No. 14-992

In the Supreme Court of the United States

MARY C. MAYHEW, COMMISSIONER, MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, provides that, as a condition for receiving federal Medicaid funds, a State must maintain until October 2019 the Medicaid eligibility standards for children that it had in effect when the Act was passed in March 2010. 42 U.S.C. 1396a(gg)(2). That maintenance-of-effort provision requires Maine to continue to apply the same eligibility standards for 19- and 20-year olds that it has had in place for the past 25 years. The questions presented are as follows:

1. Whether the court of appeals correctly rejected petitioner's contention that the maintenance-of-effort provision exceeds Congress's power under the Spending Clause because it is impermissibly coercive.

2. Whether the court of appeals correctly rejected petitioner's contention that the maintenance-of-effort provision is an impermissible retroactive condition on the receipt of federal funds.

3. Whether the court of appeals correctly rejected petitioner's contention that the maintenance-of-effort provision violates the Constitution by denying Maine equal sovereignty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 772 F.3d 80.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36-39) was entered on November 17, 2014. The petition for a writ of certiorari was filed on February 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Medicaid statute, enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, establishes a cooperative federal-state program to

provide medical care for needy individuals. "Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015). "States are not required to participate in Medicaid, but all of them do." *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 275 (2006).

a. Before 2010, Medicaid generally "require[d] States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2601 (2012) (*NFIB*) (opinion of Roberts, C.J.). "There [wa]s no mandatory coverage for most childless adults, and the States typically d[id] not offer any such coverage." *Ibid.*

In the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] Congress dramatically expanded Medicaid by requiring participating States to extend coverage to all "individuals under the age of 65 with incomes below 133 percent of the federal poverty line." *NFIB*, 132 S. Ct. at 2601 (opinion of Roberts, C.J.) (citing 42 U.S.C. 1396a(a)(10)(A)(i)(VIII)). The Act established a new level of benefits coverage for the expansion population and provided for substantially more generous federal reimbursement for "the costs of covering these newly eligible individuals." *Ibid.* (citing 42 U.S.C. 1396d(y)(1)).

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

The Affordable Care Act's adult eligibility expansion became effective in 2014. 42 U.S.C. 1396a(a)(10)(A)(i)(VIII). States that failed to comply with the requirement to expand coverage risked the loss of federal Medicaid funds under 42 U.S.C. 1396c, which authorizes the Department of Health and Human Services (HHS) to withhold funding if a State violates the requirements of the Medicaid statute—including the requirements added by the Affordable Care Act's adult eligibility expansion. *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.).

b. Twenty-six States challenged the constitutionality of the adult eligibility expansion, contending that it exceeded Congress's authority under the Spending Clause. *NFIB*, 132 S. Ct. at 2580-2582. This Court agreed, holding that Congress could not condition a State's continued receipt of funds for its preexisting Medicaid program on the State's participation in the expansion. *Id.* at 2607 (opinion of Roberts, C.J.); see *id.* at 2666-2667 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

The *NFIB* plurality reaffirmed the established principle that Congress may "condition the receipt of funds on the States' complying with restrictions on the use of those funds." 132 S. Ct. at 2603-2604 (opinion of Roberts, C.J.). It also noted that Congress had expressly reserved the right to modify the Medicaid program, see 42 U.S.C. 1304, and that Congress had repeatedly made changes to the program over the years—including by requiring participating States to expand coverage in various ways. 132 S. Ct. at 2605. But the plurality concluded that unlike those past changes, the adult eligibility expansion was not "properly viewed merely as a modification of the existing

program." *Ibid.* Prior amendments "merely altered and expanded the boundaries of the[] categories" of individuals covered by Medicaid. *Id.* at 2606. Under the Affordable Care Act, in contrast, the plurality concluded that "Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *Ibid.*

The plurality therefore concluded that, in enacting the adult eligibility expansion, Congress had effectively sought to "enlist[] the States in a new health care program" and had "penalize[d] States that choose not to participate in that new program by taking away their existing Medicaid funding." *NFIB*, 132 S. Ct. at 2606-2607 (opinion of Roberts, C.J.). The plurality explained that unlike a condition that governs the use of the granted funds, this sort of "threat[] to terminate other significant independent grants" is "properly viewed as a means of pressuring the States to accept policy changes." *Id.* at 2604. And the plurality further explained that such financial pressure is impermissible if it is "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Ibid.* (quoting *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987)).

Applying that standard, the plurality concluded that conditioning continued funding for a State's preexisting Medicaid program on the State's participation in the adult eligibility expansion was impermissibly coercive. *NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J.). The plurality explained that "Medicaid spending accounts for over 20 percent of the average State's total budget" and that "the States have developed intricate statutory and administrative regimes over the course of many decades to implement their

objectives under existing Medicaid." *Id.* at 2604. In light of those circumstances, the plurality concluded that the possibility of losing funding for their preexisting Medicaid programs meant that States had "no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605; see *id.* at 2606-2607.

To remedy that constitutional defect, the plurality held that HHS "cannot apply [Section] 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." *NFIB*, 132 S. Ct. at 2607. But the plurality emphasized that this holding "d[id] not affect the continued application of [Section] 1396c to the existing Medicaid program." *Ibid.*

2. In addition to enacting the adult eligibility expansion, the Affordable Care Act also made a variety of modifications to the existing Medicaid program. One of those changes was the addition of a maintenance-of-effort (MOE) provision specifying that, as a condition for continued receipt of federal Medicaid funds, States must maintain until October 2019 the eligibility standards for children that they had in effect when the Act became law in March 2010. 42 U.S.C. 1396a(gg)(2). Such MOE requirements are common features of Medicaid and other federal spending programs. Pet. App. 32. Among other things, they serve "to protect low-income individuals from losing public assistance in times of transition between different statutory schemes for delivering that assistance." *Id.* at 33-34.

When the Medicaid program began in 1965, participating States were required to cover eligible children under the age of 21. Pet. App. 19-20; see Social Security Amendments of 1965 (1965 SSA Amendments),

Pub. L. No. 89-97, sec. 121(a), § 1905(a), 79 Stat. 286, 351. In 1981, Congress generally made coverage of children aged 18, 19, and 20 optional. Pet. App. 20 (citing Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2172(b)(1), 95 Stat. 357, 808). Under the Affordable Care Act's MOE provision, however, a State that was voluntarily providing such coverage in March 2010 is required to maintain it until October 2019. See 42 U.S.C. 1396a(gg)(2) (the MOE provision applies to children "under 19 years of age (or such higher age as the State may have elected)").

3. Petitioner is the Commissioner of the Maine Department of Health and Human Services. Maine's Medicaid program has been providing coverage for children between the ages of 18 and 20 since 1991, and it was providing such coverage when the Affordable Care Act took effect in March 2010. Pet. App. 6, 72. In 2012, however, petitioner sought HHS's approval of an amendment to Maine's Medicaid plan that, among other things, would have eliminated coverage for 19- and 20-year-olds. *Id.* at 3. Petitioner acknowledged that this aspect of the proposed plan amendment violated the MOE requirement. *Id.* at 65. She argued, however, that the MOE requirement was unenforceable because it exceeded Congress's authority under the Spending Clause. *Id.* at 63-64.

The Administrator of HHS's Centers for Medicare & Medicaid Services (CMS) denied approval of the portion of petitioner's proposed plan amendment that would have eliminated coverage for 19- and 20-year-olds. Pet. App. 69-76. In her initial decision, the Administrator rejected petitioner's contention that the MOE requirement exceeded Congress's authority under the Spending Clause. *Id.* at 73-75. The Admin-

istrator subsequently denied reconsideration, concluding that she lacked authority to decide the constitutionality of the MOE requirement. *Id.* at 38-52.[2]

4. Petitioner sought review in the court of appeals. Maine's Attorney General intervened as a respondent, citing "strong[]" disagreements with petitioner "as a matter of law and public policy." Pet. App. 3 n.1 (citation omitted). The court of appeals upheld CMS's decision. *Id.* at 1-35.

a. The court of appeals first rejected petitioner's contention that the MOE requirement is impermissibly coercive, concluding that petitioner's challenge was foreclosed by *NFIB*. Pet. App. 10-25. The court

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[2] During administrative proceedings, petitioner also challenged the constitutionality of the Affordable Care Act's separate provision requiring States to maintain their Medicaid eligibility standards for adults until "the date on which [HHS] determines that [a health insurance] Exchange established by the State under [42 U.S.C. 18031] is fully operational," 42 U.S.C. 1396a(gg)(1). Pet. App. 50-52, 71-76. That requirement expired when Maine's federally-facilitated Exchange began operating on January 1, 2014, and HHS has now approved an amendment to the State's plan tightening Medicaid eligibility standards for adults. See 14-1300 Docket entry 4 n.3 (1st Cir. Apr. 18, 2014). Petitioner therefore did not pursue her challenge to the adult MOE requirement in the court of appeals, and that provision is not at issue here.

The meaning of the adult MOE requirement is indirectly at issue in *King* v. *Burwell*, No. 14-114 (argued Mar. 4, 2015), which concerns the interpretation of the phrase "Exchange established by the State under [42 U.S.C. 18031]" in another provision of the Affordable Care Act. The petitioners in *King* incorrectly contend that the adult MOE provision remains in force until a State establishes an Exchange for itself, and therefore that it continues to bind Maine and the other 33 States with federally-facilitated Exchanges. See Gov't Br. at 29-30, *King*, *supra* (No. 14-114).

explained that where—as in the relevant portion of *NFIB*—"a majority of the Supreme Court agrees on a result but 'no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."'" *Id.* at 17 (quoting *Marks* v. *United States*, 430 U.S. 188, 193 (1977)). Applying that rule, the court held that the *NFIB* plurality's analysis is controlling because the plurality "invalidated the Medicaid expansion on narrower grounds than did the joint dissent." *Ibid.*

The court of appeals next held that the plurality's analysis "preclude[d] [it] from finding that there is a Spending Clause problem" with the MOE requirement. Pet. App. 18. That requirement "applie[s] to the long-standing provision of care to 19- and 20-year-olds." *Ibid.* Unlike the adult eligibility expansion, therefore, the MOE requirement "is not a new program" or a fundamental change in the nature of Medicaid. *Ibid.* To the contrary, it simply requires States to continue providing the same coverage to children who are already receiving it. *Id.* at 18-22. The court therefore concluded that the MOE requirement "falls comfortably within Congress's express reservation of power to 'alter' or 'amend' the terms of the Medicaid statute in its coverage of previously covered groups." *Id.* at 22.

b. For similar reasons, the court of appeals rejected petitioner's contention that the MOE requirement constituted an impermissible "retroactive" condition on federal funds. Pet. App. 26-27. In 2009, before the Affordable Care Act was enacted, Congress had offered stimulus funds to States that agreed to "main-

tain their Medicaid eligibility criteria at July 1, 2008 levels until December 31, 2010." *Id.* at 6-7. Maine had accepted those funds, and petitioner contended that by requiring States to maintain their March 2010 eligibility standards for children through October 2019, the Affordable Care Act "'changed the deal' [Congress] offered to Maine in 2009." *Id.* at 26 (citation omitted).

The court of appeals agreed with petitioner that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" and that Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." Pet. App. 26 (brackets in original) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17, 25 (1981)). But the court held that the Affordable Care Act "did not 'surprise' Maine with a retroactive condition" because the "modest change" made by the MOE requirement—which is a condition on Medicaid funding received *after* that provision's enactment—falls within Congress's express reservation of authority in 42 U.S.C. 1304 to alter or amend the Medicaid program. Pet. App. 26-27.

c. Finally, the court of appeals rejected petitioner's contention that the MOE requirement denies Maine equal sovereignty. Pet. App. 27-35. Petitioner relied on *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), which invalided the provision of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, requiring certain States to obtain preclearance from the Attorney General or a federal court before changing their election laws. The court concluded that petitioner's argument "fail[ed] at every step of the analysis." Pet. App. 28. First, the court explained that unlike

the coverage formula challenged in *Shelby County*, the MOE requirement does not "single[] out certain states for disparate treatment" because it applies to every State. *Ibid.* Second, the court noted that *Shelby County*'s scrutiny of the coverage formula was premised on this Court's conclusion that the VRA's preclearance requirement "marked an 'extraordinary' departure from basic principles of federalism" and "intruded into a realm * * * that has traditionally been the exclusive province of the states." *Id.* at 31 (quoting *Shelby Cnty.*, 133 S. Ct. at 2618). The MOE requirement, in contrast "does not intrude on an area of traditional state concern," *id.* at 32, but rather simply requires an extension of certain prior choices by States under a federal-state cooperative program. Finally, the court held that the MOE requirement withstands scrutiny even if *Shelby County* requires a showing that the requirement is "'sufficiently related' to its targeted problems," 133 S. Ct. at 2630 (citation omitted), because MOE requirements provide protection during times of transition and are common features of federal spending programs. Pet. App. 33-34.

ARGUMENT

The court of appeals correctly rejected petitioner's challenges to the MOE requirement, and its decision does not conflict with any decision of this Court or another court of appeals. Indeed, no other State has sought to raise the claims that petitioner asserts. This Court's review is not warranted.

1. There is no merit to petitioner's contention (Pet. 12-22) that the MOE requirement at issue here is impermissibly coercive under *NFIB* v. *Sebelius*, 132 S. Ct. 2566 (2012).

a. As the court of appeals explained, petitioner's coercion claim is inconsistent with the *NFIB* plurality's analysis. Pet. App. 18.[3] The plurality emphasized that Congress may "condition the receipt of funds on the States' complying with restrictions on the use of those funds." *NFIB*, 132 S. Ct. at 2603-2604 (opinion of Roberts, C.J.). The ability to impose such conditions is essential to Congress's spending power because it "is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" *Id.* at 2604. Consistent with that understanding, the plurality noted that Congress had expressly reserved the right to alter or amend the Medicaid statute and that it had exercised that authority repeatedly—including by "increasing the number of eligible children" who must be covered. *Id.* at 2606. The plurality did not suggest that those past modifications raised any constitutional concern. In fact, it said exactly the opposite, emphasizing that "[p]revious Medicaid amendments simply do not fall into the same category as the one at stake [in *NFIB*]." *Ibid.*

The critical premise of the plurality's analysis was thus that—unlike past changes to the Medicaid program—the adult eligibility expansion was not "a mere alteration of existing Medicaid," but rather "a new health care program." *NFIB*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.); see, *e.g.*, *id.* at 2605 (rejecting the government's contention "that the Medicaid expansion is properly viewed merely as a modification of

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[3] Petitioner disputes the court of appeals' interpretation of the plurality's opinion, but she does not appear to challenge the court's conclusion that the plurality's analysis is controlling under *Marks* v. *United States*, 430 U.S. 188, 193 (1977). See Pet. App. 17-18.

the existing program"); *ibid.* ("The Medicaid expansion * * * accomplishes a shift in kind, not merely degree."). Based on that understanding, the plurality concluded that the requirement that States comply with the expansion in order to continue receiving funds for their existing Medicaid programs could not be justified as a "restriction[] on the use" of the funds in question. *Id.* at 2604. Instead, the plurality viewed that condition as a "threat[] to terminate other significant independent grants" unless States agreed to participate in a new program. *Ibid.*

As the court of appeals explained, the MOE requirement is "not the same nor even analogous" to the adult eligibility expansion. Pet. App. 25. The MOE requirement "does not 'expand' Medicaid eligibility at all"; it merely requires States to preserve certain aspects of their *existing* Medicaid programs. *Id.* at 18-19. The requirement applies to "a population—low-income children of certain ages—that has historically been covered by Medicaid." *Id.* at 19. Indeed, "the Medicaid program has an extensive history of covering 18- to 20-year-olds." *Ibid.* Moreover, "[t]he category of children for which a state must provide coverage has remained subject to expansion throughout the history of Medicaid," and Congress has repeatedly required States to cover more children "based on changing age and income requirements." *Id.* at 20-21. And unlike the adult eligibility expansion—which provided a new level of benefits and relied on a new funding mechanism—the MOE provision requires States to maintain current benefits levels and "uses the same pre-existing funding mechanism as pre-[Affordable Care Act] Medicaid." *Id.* at 22.

The court of appeals thus correctly concluded that the MOE requirement is "an unexceptional 'alter[ation] . . . [of] the boundaries' of the categories of individuals covered under the old Medicaid program, completely analogous to the many past alterations of the program that *NFIB* expressly found to be constitutional." Pet. App. 18 (brackets in original) (quoting *NFIB*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.)). The MOE requirement therefore falls squarely within Congress's authority to "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds." *NFIB*, 132 S. Ct. at 2603-2604 (opinion of Roberts, C.J.).

b. Petitioner's objections to the court of appeals' analysis lack merit.

First, petitioner contends (Pet. 15, 18-22) that *NFIB* "implies that any withholding of all Medicaid funds must be proportional to the Medicaid requirement it enforces." Under the proportionality rule that petitioner posits (Pet. 21), the only permissible sanction for Maine's proposed violation of the MOE requirement would be for HHS to "withhold funds from Maine that would have been paid for covering 19- and 20-year-olds." Petitioner cites no authority adopting such a rule, which would radically transform Congress's spending power by making every federal spending program an a la carte offering in which States would be free to pick and choose which parts of the program to implement. Such a rule also cannot be reconciled with the *NFIB* plurality's admonition that "[its] holding does not affect the continued application of [42 U.S.C.] 1396c to the existing Medicaid program." 132 S. Ct. at 2607 (opinion of Roberts, C.J.). As the plurality explained, Section 1396c permits HHS

to withhold all Medicaid funding if it "determines that the State is out of compliance with any Medicaid requirement." *Ibid.*; see *id.* at 2604.

Second, petitioner asserts (Pet. 15-17) that "mandatory coverage of 19- and 20-year-olds effects a basic change to Medicaid" analogous to the adult eligibility expansion. But petitioner makes no attempt to respond to the many distinctions identified by the court of appeals—including, most obviously, the fact that the MOE requirement does not expand coverage at all. Pet. App. 18-22. Instead, petitioner's argument relies on the fact that 19- and 20-year-olds who were *not* treated as "children" under a State's existing Medicaid program are part of the population covered by the adult eligibility expansion. See 42 U.S.C. 1396a(a)(10)(A)(i)(VIII). Petitioner appears to contend that because *NFIB* held that Congress lacked the authority, as part of the expansion, to condition funds for a State's existing Medicaid program on the extension of coverage to 19- and 20-year-olds who were not already covered, Congress lacks authority to require coverage of 19- and 20-year-olds under the MOE requirement as well. But the fact that the Court held that Congress lacked authority to require *all* participating States to expand coverage to *all* nonelderly adults—including 19- and 20-year-olds—says nothing about Congress's authority to require States that were *already* covering 19- and 20-year-olds as children to continue to do so. Both requirements include some 19- and 20-year-olds, but they are otherwise entirely different.[4]

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[4] Petitioner also asserts (Pet. 16) that *NFIB* "severed [Section] 1396c's withdrawal penalty as it applied to the entire Expansion population, and did not leave the application to 19- and 20-

Third, petitioner asserts (Pet. 17-18) that the court of appeals' reasoning would allow Congress to require States that have opted to implement the adult eligibility expansion "to continue covering all low-income adults under age 65 or lose all their Medicaid funding." But the court had no occasion to address such a hypothetical provision, and its reasoning was closely tied to the particular features of the narrow, temporary MOE requirement at issue in this case. See, *e.g.*, Pet. App. 18-22.

2. Petitioner next contends (Pet. 22-23) that the MOE requirement contravenes the principle that Congress may not impose "post acceptance or 'retroactive' conditions" on federal grants. Pet. App. 26 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17, 25 (1981)). That argument rests on the premise that the MOE requirement was a new condition on Maine's prior receipt of stimulus funds under the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, § 5001(f)(1)(A) and (h)(3), 123 Stat. 115, 500, 502. But that premise is incorrect. Under ARRA, Maine was required to preserve its July 2008 Medicaid eligibility standards until December 2010 in order to receive certain stimulus funds.

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year-olds unaffected." But the court of appeals' decision is entirely consistent with the remedy adopted in *NFIB*. Under *NFIB*, HHS "cannot apply [Section] 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." 132 S. Ct. at 2607 (opinion of Roberts, C.J.). Here, however, Maine does not risk the loss of its Medicaid funds "for failure to comply with the requirements set out in the expansion." Instead, it is subject to a separate requirement to maintain certain aspects of its *existing* Medicaid program. The *NFIB* plurality emphasized that its holding "d[id] not affect the continued application of [Section] 1396c to the existing Medicaid program." *Ibid.*

Ibid.; see Pet. App. 6. The MOE requirement did not add any further conditions to the receipt of those stimulus funds; instead, it required that, as a condition of receiving *future* Medicaid funding, a State must maintain its March 2010 eligibility standards for children until October 2019. 42 U.S.C. 1396a(gg)(2). That is a forward-looking condition on a State's ongoing participation in Medicaid, and it applies only if a State received Medicaid grants after the MOE provision was enacted in March 2010.[5]

The *NFIB* plurality concluded that the adult eligibility expansion raised retroactivity concerns because "[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." 132 S. Ct. at 2606 (opinion of Roberts, C.J.). As the court of appeals explained, however, the MOE provision suffers from no similar difficulty. Pet. App. 26-27. A narrow, temporary requirement to maintain existing coverage is nothing like the permanent adult eligibility expansion. Similar requirements are common features of federal spending programs. *Id.* at 32. Indeed, the Medicaid statute itself has previously included MOE requirements. For example, since 1988, Congress has required participating States to maintain their payment levels under the Aid to

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[5] Petitioner asserts (Pet. 23) that the MOE requirement effectively added new conditions to the funds provided under ARRA because the ARRA grants took the form of increased Medicaid funding that Maine would have been unable to use if it had ceased participating in the Medicaid program altogether. But petitioner forfeited that argument by failing to raise it below, and the court of appeals therefore did not address it. See Pet. C.A. Br. 18-19; Pet. C.A. Reply Br. 2-5.

Families with Dependent Children (AFDC) program (which are benchmarks for Medicaid eligibility) at their 1988 levels. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 302(c)(1), 102 Stat. 683, 752; 42 U.S.C. 1396u-1(b)(2)(A) (similar provision enacted in 1996). Likewise, when Congress established the Medicaid program in 1965, it prohibited HHS from approving any state Medicaid plan that would reduce assistance provided under one of the five cash assistance programs related to Medicaid eligibility, including AFDC. 1965 SSA Amendments, sec. 121(a), § 1902(c), 79 Stat. 348. The court of appeals thus correctly concluded that the "modest change" made by MOE requirement falls within Congress's express reservation of authority to alter or amend the Medicaid program. Pet. App. 26-27.

3. Finally, petitioner contends (Pet. 24-27) that the MOE requirement denies Maine equal sovereignty under *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013). But the court of appeals correctly held that the MOE requirement bears no resemblance to the VRA coverage formula at issue in *Shelby County*. That formula required nine States (and several additional political subdivisions) to obtain preclearance from the Attorney General or a federal court before making changes to their election laws. *Id.* at 2624. The Court emphasized that the coverage formula had been "reverse-engineered" to subject "a disfavored subset of States to extraordinary legislation otherwise unfamiliar to our federal system." *Id.* at 2628 (citation and internal quotation marks omitted). The Court reasoned that those States were "singled out" for less favorable treatment, *id.* at 2627, in an area "the Framers of the Constitution intended the States to keep for them-

selves, * * * the power to regulate elections," *id.* at 2623 (citation omitted). And the Court concluded that the coverage formula's "'disparate geographic coverage'" was not "'sufficiently related' to [the VRA's] targeted problems," in part because it was "based on 40-year-old data, when today's statistics tell an entirely different story." *Id.* at 2630-2631 (citation omitted).

By contrast, the MOE requirement arises under a cooperative federal-state program for the expenditure of federal funds, and it does not single out any State (or group of States) for disfavored treatment. The funding condition applies across the board to any State that participates in the Medicaid program. It is of course true that the *effects* of that requirement differ depending on the coverage rules that each State had in place in March 2010. But if the mere fact that the uniform application of a rule had different effects in different States were sufficient to establish a violation of the equal sovereignty principle, then all manner of legislation would be constitutionally suspect. Indeed, under the Medicaid statute's formula for determining the amount of federal financial assistance that each State receives, Maine receives a greater percentage of federal funds (62.67%) than do Massachusetts and New Hampshire, (50%). See 79 Fed. Reg. 71,428 (Dec. 2, 2014). Petitioner does not suggest that this formula denies equal sovereignty to Maine's sister States. There is no requirement of geographic uniformity in federal spending programs, which do not fall within an area "the Framers of the Constitution intended the States to keep for themselves." *Shelby Cnty.*, 133 S. Ct. at 2623 (citation omitted).

4. Petitioner correctly acknowledges (Pet. 31) that the decision below does not conflict with any decision by another court of appeals. Indeed, no other State has sought to challenge the constitutionality of the MOE requirement, no other State has supported petitioner's challenge, and Maine's own Attorney General has disavowed petitioner's claims. Pet. App. 3 n.1. Under the circumstances, there is no reason to expect a circuit conflict to develop in the four years that remain before the MOE requirement expires in 2019. Petitioner's challenge to a narrow, temporary provision of the Medicaid program does not warrant this Court's review.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2015

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[6] Petitioner asserts (Pet. 27-32) that the questions presented are of broad and urgent importance to the States. But that assertion is belied by the absence of parallel challenges by other States. And many of the issues that petitioner highlights do not relate to the MOE requirement at all, but instead involve questions neither addressed nor resolved by the court of appeals. See, *e.g.*, Pet. 29 (asserting that States that are considering opting into the adult eligibility expansion "need to know whether they are free to opt back out" once they do so).