where one ends and the other begins.
3. **Novel argument.** The state officials frame their argument in terms of “onerous conditions,” but previous Supreme Court cases do not use the phrase. This would be a new element for the Court to address: the states are arguing not only about the amount of federal money they stand to lose, but also about what they have to do to comply.
4. **Expansion not onerous.** It is difficult to understand how the expansion can be onerous. Numerous analyses conclude that states’ costs under the ACA will not increase as a result of the Medicaid expansion. Among other things, states will see multi-billion dollar savings from federal Medicaid funding of currently state-only funded uncompensated care and mental health/substance abuse services.
5. **Unprecedented federal support.** The state officials argue that the expansion is “significantly more onerous” than previous conditions. However, the federal government will initially pay 100% of the costs, to be phased down to 90% by 2020. To find coercion, the Court will have to distinguish the funding made available in the ACA expansion from typical Medicaid funding (ranging between 50%-83%).
6. **History.** The state officials say the ACA expansion is an “unprecedented” abuse of Congress’s spending authority. But participating states have always been on notice that the conditions of Medicaid funding can change, and the conditions have in fact changed numerous times since 1965. The ACA expansion fits the mold of these previous expansions.
7. **Less onerous than Part D.** The states officials say the ACA expansion is a new and “extreme” use of Congress’s Spending authority. By comparison, during the Bush administration, Congress enacted Medicare Part D and shifted prescription drug coverage of individuals dually eligible for Medicaid and Medicare from the states to Medicare Part D. As a condition of receiving any federal funding, a new Medicaid condition required states to screen individuals for dual eligibility, offer them enrollment in Medicaid, and then pay funds to the federal government based on the enrollment.

8. **Medicaid is voluntary.** The state officials argue that the expansion “transformed Medicaid” into a “program to provide a minimum level of coverage to every needy person.” But it did not. Medicaid is—as it has always been—voluntary for individuals and for states. Moreover, Medicaid is only one way for needy people to obtain the minimum level of essential coverage that the ACA requires.
9. **Exaggerated fears.** The state officials say they will lose all federal funding if they do not implement the expansion. But that is not what Medicaid Act requires. It gives the Secretary of the Department of Health and Human Services (DHHS) discretion to terminate or withhold all or partial funding or take other intermediate steps. DHHS has never used its full-termination authority.
10. **Feds not driving spending.** The state officials complain that federal funding has become too significant to pass up. Much of this “significance” has been driven by the conduct of the states:

In fiscal year 2007, 60.4% of all Medicaid spending was attributable to States’ optional expenditures on mandatory populations and expenditures on optional populations. As is typical for Medicaid, there is variation among the States. For example, 76.5% of expenditures in Petitioner North Dakota are attributable to this optional spending; 74.7%, in Ohio; 74%, in Wisconsin; 69.4%, in Iowa; 69.2%, in Maine; 67.4%, in Nebraska; 61.5%, in Indiana; 53%, in Florida (Kaiser Family Found. Jan. 2012).

11. **Collateral damage: Medicaid.** If it rules against the expansion, the Court would have to distinguish or account for how the unconstitutionality of the ACA expansion affects the remainder of the Medicaid program.
12. **Collateral damage: Other spending programs.** Presumably, the Court would have to distinguish or account for how unconstitutionality would affect other large federal spending programs enacted to address a range of national concerns, such as education, law enforcement, prisons, transportation, foster care, discrimination.
13. **Lack of evidence.** Coercion must be fact specific. So, presumably, there needs to be a state-by-state analysis to show coercion there. Yet fourteen of the states provided no evidence to the district court regarding coercion.
14. **Weak facial challenge.** This is a facial challenge, meaning that under no circumstances can the ACA expansion be constitutional. But state legislators from all 50 states and DC filed a brief supporting the constitutionality of the Medicaid expansion. The State of Iowa is taking both sides, as a petitioner state against and an *amici* state for the expansion. Elected representatives in 22 of 26 states voted for ACA; the Medicaid expansion could not have passed without these states on board. Early implementation is already underway in CT, MN and DC.
15. **Unprecedented worries.** The state officials are asking the Supreme Court to find unconstitutionality based on their fear of a never-expressed intent by the federal government to use a never-used defunding provision years before the authority would be used.