HEALTH CARE REFORM

Mr. GRASSLEY. Mr. President, in the past 3 weeks I think I have come to the floor three times to discuss the case on the President's health care reform bill: one time to discuss the constitutionality of the individual mandate and another time to deal with the severability clause. I come now to speak about the unconstitutionality of the massive expansion of Medicaid. Those are three of four issues that the Court is going to deal with. My colleagues probably remember the Court has extended the period of time they normally deal with arguments before them from 1 hour to 5½ hours because this is such a very important case.

Today I wish to talk about the far-reaching implications of this mandate, but also about the constitutionality of the Medicaid expansion. If the Supreme Court rules the individual mandate unconstitutional, it will have the effect of striking down this new law that has not been fully implemented. If the Supreme Court rules that the Medicaid expansion and the Affordable Care Act is unconstitutional, it has the potential to cause significant changes in a program that has been in operation for the last 46 years.

Just to remind everybody about Medicaid, it was created in 1965 at exactly the same time Medicare was created. Where Medicare was created to provide health care coverage for our senior citizens, Medicaid was created as a safety net for low-income individuals. Medicare is run exclusively by the Federal Government. Medicaid is a Federal-State partnership. The Federal Government sets the parameters of the Medicaid Program. It pays at least half of the program in every State but then turns the functional operation of the Medicaid Program over to the States.

In the 46 years since both programs were created, eligibility for the Medicare Program has been essentially unchanged. On the other hand, eligibility for the Medicaid Program has expanded significantly through the years and, with that, the program has grown dramatically as well.

Medicaid, when it was created, covered fewer than 5 million. Today, the Medicaid Program currently covers nearly 57 million. The program spends more than $300 billion each year.

Medicaid has expanded so dramatically for two reasons. First, at various points in the last 46 years Congress has mandated that the States increase eligibility and services for the program. Second, Congress has also given the States the option to expand their eligibility. When Congress gives States the option of expanding their eligibility, States can expand and the Federal Government will still provide its proportionate share of Federal dollars.

For instance, one of the programs I helped get passed with Senator Kennedy from Massachusetts when he was a Member of the Senate was a program that allowed some help for families who had particularly high health care costs for kids—something that was just catastrophically high. That is just one example.

The decision to expand is up to the States. When Congress mandates the States expand eligibility, States can either expand their programs or forfeit all Federal funds for the program.

Now, this is what we call an all-or-nothing requirement. It has been used in every expansion of the program. The all-or-nothing requirement on States has not only been used to expand eligibility within the Medicaid Program, but it has been used to expand services and require changes in the administration of the program.

If the Federal Government wants States to cover podiatrists in Medicaid, the Federal Government can mandate States to do so. If a State doesn't do it? Withhold all Federal dollars to that State. If the Federal Government wants States to implement a secondary payer program to ensure that services are being properly paid by private dollars, the Federal Government can mandate States to do so and withhold every Federal dollar if that State refuses to go along.

It has been a staple of the program for 46 years that the Federal Government can require States to do certain things in Medicaid. Now comes along the Affordable Care Act. That act requires States to expand their Medicaid Program to cover all individuals up to 133 percent of the poverty level. It is the first expansion of Medicaid's mandatory eligibility groups since the all-or-nothing expansion in the bills of 1989 and 1990. Those were both reconciliation acts.

It is this all-or-nothing requirement that States are challenging and that the Supreme Court will consider next year and has given a certain portion of the 5½ hours just to debate this issue. So I think that means the Supreme Court thinks this is a very significant issue they are being asked to consider.

So I would like to describe the arguments being made by the States that this is an unconstitutional use of congressional power. The States argue that the 10th amendment limits the power of Congress to coerce States to accept Federal funds as opposed to providing inducements. The States argue that a restriction on Federal funds compels rather than induces if its burdens and losses as they affect vital ordinary State functions are too burdensome and costly. So I quote from their position:

> By conditioning all of the States Federal Medicaid funding—for most States, more than a billion dollars each year—upon agreement to substantially expand their Medicaid programs, the Affordable Care Act passes the point at which pressure turns into compulsion and achieves forbidden direct regulation of the States.

The part of the quote which says it is at the point where pressure turns into compulsion makes the act unconstitutional because it has always been a principle that the Federal Government can put certain conditions on States, but if it reaches a point where the State has to do it, in this case the States say: You have really gone too far.

The Affordable Care Act withholds all Federal dollars, then, from States that refuse to submit to the policy dictates of the Congress. Medicaid accounts for more than 40 percent of all Federal funds that States receive. States spend on average 20 percent of their State budget on Medicaid. Federal funds cover, on average, 57 cents of each dollar spent on the program because previously I said the Federal Government gives every State at least 50 percent, but the average of all 50 States is 57 percent of the Medicaid dollars coming from Federal dollars.

In my State of Iowa, for instance, I think it is 63 percent from the Federal Government and 37 percent of State funds. So the loss of all Federal Medicaid funding would obviously be devastating to the States.

The States maintain that the law's expansion of Medicaid was deliberately designed to force the States to agree to expand the program because of the threat that a State's entire Federal funding stream would be cut off if they decided not to go along with decisions made in Congress. In the harshest terms, they were made an offer they could not refuse. Further quoting from the States' argument:

> The Affordable Care Act essentially holds the States hostage based on their earlier decision to establish a Medicaid infrastructure and accept federal funds subject to different conditions.
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> The Affordable Care Act uses the States' decision to accept earlier federal inducements against them, and, in doing so, presents states with no real choice: they must abandon completely the existing Medicaid system and funding or accept the radical new conditions. This amounts to a massive bait-and-switch.

The States are arguing to the Supreme Court that there is no way the States can turn down a Federal inducement as massive as all Medicaid funding.

This is especially true because the effect of declining is that the State's own taxpayers have to pay the full cost of providing health care for the neediest citizens of the State and, at the same time, provide the Federal Government taxes for Medicaid funds that would be distributed to pay for the program, including expansion in the other 49 States.

Since no State could make taxpayers fund the State and Federal portions of Medicaid, while also taxing their citizens to pay for Medicaid in the other 49 States, it is a phony choice, not a real choice, for the States to turn down the money to expand their Medicaid Programs. In other words, the States are being compelled to do so.

The States argue that giving notice of the coercion they face does not make the choice any less coercive, and they argue that when States originally accepted Medicaid, they were not

warned that their participation would put them at the mercy of any future unpredictable congressional demands.

The States are arguing Congress can change Medicaid, and Congress can condition the funding for those changes on State agreement to them.

But it cannot force changes on the States by threatening them with the loss of the entirety of Federal funds.

Although the Federal Government will pay the vast majority of the cost of expansion, the States also point out that coercion turns on the financial inducement that Congress offers, not the amount a State is coerced to spend.

The critical issue is what is referred to as the ''coercion doctrine.'' The coercion doctrine protects the States' decision whether the inducement is worth the cost.

Among the controlling cases is South Dakota v. Dole in 1987. The Supreme Court there upheld a Federal law that threatened States with the loss of 5 percent of Federal highway funds if they did not raise their drinking age to 21.

Remember, that was only 5 percent of their road funds, not 100 percent of their road funds, as in the case of the all-or-nothing in the case of Medicaid, where if you do not go along, you are going to lose everything.

So in that Dole case, writing for the majority, Chief Justice Rehnquist noted:

> Our decisions have recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which ''pressure turns into compulsion.''

In the years since the Dole decision, Federal courts have yet to establish a clear test for coercion. I assume that is what could happen if they would overturn Congress's decision; that there would be a clearer test of coercion in this Affordable Care Act.

The Supreme Court will be challenged in this affordable care act case to determine where the limits of Federal coercion, if any, lie.

It is difficult to overstate the potential implications of this particular aspect of the affordable care act in the case that is being appealed.

There are three specific ways this decision could have a profound impact on Federal policy if the Supreme Court rules in favor of the States.

A ruling for the States could affect future Medicaid policy, current Medicaid policy, and broader Federal-State partnerships.

The expansion of Medicaid in the Affordable Care Act was written to minimize the cost to the States. The Federal Government pays for 100 percent of the cost of the Medicaid expansion in the first few years, before transitioning to an approximately 92-percent share of the cost of the expansion.

If the Federal Government cannot require expansion of the Medicaid Program and pick up 92 percent of the tab, what can the Federal Government require? Would a mandatory expansion be constitutional if the Federal Government permanently paid for 100 percent of the cost? Could the Federal Government mandate future expansions if they were much smaller in scope, such as in the 1989 and 1990 mandatory expansions under those reconciliation bills?

If the Federal Government wanted to require States to cover podiatrists or implement a secondary payer program, could it do so using Federal funds as leverage to require it?

A ruling in favor of the States would raise those questions.

Further, if the current mandatory expansion of Medicaid is unconstitutional, what does that imply for previous expansions and policies?

In the 1989 and 1990 acts, when Congress required States to expand eligibility for women and children, Congress did so without providing any additional funding to the States beyond their normal share, which in the case of Iowa today would be 63 percent Federal, 37 percent State.

If the Supreme Court rules in favor of the States, will previous mandatory expansions to Medicaid be subject to challenge? Will a State be able to challenge the existing enforcement mechanism of withholding Federal dollars if a State wants to ignore a service requirement or an antifraud provision? These questions will then have to be answered.

Finally, a Supreme Court ruling on a coercion test necessarily has broader implications for all Federal-State partnerships. The original Dole case was about transportation funding.

A Supreme Court ruling in favor of the States will necessarily bring into question every agreement between the Federal Government and the States where the Federal Government conditions 100 percent of the Federal funds on States meeting requirements that are determined in Washington, DC.

It is certainly possible that such a Supreme Court ruling could require future Congresses to carefully consider a coercion test in designing legislation.

A Supreme Court ruling in favor of the States in this case could not only jeopardize the mandated Medicaid expansion in the Affordable Care Act but could challenge the fundamental structure of Medicaid and have broader implications outside health care.

One may ask: Does the Supreme Court have this case before it—and why does it have it before it?—a case with such broad and far-reaching implications? It is because of a massive restructuring of our health care system in a partisan fashion, using nearly every procedural tool at the majority party's disposal in accomplishing the goal of passage.

The constitutionality of this law has been challenged in numerous courts throughout the country. These challenges will soon be heard before the Supreme Court. While most people want to focus on the individual mandate, it is important we do not forget the potential consequence of the Medicaid question before the Court.

It could, obviously, strike the expansion in the Affordable Care Act. It could hamstring future Congresses as they consider potential policies for the Medicaid Program in the future. It could threaten the fundamental structure of the Medicaid Program by bringing into question all the requirements on the States in the program today. It could require future Congresses to consider the structure of every Federal-State partnership.

We are here discussing this because the White House and the Democratic majority put their partisan goals ahead of collaboration with Republicans and States to build legitimate public policy—contrary to how most social policy in this country has been devised: Social Security, bipartisan; Medicare, Medicaid, bipartisan; civil rights laws, bipartisan—but not this Affordable Care Act, a partisan document.

Now we see that far more than this one specific policy is threatened. If the Supreme Court accepts the States' argument, a host of constitutional questions will surround the operation of many Federal funding streams to the States. It would be difficult to overstate the significance of such a ruling. I have outlined it was not necessary for the Congress to have taken action that might produce that result.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. RUBIO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BENNET.) Without objection, it is so ordered.

CUBA TRAVEL POLICY

Mr. RUBIO. Mr. President, there is a lot of conversation in the building today about one of the provisions that is holding up the omnibus; they are saying this is Cuba travel, families traveling back to Cuba. I have strong opinions about that as well. Suffice it to say that it is important to let my colleagues know what is being asked for in the omnibus, and what will be coming over here if it is kept in, will not prohibit families from traveling to Cuba. It will limit the amount that they can. That is a wise policy, one that I support, because it limits access to hard currency to a tyrannical regime.

I am here to talk about a different part of the Cuba policy, however, Cuban travel, which does not get a lot of notice these days, but it is part of conversations that are ongoing with the administration and the State Department with regard to some of the appointments they have in the Western Hemisphere, and that is the so-called people-to-people travel.