NO. 12-1039

In the

Supreme Court of the United States

SECRETARY OF THE INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICANS FOR TAX REFORM AND SUSAN B. ANTHONY LIST IN SUPPORT OF PETITIONER

STEVEN H. ADEN *(Counsel of Record)*
MICHAEL J. NORTON
M. CASEY MATTOX
ALLIANCE DEFENDING FREEDOM
801 G St., N.W., Suite 509
Washington, DC 20001
(202) 393–8690
saden@alliancedefendingfreedom.org
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and policy advocacy groups that advocate for limited government and a vigorous Federal system that safeguards State authority in the interest of protecting personal liberty.

Americans for Tax Reform ("ATR"), founded in 1985 by its president, Grover Norquist, at the request of President Reagan, is the Nation's foremost taxpayer advocacy group. ATR works to limit the size and cost of government and opposes higher taxes at the federal, state, and local levels and supports tax reform that moves towards taxing consumed income one time at one rate.

Susan B. Anthony List is a 501(c)(4) membership organization dedicated to electing candidates and pursuing policies that will reduce and ultimately end abortion. To that end, the SBA List emphasizes the election, education, promotion, and mobilization of pro-life women.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals failed to regard fundamental principles of constitutional Federalism in ruling that Medicaid providers and

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[1] The parties' counsel of record received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties' counsel granted consent to the filing of this brief in support of the petition for certiorari. Pursuant to S. CT. R. 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

recipients could sue the State of Indiana in federal court to force it to hew to a federal agency interpretation of a Medicaid State plan requirement, and in construing that requirement against the State and contrary to clear law reserving State authority to set provider qualifications in accordance with State fiscal policy. Given the magnitude of the Seventh Circuit's legal errors and the significance of their real-world impact, this Court should grant review to vindicate the principle, fundamental to the Federal system, that States may not be subjected to judicially-enforced deprivations of their residual sovereignty in cooperative federal-State Spending Clause programs. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) ("If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.").

BACKGROUND

As the Court of Appeals acknowledged, "Act 1210 fills a gap in Indiana law regarding public funding of abortion." *Planned Parenthood v. Comm'r*, 699 F.3d 962, 970 (7th Cir. 2012). The federal Hyde Amendment prohibits the use of federal funds to pay for abortion except under rare and extreme circumstances,[2] and Indiana law similarly restricts

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[2] The Hyde Amendment is an annual appropriations rider to the federal Health and Human Services budget, renewed with

the use of State funds. *Id.*, citing IND. CODE §§ 12-15-5-1(17), 16-34-1-2; 405 IND. ADMIN. CODE 5-28-7. Act 1210 "aims to prevent the indirect subsidization of abortion by stopping the flow of all state-administered funds to abortion providers." 699 F.3d at 970.

In compliance with the Medicaid Act, three days after the governor signed Act 1210 into law, Indiana notified the Centers for Medicare and Medicaid Services ("CMS") of the change in State law and requested approval for a State Plan Amendment ("SPA") to its Medicaid plan to clarify that providers of abortion services (not including hospitals and ambulatory surgical centers) were no longer qualified to participate. *Id.* at 970. After consulting with the Secretary of Health and Human Services, the CMS Administrator rejected the proposed SPA, citing 42 U.S.C. § 1396(a)(a)(23), the "free choice of qualified provider" provision. *Id.* Crafting a new guideline for Indiana and States that may consider similar provisions, CMS opined that "Medicaid programs may not exclude qualified health care providers from providing services that are funded under the program because of a provider's scope of practice." *Id.*

Indiana petitioned for reconsideration pursuant to 42 U.S.C. § 1316(a)(2) (42 C.F.R. § 430.18), resulting in an administrative appeal hearing and

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each budgetary cycle or (since 2009) Continuing Resolution. *See Omnibus Appropriations Act of 2009*, PUB. L. NO. 118, §§ 507-08, 123 Stat. 524, 802-03 (2009) (enacting H.R. 1105).

the right for Indiana to seek final review. *Id.*[3] The hearing resulted in a recommended decision to uphold the initial determination. *Id.* The Seventh Circuit noted that the parties had an opportunity to file objections, which Indiana did, Pet. at 26, but to date no decision has been forthcoming from CMS. Notably, any such final decision could then be appealed to the Seventh Circuit, which would then have the benefit of the agency's deliberative process, including the agency record.[4] Further, if upheld, the final agency decision would have determined what, if any, penalty in loss of federal Medicaid funding Indiana would have to pay for its non-compliance, and the People of the State of Indiana would have been able to decide – through the legislative process - whether the price for declining to subsidize abortion was worth the potential loss of Medicaid funding.[5]

Meanwhile, Respondents had filed suit in federal court to enjoin the provision as soon as it was enacted. *Id.* at 968. Respondents claimed, *inter alia*, that Indiana had deprived them of their "free choice of qualified provider." The District Court agreed, and, notwithstanding the ongoing administrative appeal process, enjoined "[a]ll attempts to stop

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[3] *See* 42 C.F.R. §§ 430.76(a), 430.83 (appeal process); 42 U.S.C. § 1316(a)(3); 42 C.F.R. § 430.38 (judicial review).

[4] 42 U.S.C. § 1316(a)(3).

[5] Texas did exactly this last year, deciding that State funds would be expended for its Medicaid family planning waiver program after losing federal funding as a result of deeming providers of abortion and abortion referral non-qualified for Medicaid family planning funds. *See generally Planned Parenthood v. Suehs*, 692 F.3d 343 (5th Cir. 2012).

current or future funding contracted for or due" to Planned Parenthood and ordered Indiana to "take all steps to insure that all monies are paid." *Id*. at 972.

The Seventh Circuit affirmed on Respondents' Medicaid/Federal Supremacy claim. *Id*. at 968. The court first held that Respondents had a private right of action under 42 U.S.C. § 1983 to enforce § 1396(a)(a)(23), applying the well-known *Blessing v. Freestone*[6] standard. What it called the "free choice of provider" [*sic* – *vice* "qualified" provider] provision "unambiguously gives Medicaid-eligible patients an individual right," the court held (*id*. at 974); that right "is administrable and falls comfortably within the judiciary's core interpretive competence" (*id*.); and the provision "is plainly couched in mandatory terms." *Id*. The Seventh Circuit acknowledged that "the contract model for interpreting Spending Clause legislation has important implications for the relationship between the federal government and the states," *id*. at 977, citing *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 132 S.Ct. 2566, 2601-03 (2012), but concluded that "it does not follow that Spending Clause legislation can never create judicially enforceable rights." *Id*.

The court rejected Indiana's reliance on § 1396(a)(p)(1) of the Medicaid Act, which provides that a State possesses all the authority that the federal Secretary has to exclude providers from Medicaid, "in addition to any other authority." The court held, "Athough Indiana has broad authority to exclude unqualified providers from its Medicaid

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[6] 520 U.S. 329, 340-41 (1997).

program, the State does not have plenary authority to exclude a class of providers for *any* reason – more particularly, for a reason unrelated to provider qualifications." 699 F.3d at 968.

ARGUMENT

I. THE PETITION PRESENTS ISSUES THAT ARE CRITICALLY IMPORTANT TO THE FEDERAL-STATE RELATIONSHIP CONTEMPLATED BY SPENDING CLAUSE LEGISLATION.

The Seventh Circuit derived two errant conclusions from the same faulty view of Federalism: First, that Congress could be said to have "clearly" intended for the States to be subjected to suit in federal court based upon boilerplate provisions intended to specify what elements of a state Medicaid plan must be present for federal approval of the "contract;" and second, that Indiana lacked plenary authority to determine the conditions upon which Medicaid providers would be "qualified" to provide services based upon State policy, in spite of clear statutory language reserving that residual authority to the States. The Court of Appeals' two-fold error, permitting private litigants to circumvent the statutorily-prescribed agency appeal system for adjudicating State Plan Amendments and construing the terms of the federal-State "contract" against the State party, both present questions that are critically important to the Federal system.

A. The Federal Government is a Government of Limited, Not Plenary, Authority.

The Federal Government "is acknowledged by all to be one of enumerated powers." *NFIB*, 132 S.Ct. at 2577, quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). The federal government does not possess general authority; rather, the Constitution lists and thereby limits its powers. As the Supreme Court recently reaffirmed in *National Federal of Independent Business* with respect to the Patient Protection and Affordable Care Act,[7] "The Constitution's express conferral of some powers makes clear that it does not grant others." 132 S.Ct. at 2577. And the Federal Government "can exercise only the powers granted to it." *Id.*, quoting *McCulloch,* 17 U.S. at 405. This foundational precept of Federalism dates back to such seminal decisions as ("[t]he powers of the [federal] legislature are defined, and limited"); and *McCulloch v. Maryland*, 17 U.S. at 405 ("The principle, that [Congress] can exercise only the powers granted to it … is now universally admitted.").[8]

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[7] PUB. L. 111–148, 124 STAT. 119.

[8] In fact, as Justice Kennedy noted in *United States v. Lopez*, 514 U.S. 549 (1995), for nearly the first century after the Constitution's ratification, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate, but rather, the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act. 514 U.S. at 568-69 (1995) (Kennedy, J., concurring in the judgment). "The simple fact was that in the early years of the Republic, Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question." *Id.* Thus, the Court's initial task was "to elaborate the theories that would permit the States to act where Congress had not done so." *Id.*

The principal reason for the constitutional reins on federal power is to ensure that the liberty of the People is preserved. "[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992), quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). "[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."[9] *United States v. Lopez*, 514 U.S. 549, 576 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front…."). The independent power of the States thus serves to check the power of the Federal Government. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."

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[9] *See* THE FEDERALIST NO. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison):

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Bond v. United States, 564 U.S.___, 131 S.Ct. 2355, 2364 (2011).

A related reason for limiting the power of the central government was to ensure that the People could assign appropriate political accountability for governmental actions. As Justice Kennedy explained in *Lopez*:

> If, as Madison expected, the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function…. Were the Federal Government to take over the regulation of entire areas of traditional state concern… the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

514 U.S. at 576–77 (Kennedy, J., concurring) (citations omitted). By delineating two spheres of authority, and reserving all authority in the States except that which they, acting in Congress, expressly delegate to the federal government, the Framers ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by local governments that

were more accountable than a distant federal bureaucracy. THE FEDERALIST NO. 45, at 293 (J. Madison).

B. Under the Federal System, States Retain Plenary Authority to Implement Policy Choices.

The corollary to the limited nature of the federal government in the constitutional system is that States retain plenary authority to express State policy choices, even in joint Federal-State programs. Since the federal system "preserves the integrity, dignity, and residual sovereignty of the States," *Bond*, 131 S. Ct. at 2364, States must be able to choose what policies to adopt and how to implement them. Only when States "remain independent and autonomous within their proper sphere of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997), can "[f]ederalism secure[] the freedom of the individual." *Bond*, 131 S. Ct. at 2364.

This precept is expressed in the Bill of Rights' broad reservation of powers to the States. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., AMEND. X. Thus, even in matters much more fundamental than the proper interpretation of federal-State contracts, the interests of the States must be balanced against the interests of the federal government:

> [O]ur Constitution is an instrument of federalism. The Constitution furnishes the

> structure for the operation of the States with respect to the National Government and with respect to each other. *The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.*

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532 (1959) (Brennan, J., concurring) (emphasis supplied); *accord United States v. Morrison*, 529 U.S. 598, 620 (2000) (limitations on Congress' section 5 authority "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government").

Another key purpose of this reservation of authority in the States is to empower them to implement innovative policies that may serve as a model to other States and the Federal government. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Corp. v. Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), citing *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

One area in which the States have fulfilled their role as exemplars of economic innovation is that of fiscal restraint. The federal government has gone without a budget for three years and is currently running a deficit of $1.327 trillion dollars (FY 2012).[10] On the other hand, according to the National Conference of State Legislatures, twenty-nine states enjoyed budget surpluses for 2012 by virtue of a combination of fiscal restraint and policies that promote business investment and job growth.[11]

Another sphere of State policy innovation is in areas of traditional State concern such as health care,[12] as to which the Supreme Court has counseled particular solicitude. "[The] structure and limitations of federalism… allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546

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[10] http://useconomy.about.com/od/fiscalpolicy/p/deficit.htm.

[11] Available at http://www.ncsl.org/portals/1/documents/fiscal/sbu_spring2012_freeversion.pdf.

[12] The Supreme Court has repeatedly affirmed that health care is an area of traditional State concern. *See, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002); *New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995). Chief Justice John Marshall observed, "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State," together "form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves." *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824).

U.S. 243, 270 (2006) (quotation marks and citation omitted); *Lopez*, 514 U.S. at 581 ("In these circumstances [areas of traditional concern to States], we have a particular duty to ensure that the federal-state balance is not destroyed.").[13] As Petitioners' brief sets forth (at 39-43), roughly a dozen States have taken steps to end direct or indirect subsidization of abortion providers through public health programs.

Until now, the Courts of Appeals have shown this solicitude to State efforts to improve efficiency in delivering public health care services while advancing State policy. For example, the District of Columbia Circuit affirmed the State of Utah's authority to act as sole grantee (pursuant to a state statutory mandate) for the Title X federal family planning program within the State through a consolidated grant award from Health and Human

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[13] The PPACA statute, at least ostensibly, sought to maintain the federal-State balance on this issue. The President's Executive Order prohibiting the funding of abortion in PPACA (Executive Order 13535 (2010)), was intended to respect the strong public policy of many States against taxpayer funding of abortion by implementing Hyde Amendment-type restrictions on funding elective abortion in the newly federalized health care system. *Id.*, Sec. 2. Whatever the efficacy of that amendment in prohibiting abortion subsidization – and its progenitor, former Rep. Bart Stupak (D-Ill.), as well as many States and legal advocacy groups are dubious about whether it had its intended effect (*see* Amicus Br. filed by Rep. Stupak and Democrats for Life of America in *Newland v. Sebelius*, Appeal No. 12-1380, U.S.C.A. 10 (Docket No. 10049741, Mar. 1, 2013) – it is nonetheless an expression of the political calculus necessary to respect States' rights in this sensitive area.

Services ("HHS") Region VIII.[14] The State's policy was an innovative application of a federal policy of consolidating grants in the interests of efficiency and in view of limited funds availability; in 1982, the court noted, consolidated grants had been awarded in 28 states, with 23 consolidated in state agencies and 5 in non-state agencies.[15] The Court of Appeals turned back a preemption challenge from one provider, Planned Parenthood, concluding that the consolidation process was consistent with Congressional directions to encourage "better coordination of existing services"[16] and to "determine the degree of duplication and philosophical consistency existing in current Federal programs including family planning."[17]

Two other Circuits, the Fifth and Eighth, have strongly supported State efforts to ensure that public health care funds do not subsidize elective abortion. *See Planned Parenthood v. Sanchez*, 403 F.3d 324 (5th Cir. 2005); *Planned Parenthood of Mid-Missouri and Eastern Kansas v. Dempsey*, 167 F.3d 458, 463 (8th Cir. 1999). The Eighth Circuit, upholding a Missouri provision that prohibited indirect subsidization of abortion providers with State funds, construed the provision to save it from constitutional attack in order to "respect[] the State's valid policy decision to remove its imprimatur from abortion

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14 *Planned Parenthood Association of Utah, et al. v. Schweiker*, 700 F.2d 710, 723-24 (D.C. Cir. 1983).

15 *See id.*

16 *Id.* at 724, quoting 42 U.S.C. § 300z(a)(10)(B).

17 *Id.*, quoting S.REP. NO. 161, 97th Cong., 1st Sess. 16 (1981).

services and to encourage childbirth over abortion." 167 F.3d at 463-64.

The Seventh Circuit's decision is thus an outlier from the otherwise-uniform approach among the federal courts of appeal to uphold the States' authority to implement policies against subsidizing abortion in public health care systems.

II. THE FEDERAL CONSTITUTIONAL STRUCTURE ENTAILS A CAUTIOUS INTERPRETATION OF SPENDING CLAUSE CONDITIONS, TO THE END THAT STATE FISCAL POLICY IS RESPECTED AND STATES AFFORDED MAXIMUM FLEXIBILITY TO PURSUE EFFICIENT UTILIZATION OF TAXPAYER REVENUE WHILE FURTHERING THE LEGITIMATE GOALS OF FEDERAL-STATE PROGRAMS.

Because the signal and foundational component of the Federal structure is the limited authority of the Federal government, the Constitution tolerates no direct imposition on the police power of the States by the Federal government. *New York v. United States*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."). Aside from the constitutional power to regulate interstate commerce and to tax, the federal government may only implement policy through the States by contracting with them as co-equal sovereigns pursuant to its authority under the Spending Clause.

However, as the Court recently observed in *National Federation of Independent Business*, the

grant of the power to tax and spend "gives the Federal Government considerable influence even in areas where it cannot directly regulate." *NFIB*, 132 S.Ct. at 2579. "[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions…." *Id.* Nonetheless, "[U]nder any 'permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.'" *Id.*, quoting *New York*, 505 U.S. at 168. Were this not the case, the Court warned, the Spending Clause "would become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.*, quoting *United States v. Butler*, 297 U.S. 1, 75 (1936).

In view of these principles of Federalism, the Court has frequently observed that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17. Unless federal provisions are clear, there can be no waiver of State sovereignty pursuant to the federal-State contract, nor are States presumed to have contracted away their residual sovereignty under the Tenth Amendment. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218,

230 (1947) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).

Absent these discernible limits, the spending power "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting). In that event, one Justice has warned, "stand[ing] between the remaining essentials of state sovereignty and Congress" would only be "the latter's underdeveloped capacity for self-restraint." *Garcia,* 469 U.S. at 588 (O'Connor, J., dissenting).

Like all Spending Clause legislation, the Medicaid Act is a voluntary and cooperative federal-state program that enables States to seek federal matching grants for qualifying State healthcare benefits programs.[18] Medicaid "was designed to provide the states with a degree of flexibility in designing plans that meet their individual needs. As such, states are given considerable latitude in formulating the terms of their own medical

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[18] *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003) ("A state's participation in the Medicaid program is completely voluntary.").

assistance plans."[19] A State is free to opt out of eligibility for federal Medicaid funds and is in no way obligated to structure its Medicaid program in accordance with the conditions required for federal funding, although the Secretary has authority to deny or restrict federal Medicaid funding to non-compliant programs.[20]

As discussed above, the process begins with a State's proposal of a plan or plan amendment. 42 C.F.R. § 430.12(c)(1). CMS then either approves or disapproves the plan. 42 C.F.R. § 430.15. In the event of disapproval, the State may file a request for reconsideration. 42 C.F.R. § 430.18(a). A final determination by CMS is then reviewable by the

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[19] *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998); *see also Pharm. Researchers & Mfrs. of Am. v. Walsh ("PhRMA")*, 538 U.S. 644, 686 (2003) (O'Connor, J., concurring in part and dissenting in part) ("Congress has afforded States broad flexibility in tailoring the scope and coverage of their Medicaid programs[.]").

[20] *See* 42 U.S.C. § 1396c; 42 C.F.R. § 430.12(c). *See also PhRMA*, 538 U.S. at 675 (quoting 5 U.S.C. § 706(2)(A)) (Scalia, J., concurring):

> [T]he remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act, is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services. Petitioner must seek enforcement of the Medicaid conditions by that authority—and may seek and obtain relief in the courts only when the denial of enforcement is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Circuit Court of Appeals. 42 C.F.R. §§ 430.38, 430.102(c). Affected individuals and groups, such as Respondents, may participate in the administrative appeal process "if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute." 42 C.F.R. § 430.76(b). Respondents, however, made no effort to participate as parties to the agency proceeding.

Contrary to the Seventh Circuit's decision, Indiana's no-subsidization provision interposes no conflict with federal law, since it neither stands as an obstacle to the execution of Congressional objectives, *see, e.g., International Paper v. Ouellette*, 479 U.S. 481, 491-92 (1987), nor creates a situation in which it is physically impossible to comply with both state and federal requirements. *See, e.g., PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011). The Fifth Circuit Court of Appeals so held with respect to an abortion qualification provision very similar to Indiana's.[21] Texas' amendment, "Rider 8," restricted distribution of federal family planning funds to individuals or entities that did not perform elective abortion procedures and did not contract with or provide funds to individuals or entities for the performance of elective abortion procedures.[22] Planned Parenthood claimed that Rider 8 violated federal supremacy by imposing additional eligibility requirements on its receipt of federal funds that were inconsistent with federal funding law.[23] The

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21 *Planned Parenthood v. Sanchez*, *supra*, 403 F.3d 324.

22 *Id.*, at 328.

23 *Id.*, at 337-338.

Fifth Circuit rejected this argument, holding that Rider 8 did not impose conflicting requirements on providers because its language could be read to permit family planning agencies to continue to receive funds by creating separate affiliates – a measure that Indiana had proposed to permit when the injunction was entered and halted agency implementation. Pet. at 5. It is well established that "The mere fact that a state program imposes an additional 'modest impediment' to eligibility for federal funds does not provide a sufficient basis for preemption," the court concluded.[24] Likewise, in *Planned Parenthood v. Dempsey, supra*, the Eighth Circuit held that Missouri's similar non-subsidization provision did not impose an unconstitutional condition on abortion providers' receipt of Title X family-planning funds because recipients could continue "to exercise their constitutionally protected rights through independent affiliates." *Id*. at 463.

The Seventh Circuit's decision that broad and ambiguous conditions can be imposed upon State Medicaid agencies via contract interpretations that favor the federal party is not an example of the classic Spending Clause danger of the federal government overbearing State sovereignty by

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[24] *Sanchez*, 403 F.3d at 337, citing *PhARMA v. Walsh*, 538 U.S. at 661-62 (rejecting Medicaid Act preemption challenge to state statute imposing prior authorization requirement on access to prescription drugs financed by federal funds); *accord* (territory's modifications to Medicare Advantage plan held not a prohibited "standard" for operation under Medicare Part C, but rather a permissible eligibility requirement for an entity wishing to participate in a Puerto Rico Medicaid program).

imposing coercive conditions, *see, e.g., Nat'l Fed. of Indep. Bus., supra*, since the contract has already been accepted and is being implemented by the States who have agreed to accept Medicaid funds. It is rather a matter of undermining State authority by imposing a constricted reading of sovereignty that construes provision in the Medicaid contract against State parties. This form of subverting State sovereignty may be at least as dangerous because the influence of such a standard may prove to be as ubiquitous as the myriad provisions of Spending Clause programs.

III. THE COURT OF APPEALS' DECISION DEPARTS FROM THESE ESTABLISHED PRINCIPLES OF FEDERALISM AND THREATENS TO SEVERELY CONSTRICT STATE AUTHORITY TO EXPRESS STATE FISCAL POLICY IN SPENDING CLAUSE PROGRAMS.

The Seventh Circuit's decision radically expands Federal supremacy over an area of traditional State authority. Indiana's non-subsidization provision merely applied the State's own congruent conditions to eligibility for qualified provider status under Medicaid, and did not impose conditions inconsistent with federal guidelines. The Medicaid Act explicitly reserves State authority to establish provider qualifications, providing that "[i]n addition to any other authority, a State may exclude any individual or entity [from participating in its Medicaid program] for any reason for which the Secretary [of the Department of Health and Human Services] could exclude the individual or entity from

participation in [Medicaid]."[25] Likewise, § 1396(a)(p)(1)'s implementing regulation, 42 C.F.R. § 1002.2(b), declares, "Nothing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid *for any reason or period authorized by State law*." (Emphasis supplied.) Thus, as this Court has observed, "[t]he fact that a State's decision to curtail Medicaid benefits may have been motivated by a state policy unrelated to the Medicaid Act does not limit the scope of its broad discretion to define the package of benefits it will finance."[26] Similarly, in *First Medical Health Plan v. Vega-Ramos*,[27] the First Circuit interpreted the qualifications authority provided by 1396a(p)(1) as a specific delegation of power to the State to regulate its Medicaid program. The court, citing the legislative history of Section 1396a(p)(1), held that the provision "was intended to permit a state to exclude an entity from its Medicaid program *for any reason established by state law*."[28]

By ignoring clear statutory and regulatory authority reserving to the States the right to implement State policy in Medicaid programs, the Seventh Circuit has departed from the deferential approach taken by the Fifth, Eighth and District of Columbia Circuits in evaluating non-subsidization provisions like the one at issue, and has flouted long-

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[25] 42 U.S.C. § 1396a(p)(1).); S. Rep. No. 100-109, at 20 (1987) (section 1396a(p)(1) "is not intended to preclude a State from establishing, under State law, any other bases for excluding individuals or entities from its Medicaid program").

[26] *PhRMA*, 538 U.S. at 666.

[27] 479 F.3d 46 (1st Cir. 2007).

[28] *Id*. at 53 (emphasis supplied).

settled principles of Federalism. The decision threatens to severely curtail State authority in implementing joint federal-State Spending Clause programs, and certiorari accordingly should be granted.

CONCLUSION

"Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring in the judgment) (citations omitted). Because the Seventh Circuit's decision "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise…," *id*. at 583, *Amici* urge that review be granted.

Respectfully submitted,

STEVEN H. ADEN
Counsel of Record
MICHAEL J. NORTON
M. CASEY MATTOX
ALLIANCE DEFENDING FREEDOM
801 G St., N.W., Suite 509
Washington, DC 20001
(202) 393–8690
saden@alliancedefendingfreedom.org

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