



FEDERAL RATES ARE TEMPORARY, BUT EXPANSION IS FOREVER

THE SIGNIFICANT FINANCIAL RISKS FOR
STATES CONSIDERING MEDICAID EXPANSION

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In the decade since the United States Supreme Court decided *National Federation of Independent Business v. Sebelius*,¹ numerous states and the District of Columbia have joined and other states have been tempted to enter the federal government's expanded Medicaid program. Any state considering opting into expansion should understand that the decision to opt in potentially carries permanent consequences, and risks existing Medicaid funds should the state seek to "opt-out" of expansion in the future.

The *NFIB* decision held in part that Congress could not withhold all Medicaid funding from states that declined to join the expanded program at the outset, but reaffirmed the discretion of the secretary of U.S. Department of Health and Human Services to withhold funding from states that do not comply with the requirements of the program—including from those states that subsequently and voluntarily choose to opt into expanded eligibility under the Patient Protection and Affordable Care Act (PPACA). Like other states before it, Wyoming may soon consider treading into those murky legal waters—and it does so with significant risk.

Advocates of opting into the Medicaid expansion often argue that if a state's proposed Medicaid plan does not work as expected, if its Section 1115 waiver requests are denied, or if future federal funding fails to meet a state's statutory funding threshold, then the state can always exit the expansion and return to the *status quo ante*. Such arguments, however, ignore the law and *NFIB*'s reasoning, and naively assume that Medicaid expansion can be explored risk-free. As a practical matter, of course, a state may always exit Medicaid by ending its participation in the program altogether—an option that states are very unlikely to entertain—but the question here is whether a state, after entering the expansion, may revert to its pre-expansion status without jeopardizing *all* of its Medicaid funds. Legal and political realities make it clear that they cannot.²

¹ 567 U.S. 519 (2012).

² See Robert Alt and Dan Greenberg, *Can Arkansas Escape From Medicaid Expansion if the Federal Government Breaks Its Commitments?*, Advance Arkansas Institute, April 16, 2013.

Section 1396c of the Social Security Act gives the secretary of the U.S. Department of Health and Human Services the discretion to withhold the first dollar of funding for a state's failure to comply with the program's requirements. Given that Medicaid accounts for more than 20 percent of an average state's budget, and accounts for 13 percent of Wyoming's annual budget, the decision to withhold all federal Medicaid dollars would be crippling for Wyoming, and would likely compel it to reconsider an attempt to opt-out of the expansion.

Although *NFIB* explained that Washington may not condition the first dollar of existing Medicaid coverage upon a state's coerced participation in Medicaid expansion, the court did *not* say that § 1396c would not apply after a state voluntarily chooses to amend its Medicaid plan and opts-in to the expansion. Instead, the court emphasized that changes made by the PPACA were unforeseeable to the states, and that it therefore would be problematic to hold the states to new conditions that they could not have anticipated when they agreed to participate in the Medicaid program. That argument and the court's concern abate when a state voluntarily enters the expansion program *now*. Indeed, several justices indicated in *NFIB* that changing match rates, for example, were foreseeable and that states should not assume that Congress would continue funding the expansion at current statutory levels. An opinion joined by four justices in *NFIB* emphasized that "costs may increase in the future because of the very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover. This would leave the States to bear an increasingly large percentage of the bill."³

Thus, should Wyoming or any other state opt-in to the expanded program, a decrease in federal funding levels would not likely be interpreted as providing an adequate basis to rescind its binding contract with Uncle Sam. Instead, courts would likely look to the plain terms of § 1396 of the Social Security Act—which remains fully in force—and authorize the Health and Human Services secretary to withhold *all* Medicaid funds for failure to adhere to the terms of expanded Medicaid.

Advocates of the opt-in/opt-out strategy have noted that Health and Human Services officials in the Obama Administration suggested that they would allow states to withdraw from expansion. Such statements—even if they were made by the current administration—do not constitute administrative rules, are not legally binding, and states would be imprudent to rely on them. The federal statute granting Health and Human Services authority to withhold funds for failure to meet the requirements of a state plan will control any judicial inquiry.

Expanding Medicaid under the PPACA carries potentially permanent consequences. Policymakers should resist the temptation to go along on the attenuated hope that Washington—in its beneficence—will maintain federal funding at current levels, allow them latitude in designing long-term cost-saving and delivery measures, and graciously permit a return to the status quo ante if the expansion proves untenable. Any decision to enter the Medicaid expansion today should be made with eyes wide open, confronting the reality that under the *NFIB* decision, the federal government has the authority to both increase the state's share of the cost, and to withhold all federal Medicaid dollars if a state attempts to opt out of expansion.

³ *NFIB v. Sebelius*, 567 U.S. 519, 688 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

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