LEGAL MEMO

State Attorneys General Should Challenge H.R. 2617's New Continuous Medicaid Coverage Requirement

To: FGA Partners

From: Sofia De Vito, *Visiting Legal Fellow,* and Stewart Whitson, *Legal Director*, Foundation for Government Accountability

Key points

- Section 5112 of the "Consolidated Appropriations Act, 2023," also known as H.R. 2617, includes a new requirement prohibiting states from removing ineligible Medicaid recipients under the age of 19 until after a 12-month period has passed from the date when the state first determined the individual to be eligible, unless the individual attains the age of 19, or ceases to be a resident of the state.[1]

- This new requirement will cost hundreds of billions of dollars over the next decade, with much of that cost being borne by the states. [2]

- This new requirement is also illegal and unconstitutional as it commandeers and coerces states into accepting new unforeseen and costly obligations, which severely undermines states' rights, in violation of the Tenth Amendment.[3] [4] [5] [6]

- State attorneys general (AGs) should challenge this new mandate in federal court.

Background

The Medicaid program was originally established in 1965 to provide assistance to seniors, low-income children, and individuals with disabilities who were truly in need.[7] However, following the passage of the Affordable Care Act (ACA) in 2010 and subsequent legal challenges, the Medicaid program was expanded in 2014 to include low-income adults under 65, regardless of their parenting or disability status.[8] As a result of this expansion, the number of able-bodied adults on Medicaid dramatically increased.[9]

The COVID-19 pandemic further impacted the Medicaid program when the Families First Coronavirus Response Act (FFCRA) passed, providing a temporary increase in the percentage of traditional Medicaid costs that the federal government would provide to states. In exchange for this increase, states agreed not to remove any individuals who were enrolled in Medicaid when the FFCRA was passed or who enrolled during the declared emergency period.[10] This has resulted in tens of millions of individuals, deemed ineligible based on income increases and other factors, continuing to receive Medicaid benefits anyway at the expense of taxpayers.[11]

The public health emergency (PHE) that began in January 2020 has been renewed 12 times to date.[12] It has allowed for an unprecedented number of ineligible individuals to receive Medicaid benefits, adding to already bloated costs and potentially jeopardizing the stability of the Medicaid program.[13] Fortunately, the Biden administration recently announced it will end the PHE on May 11, 2023.[14]

Nevertheless, Congress recently changed the Medicaid law to force states to provide continuous eligibility to all individuals under 19 years old for one year from the initial date of eligibility, regardless of whether they subsequently become ineligible.[15] Prior to this change, the law allowed states to grant continuous eligibility to those younger than 19 if they chose to do so.[16] Many states did implement this policy, but more than half of them either refused the policy altogether or only implemented it to a limited degree.[17]

The proposed change represents a subtle attempt to expand Medicaid beyond its original scope, as envisioned by the states and federal government. Although the change may be seen as beneficial for minors and young adults, it is likely to have significant long-term financial consequences for many states. Moreover, the change has not been subject to adequate scrutiny or consent by a significant number of states.

Fortunately, there is a strong argument that Section 5112 violates states' rights under the Tenth Amendment and the Spending Clause. These constitutional provisions prohibit Congress from using its funding to unduly coerce states into accepting retroactive and unforeseeable changes to programs such as Medicaid.[18] [19]

This new law Is unconstitutional

The U.S. Constitution's Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general welfare of the United States," while the Tenth Amendment declares that "[t]he 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." [20] [21] In the context of the Spending Clause, under which the Medicaid program is constitutionally authorized, "the Tenth amendment represents a prohibition against 'impermissible compulsion' or 'commandeering,' i.e., 'when state participation in a federal spending program is coerced.'" [22] While the Spending Clause does give Congress the power to place conditions on funds it grants to states to "ensure that the funds are used by the States to 'provide for the…general Welfare' in the manner Congress intended," this power comes with important limitations.[23]

The Supreme Court has long held that Spending Clause legislation, including Medicaid, is akin to a contract made between the federal government and the state.[24] While Congress may attach conditions to federal funds it provides to the states through Spending Clause legislation, those conditions must first be agreed to by the states in the same way a contract would be between two parties.[25] "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" [26] And the federal government may not "surprise[e] participating states with postacceptance [*sic*] or 'retroactive' conditions," lest "the status of the States as independent sovereigns in our federal system" be undermined.[27] [28] This is particularly true when those changes are accompanied by "threats to terminate" other significant funding, serving as a "means of pressuring the states to accept policy changes." [29] When the "financial inducement" offered by the federal government is "so coercive as to pass the point at which pressure turns into compulsion," that inducement becomes unconstitutional.[30]

Since courts view Spending Clause legislation including Medicaid "in the nature of a contract," the legitimacy of any changes made to the Medicaid statute hinges on "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" [31] Any attempt to use its power under the Spending Clause to "commandeer[] a State's legislative or administrative apparatus for federal purposes," or to "us[e] financial inducements to exert a 'power akin to undue influence,'" must be struck down.[32]

The facts in *NFIB* and the present case are strikingly similar. In *NFIB*, the Supreme Court held that the threat of withdrawing *all* Medicaid funds if the states refused to comply with the ACA's Medicaid expansion requirement was a violation of the Tenth Amendment. As the Court noted in *NFIB*, when "'pressure turns into compulsion'…the legislation runs contrary to our system of federalism." [33] At the end of the day, the "Federal Government may not compel the States to enact or administer a federal regulatory program." [34]

Here, just like in *NFIB*, through Section 5112 of H.R. 2617, Congress is suddenly changing the terms of its agreement with the states in a way the states could not have foreseen at the start of Medicaid. The federal government is forcing the states to continue providing benefits to a large group of Medicaid recipients for up to full year after they become ineligible.[35] When agreeing to the state and federal partnership underlying the Medicaid program, states could not have anticipated that the federal government reserved the right to "transform it so dramatically" by executive fiat.[36]

Moreover, in the present case, if states refuse to provide benefits to this ineligible group, they will face the same potential penalty as the states did in *NFIB* wherein the federal government would likely "withhold payments to the states, in whole or in part," for non-compliance with federal requirements.[37] [38] As was the case in *NFIB*, a state that opts out of the expansion prescribed in Section 5112 of H.R. 2617 "stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it." [39] Given that the Medicaid program is the single largest line item in states' budgets, representing nearly 30 percent of states' budgets on average, and that federal matching funds account for almost two-thirds of that Medicaid spending, cutting off this funding would be catastrophic for the states.[40] [41]

In the end, the potential threat to withhold this funding is "so coercive as to pass the point at which 'pressure turns into compulsion.'" [42] As the Supreme Court concluded, this type of threat is "much more than a relatively mild encouragement" but rather, it is "a gun to the head." [43] Such a budgetary loss would cause so much harm that states are left here "with no real option but to acquiesce" to these new statutorily imposed demands.[44] Pressure has turned into compulsion.

Section 5112 invariably violates the states' Tenth Amendment rights to provide program benefits only to eligible individuals and commandeers them into adopting a policy that the states never could have foreseen when they agreed to participate in the Medicaid program, all under threat of losing some or all of their Medicaid funding. This change violates the U.S. Constitution, providing a solid legal avenue state AGs can take to stand up to this federal overreach effort.

This new law is bad policy

Although states have had the option to implement the Section 5112 change to their own Medicaid programs, roughly half of them decided not to or only implemented it to a limited degree.[45] [46] These decisions were likely driven by three main concerns.

First, this change to Medicaid will force states to provide benefits to millions of ineligible individuals, which will significantly drive up already bloated costs.[47] In 2000, the average state spent a little under 20 percent of its budget on Medicaid.[48] By 2019, 30 percent of the average state budget went to Medicaid.[49] With the onset of the PHE in 2020, Medicaid expenditures ballooned even further as an additional 20 million people were enrolled between January of 2020 and October of 2022 and states were barred from disenrolling ineligible recipients.[50]

Second, increasing the number of Medicaid recipients will endanger the financial stability of hospitals. Before the ACA passed, proponents of Medicaid expansion often argued that their plan would be a financial boon for hospitals and create countless new jobs.[51] However, those results never materialized. In fact, the evidence shows that expansion had the opposite effect.[52]

States that expanded Medicaid saw a spate of hospital closures in the following years, which the hospitals attributed to meager Medicaid reimbursement rates.[53] In 2020, the Foundation for Government Accountability (FGA) reported that "Medicaid pays hospitals roughly 60 percent of what private insurance pays" and "Medicaid reimbursement rates are far lower than the actual cost to treat those patients." [54] Compounding the issue is the fact that Medicaid expansion funnels able-bodied adults who have private insurance onto Medicaid by forcing them out of federally subsidized private health plans available on the ACA Marketplace.[55]

Third, providing continuous coverage for this eligibility group will increase the Medicaid error rate. If states are prohibited from removing ineligible enrollees from their programs, they will have less incentive to regularly verify income for potentially millions of recipients. As it stands, more than 20 percent of all Medicaid expenditures are improper, and more than 80 percent of all improper payments are a result of eligibility errors.[56] That amounts to more than $112 billion in wasted money

across the U.S. every year.[57] For comparison, Illinois's entire Medicaid budget is $29 billion per year.[58]

Limiting the error rate is about more than simply holding the government accountable as a matter of principle. Left unchecked, improper payments can jeopardize a state's entire Medicaid program. For instance, Ohio's program is on the cusp of insolvency as its costs doubled in the last decade and quadrupled in the last two.[59] Last year, FGA reported that "Ohio's Medicaid improper payment rate is an astonishing 44 percent, more than twice the national average," and that 98 percent of those improper payments were due to eligibility errors.[60]

Bottom line

Through a provision quietly inserted into H.R. 2617, a 1,653-page bill, Congress has attempted to expand Medicaid by forcing states to provide benefits to a large group of otherwise ineligible individuals for an extra 12-month period, placing the onus for covering the higher program costs squarely on the shoulders of the states.[61] Fortunately, state AGs have a strong argument to challenge the constitutionality of this new mandate, and for all the reasons outlined above, they must.

---

[1] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (H.R. 2617, 117th Cong. §5112, p. 1482 (2023)), https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf.
[2] "CBO Estimate for Divisions O Through MM of H.R. 2617, the Consolidated Appropriations Act, 2023," p. 20, Congressional Budget Office (CBO) (2023), https://www.cbo.gov/system/files/2023-01/PL117-328_1-12-23.pdf.
[3] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012).
[4] U.S. CONST. amend. X.
[5] U.S. CONST. art. I, § 8, cl. 1.
[6] 5 U.S.C. § 706(2)(B) (2023).
[7] Sam Adolphsen and Jonathan Ingram, "Stopping the Medicaid madness: How Congress and states can start salvaging some program integrity," Foundation for Government Accountability (2022), https://thefga.org/research/stopping-the-medicaid-madness-how-congress-and-states-can-start-salvaging-some-program-integrity/.
[8] Medicaid Program History, Centers for Medicare & Medicaid Services (CMS) (2022), https://www.medicaid.gov/about-us/program-history/index.html.
[9] Sam Adolphsen and Jonathan Ingram, "Stopping the Medicaid madness: How Congress and states can start salvaging some program integrity," Foundation for Government Accountability (2022), https://thefga.org/research/stopping-the-medicaid-madness-how-congress-and-states-can-start-salvaging-some-program-integrity/.
[10] Pub. Law No. 116-127, § 6008 (2020).
[11] Hayden Dublois and Jonathan Ingram, "The Medicaid crisis is here: How Congressional handcuffs are causing Medicaid to implode," Foundation for Government Accountability (2022), https://thefga.org/research/congressional.handcuffs-causing-medicaid-to-implode/.
[12] "Renewal of Determination that a Public Health emergency Exists," U.S. Department of Health and Human Services (2023), https://aspr.hhs.gov/legal/PHE/Pages/covid19-11Jan23.aspx.
[13] Hayden Dublois and Jonathan Ingram, "The Medicaid crisis is here: How Congressional handcuffs are causing Medicaid to implode," Foundation for Government Accountability (2022), https://thefga.org/research/congressional.handcuffs-causing-medicaid-to-implode/.
[14] Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, White House Briefing Room (2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/.
[15] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (H.R. 2617, 117th Cong. §5112, p. 1482 (2023)), https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf.
[16] 42 USC § 1396a(e)(12).
[17] Tricia Brooks et al., "Medicaid and CHIP Eligibility and Enrollment Policies as of January 2022: Findings from a 50-State Survey," Kaiser Family Foundation (2022), https://www.kff.org/medicaid/report/medicaid-and-chip-eligibility-and-enrollment-policies-as-of-january-2022-findings-from-a-50-state-survey/.
[18] U.S. CONST. amend. X.

[19] U.S. CONST. art. I, § 8, cl. 1.
[20] *Id.*
[21] U.S. CONST. amend. X.
[22] *City of Phila. v. Sessions*, 280 F. Supp. 3d 579, 647 (E.D. Pa., 2017) (quoting *NFIB*, 567 U.S. at 677).
[23] *NFIB*, 567 U.S. at 576 (quoting U.S. CONST., art. I, § 8, cl. 1).
[24] *Id.* at 577.
[25] *Id*.
[26] *Id*. (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).
[27] *Id*. at 584 (quoting *Pennhurst*, 451 U.S. at 25).
[28] *Id*. at 577.
[29] *Id*. at 580.
[30] *Id*. at 577 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
[31] *Id.* (citing *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17).
[32] *Id.* (citing *Printz*, 521 U.S. at 933. (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).
[33] *Id.* at 577-78 (quoting *Steward Machine*, 301 U.S. at 590).
[34] *New York v. United States*, 505 U.S. 144, 188 (1992).
[35] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (H.R. 2617, 117th Cong. §5112, p. 1482 (2023)), https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf.
[36] *Id*. at 584.
[37] 42 C.F.R. § 430.35.
[38] 42 C.F.R. § 457.204.
[39] *NFIB*, 567 U.S. at 581 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).
[40] Jonathan Ingram et al, "Comment on Proposed Streamlining Medicaid Eligibility Rule," Opportunity Solutions Project (2022), https://solutionsproject.org/wp-content/uploads/2022/10/OSP-Comment-On-Proposed-Streamlining-Medicaid-Eligibility-Rule-10-28-2022.pdf.
[41] *Id*.
[42] *NFIB*, 567 U.S. at 580 (citing *Dole*, 483 U.S. at 211 (quoting *Steward Machine*, 301 U.S. at 590)).
[43] *Id*. at 581.
[44] *Id*. at 523.
[45] 42 USCS § 1396a(e)(12)
[46] Tricia Brooks et al., "Medicaid and CHIP Eligibility and Enrollment Policies as of January 2022: Findings from a 50-State Survey," Kaiser Family Foundation (2022), https://www.kff.org/medicaid/report/medicaid-and-chip-eligibility-and-enrollment-policies-as-of-january-2022-findings-from-a-50-state-survey/.
[47] "November 2022 Medicaid and Chip Enrollment Trends Snapshot," Centers for Medicare & Medicaid Services (CMS) (2022), https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/november-2022-medicaid-chip-enrollment-trend-snapshot.pdf.
[48] Nicholas Horton, "The Medicaid Pacman: How Medicaid is Consuming State Budgets," The Foundation for Government Accountability (2019), https://thefga.org/wp-content/uploads/2019/10/Medicaid-Pac-Man-Paper-2.pdf.
[49] *Id*.
[50] Bradley Corallo & Sophia Moreno, "Analysis of Recent National Trends in Medicaid and CHIP Enrollment," Kaiser Family Foundation (2023), https://www.kff.org/coronavirus-covid-19/issue-brief/analysis-of-recent-national-trends-in-medicaid-and-chip-enrollment/.
[51] Hayden Dublois, "Medicaid Expansion Is Closing Hospitals," Foundation for Government Accountability (2023), https://thefga.org/research/medicaid-expansion-is-closing-hospitals/.
[52] *Id.*
[53] *Id.*
[54] Hayden Dublois & Jonathan Ingram, "Hospital Losses Pile Up After ObamaCare Expansion," Foundation for Government Accountability (2020), https://thefga.org/research/obamacare-expansion-hospital-losses/.
[55] Jonathan Ingram & Nick Stehle, "Forced Into Welfare: How Medicaid Expansion Will Kick Millions of Americans Off of Private Insurance," Foundation for Government Accountability (2019), https://thefga.org/research/medicaid-expansion-private-insurance/.
[56] Hayden Dublois & Jonathan Ingram, "Ineligible Medicaid Enrollees Are Costing Taxpayers Billions," Foundation for Government Accountability (2022), https://thefga.org/research/ineligible-medicaid-enrollees-costing-taxpayers-billions/.
[57] *Id.* (authors' calculation assumes a total annual Medicaid budget of $700 billion, that 20% of all payments are improper, and that eligibility errors make up at least 80% of improper payments).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (H.R. 2617, 117th Cong. §5112, p. 1482 (2023)), https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf.