No. _____, Original

# In The Supreme Court of the United States

STATES OF TEXAS, KENTUCKY, MAINE, MISSOURI, AND NEW JERSEY,

*Plaintiffs,*

v.

MICHAEL O. LEAVITT, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

*Defendant.*

**Motion For Leave To File Bill Of Complaint**

## BRIEF OF THE STATES OF ARIZONA, ALASKA, CONNECTICUT, KANSAS, MISSISSIPPI, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH CAROLINA, AND VERMONT AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General
KATHLEEN P. SWEENEY*
Assistant Attorney General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-3333
*Counsel for Amicus Curiae, State of Arizona*

[Additional Counsel Listed On Inside Front Cover]

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

DAVID W. MÁRQUEZ
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-2133

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford, CT 06106
(860) 808-5318

PHILL KLINE
Attorney General of Kansas
120 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215

JIM HOOD
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205
(601) 359-3820

KELLY A. AYOTTE
Attorney General of
New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-1202

JIM PETRO
Attorney General of Ohio
30 East Broad Street,
17th Floor
Columbus, OH 43215
(614) 466-4320

W. A. DREW EDMONDSON
Attorney General of
Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK
73105-4894
(405) 521-3921

HENRY MCMASTER
Attorney General of
South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3680

WILLIAM H. SORRELL
Attorney General of
Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3173

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## INTEREST OF THE AMICI CURIAE STATES

The "clawback" provision, 42 U.S.C. § 1396u-5(c), of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108-173, 117 Stat. 2066, is an unprecedented intrusion into each State's sovereignty. The States administer Medicaid, the country's major public health program for low-income Americans, and finance the program jointly with the federal government under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v. While federal law requires States to provide persons with incomes below certain minimum levels with Medicaid coverage, it gives each State flexibility to determine what additional Medicaid coverage, if any, it will provide. The law defines twenty-eight categories of medical services that a State's Medicaid program can include. 42 U.S.C. § 1396d(a). As a condition of participating in the federal program, each State must include seven specified categories. 42 U.S.C. § 1396a(a)(10)(A). Each State also has the option of including any of the other twenty-one categories. Prescription drug coverage is one of those optional categories. 42 U.S.C. § 1396d(a)(12).

Before Part D of the MMA, 42 U.S.C. §§ 1395w-101 to -152, became effective in January 2006, all fifty States provided prescription drug coverage to at least some Medicaid enrollees. *See* A. Grady & C. Scott, *Congressional Research Service Report to Congress, Implications of the Medicare Prescription Drug Benefit for State Budgets*, CRS-1 (June 23, 2004). Part D created an optional outpatient prescription drug coverage benefit for enrollees in Medicare, the federal health insurance program for seniors and certain disabled individuals. This benefit extends to Medicare enrollees who are commonly called "dual

eligibles" because their low incomes make them eligible for Medicaid as well as for Medicare. 42 U.S.C. § 1395w-101. Although each State previously provided at least some dual eligibles with prescription drug coverage benefits under Medicaid, States can no longer provide dual eligibles with such benefits under Medicaid since Part D became effective for this population on January 1, 2006. 42 U.S.C. § 1396u-5(d)(1).

While Congress chose to provide dual eligibles with a prescription drug coverage benefit exclusively under the federal Medicare program, it did not choose to make federal funds the exclusive means of paying for this benefit. In contravention of several fundamental constitutional principles, it instead chose to charge each State a "clawback" amount to help finance the Medicare benefit. The United States Department of Health and Human Services, Centers for Medicare and Medicaid (CMS), which administers Part D, will calculate what each State owes based on the statutory clawback formula and will send each State an annual bill setting out the State's monthly clawback payments. *See* 42 U.S.C. § 1396u-5(c); 42 C.F.R. § 423.910. If a State fails to make the payments, the federal government will offset the amount due, plus interest, against the Medicaid funds that it would otherwise have given the State. 42 U.S.C. § 1396u-5(c)(1)(C).

The amici States share the Plaintiff States' conviction that Congress cannot under any circumstances order them to collect, appropriate, and remit state funds to the federal government to finance an exclusively federal benefit program without violating the intergovernmental-tax-immunity doctrine, the anticommandeering doctrine, and the constitutional guarantee of a republican form of government. The amici States join the Plaintiff States in

urging the Court to exercise its original jurisdiction and strike down the clawback provision because it unconstitutionally wrests control over essential budgetary functions of state government from the States and establishes a dangerous precedent that threatens the States' rightful role as independent sovereign entities in our federal system.

## REASONS FOR GRANTING THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

### I. The Clawback Violates the Intergovernmental-Tax-Immunity Doctrine Because It Is a Direct, Discriminatory Tax on the States As States that Infringes on State Sovereignty and Unduly Interferes with Essential Functions of State Government.

#### A. The Clawback Is an Unconstitutional Federal Tax on the States As States.

In the Court's most recent decision concerning the intergovernmental-tax-immunity doctrine, *New York v. United States*, 326 U.S. 572 (1946), the Justices could not agree on the doctrine's exact contours, but did agree on the fundamental principle that the federal government cannot tax a State "as a State." *Id*. at 582, 587-88, 590-97. The clawback violates the doctrine under all of the formulations of this principle that emerge from the *New York* decision. Under Justice Frankfurter's formulation, the federal government unconstitutionally discriminates against States if it taxes revenue sources that are unique to States or functions that have attributes of state sovereignty. *Id*. at 582. Under Chief Justice Stone's formulation, federal taxes that unduly interfere with States' governmental functions

as well as federal taxes that discriminate against States are unconstitutional. *Id*. at 588 (Stone, C.J., concurring).

The clawback is discriminatory because it demands payment directly and exclusively from the States. It is imposed on the States as States because the States must meet the demand with funds that only they could have collected and that their legislatures would otherwise have been free to apportion among myriad competing interests. Although our representative system of government requires that state legislators be accountable to their constituents for the manner in which they allocate state resources and control state governmental costs, the clawback prevents state legislators from responsibly fulfilling these essential functions with respect to the funds that it requisitions. State legislatures have no control over the amounts that CMS will charge their States or the use that CMS will make of those amounts. The clawback therefore substantially and unduly interferes with essential budgetary functions of state government and deprives States of their right as separate sovereigns to be free from such federal interference.

The clawback would have these unconstitutional effects even if the charge that it imposed on each State remained fixed from year to year. Its disruptive impact on state budgetary processes is exacerbated, however, by the indeterminate nature of the charge that it imposes. The statutory formula by which CMS calculates the clawback amount that each State will owe for a particular year includes a variable – the annual increase in Part D per capita spending – that the Secretary of the United States Department of Health and Human Services (the Secretary) alone determines. 42 U.S.C. § 1396u-5(c)(2)(A)(ii), -(5)(c)(4)(B). The statute does not require CMS to provide States with their

clawback bills for an upcoming year until October, just a few months before that year begins. 42 U.S.C. § 1396u-5(c)(2)(B). Because States typically budget on a fiscal-year rather than on a calendar-year basis, *see* Brief in Support of Motion to File Bill of Complaint at argument section I(B)(1), they will not know how much to allocate to the clawback charge when preparing their budgets. The clawback therefore not only completely deprives States of control over the significant portion of their budgets that it annually demands, but also impairs their control over the remainder of their budgets by requiring them to estimate how large its annual demand will be. Given all of its attributes, the clawback violates the intergovernmental-tax-immunity doctrine under any of the formulations discussed in *New York* because it is imposed on the States as States and it unduly interferes with essential state budgetary functions.

The fact that a State can choose not to pay the clawback amount with the result that the federal government will deduct that amount plus interest from the Medicaid funds that it would have otherwise given the State, *see* 42 U.S.C. § 1396u-5(c)(1)(C), does not make the clawback constitutional. As this Court explained in *South Carolina v. Baker*, 485 U.S. 505, 516 (1988):

> The United States cannot convert an unconstitutional tax into a constitutional one simply by making the tax conditional. Whether Congress could have imposed the condition by regulation is irrelevant; Congress cannot employ unconstitutional means to reach a constitutional end.

The Court further explained that if Congress imposed a tax exclusively on a single State and levied the tax directly on that State's treasury, the Court would still have to

determine the constitutionality of the tax even if Congress permitted the State "to escape the tax by restructuring its state government in a way that Congress found more to its liking." *Id.* Thus, the fact that States can choose not to pay the clawback amount does not make the clawback constitutional.[1]

### B. The Clawback Is Not a Condition on the States' Receipt of Federal Funds.

The clawback cannot, moreover, be characterized as a permissible condition on the receipt of federal funds rather than as an unconstitutional tax upon the States. The Constitution's Spending Clause, art. I, § 8, cl. 1, empowers Congress to authorize the expenditure of federal funds for the country's general welfare and to attach conditions to the receipt of those funds. *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). In subsection (a) of the Medicaid statute that deals with the Medicare prescription drug benefit, Congress explicitly identified several requirements with which States must comply as "conditions" on their receipt of federal Medicaid funding. 42 U.S.C. § 1396u-5(a). Congress did not include the clawback provision in this subsection or identify the clawback as a condition on the receipt of federal Medicaid funding in the subsection that governs the clawback. *See* 42 U.S.C. § 1396u-5(c). Congress instead simply demanded that States make the monetary contribution to the federal Medicare prescription drug benefit program that the statutory formula identifies. *See id.* The clawback is

[1] For the same reason, the fact that States can avoid the clawback charge altogether by completely withdrawing from the Medicaid program does not make the clawback constitutional either.

therefore a direct tax upon the States rather than a condition on the States' receipt of federal funds.

If the clawback is upheld as a permissible condition on the receipt of federal funds, the intergovernmental-tax-immunity doctrine will no longer afford any protection for state sovereignty. Congress will always be able (1) to demand that the States pay specified amounts to support an exclusively federal program and (2) to enforce its demand if States choose not to pay by deducting the amounts from funds that it would otherwise have given them under some Spending Clause program. Congress could, for example, demand that every State pay ten million dollars to finance an exclusively federal program to provide better security for nuclear and chemical facilities. Under the clawback model, it could tell the States that if they did not pay, it would simply deduct the ten million dollars from amounts that it would otherwise have given them under Spending Clause programs such as highway safety or child-support enforcement.

While it should be obvious that Congress could not condition a State's receipt of federal highway safety or child-support enforcement funds on its payment of ten million dollars to support an exclusively federal program, this is precisely the funding method that Congress has chosen by enacting the clawback. That fact may be obscured, however, because Medicare and Medicaid may appear on the surface to be different aspects of the same program. They are not. Medicare is an exclusively federal medical health insurance program for the elderly and disabled that the federal government directly funds. *See Fischer v. United States*, 529 U.S. 667, 671-73 (2000). Medicaid, in contrast, is a Spending Clause program through which Congress makes federal funds available to

States that agree to provide medical benefits to needy persons in accordance with the conditions that Congress imposes. *See Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (recognizing that Medicaid is Spending Clause legislation). Viewed in this light, the clawback is clearly a direct tax on the States to support an exclusively federal program rather than a condition on the States' receipt of Spending Clause program funds.

## II. Congress Cannot Constitutionally Command State Legislatures to Appropriate Funds to Finance the Federal Medicare Program.

### A. The Constitution's System of Dual Sovereignty Precludes Congress from Commandeering State Governments to Implement Federal Regulatory Programs.

Our Constitution "established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). The Framers "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Id.* at 919-20. The Framers therefore expressly selected a Constitution that gave Congress authority "to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). Although the States relinquished much of their authority to the federal government, they nevertheless "retained 'a residuary and inviolable sovereignty'" and remained "independent political entities." *Printz*, 521 U.S. at 919 (quoting *The Federalist* No. 39, at 245 (J. Madison)). While many

aspects of the Constitution's text implicitly reflect this "[r]esidual state sovereignty," the Tenth Amendment makes it explicit. *Id.* at 919. It provides 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."

In keeping with the principle that the States are independent political entities and not "mere political subdivisions," "regional offices," or "administrative agencies" of the federal government, *New York*, 505 U.S. at 188, this Court has recognized that the federal government cannot commandeer state governments into enacting, enforcing, or administering federal regulatory programs. In *New York*, the Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required States to either take title to radioactive waste generated within their borders or to enact state laws that provided for disposing of the waste in accordance with Congress's directions. *Id*. at 174-77, 188. The Court found that either option would violate the anticommandeering doctrine. *Id.* at 175-76. In doing so, the Court recognized that while Congress had constitutional authority to regulate certain matters directly and to preempt conflicting state legislation, it did not have authority to order States to regulate or legislate. *Id.* at 178-79.

The Court again applied the anticommandeering doctrine in *Printz* to strike down a provision of the Brady Handgun Violence Prevention Act that under certain circumstances required state executive officers to perform background checks on persons seeking to buy handguns. 521 U.S. at 933. The Court concluded that Congress could no more command state executive officers to administer a

federal program than it could command state legislatures to enact legislation implementing such a program. *Id.*

### B. The Clawback Treats the States as "Mere Political Subdivisions" of the Federal Government in Violation of the Anticommandeering Principle and the Accountability Concerns that Animate It.

The clawback violates the anticommandeering doctrine by requiring state legislatures to appropriate funds to implement the federal Medicare program and to remit those funds to CMS, a federal agency over which the States have no control. In requiring state legislatures to remit state funds directly to a federal agency to finance an exclusively federal program that the federal agency will administer, Congress both ignores the fact that the States are independent political entities and seriously threatens their continued ability to function as such.

Not treating the States as independent political entities prevents both Congress and the States from being politically accountable to their constituents. This concern animated the Court's discussions in *New York* and *Printz*. In *Printz*, the Court recognized that the Constitution intended that both the federal and the state governments would "represent and remain accountable to [their] own citizens." 521 U.S. at 920. In *New York*, the Court observed that permitting the federal government to conscript state governments as its agents would diminish the accountability of both state and federal officials. *See* 505 U.S. at 168-69. It explained that when the federal government makes a decision "in full view of the public," federal officials "suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. In contrast, if the

federal government commandeers state governments, the federal officials who make the decision that the state governments are forced to implement "may remain insulated from the electoral ramifications of their decision." *Id.* at 169. In that instance, state officials who cannot respond to the local electorate's wishes because of the federal coercion may suffer the political consequences of the federal decision instead. *See id*. at 168-69; *see also Printz*, 521 U.S. at 930.

In *Printz*, the Court noted that if the federal government is permitted to force state governments to finance the implementation of federal programs, members of Congress will be able to "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 521 U.S. at 930. That is precisely what Congress has accomplished with the clawback. It has engineered a means of obtaining billions of dollars from state governments so that it can take credit for bestowing a prescription drug coverage benefit on dual eligibles without having to risk paying the political price that would accompany raising federal taxes or cutting other federal funding to cover the benefit. Simultaneously, state governments, who have no control over the amount of their clawback bills, may face their constituents' political ire for failing to use the funds that the clawback requisitions to address other problems or for raising taxes if they are forced to do so because of their clawback bills.

### C. Valid Conditions on the States' Receipt of Federal Funds Do Not Violate Accountability Principles as the Clawback Does.

As previously discussed, *see supra* part I(B), the clawback is not a condition on the States' receipt of federal

funds under the Spending Clause. Valid conditions upon the States' receipt of federal funds do not present the accountability problems that the clawback does. Congress has authority to impose federal taxes on State citizens and to use federal funds, among other things, to encourage States to implement policies that it believes will further the general welfare in areas in which it lacks authority to preempt state laws. *See Dole*, 483 U.S. at 206-07. It does this by making federal funds available to the States pursuant to the Spending Clause if they meet certain conditions. *See id.* Congress is responsible to its constituents for how this money is spent. *See Sabri v. United States*, 541 U.S. 600, 605 (2004). It can fulfill that responsibility by having federal agencies monitor the Spending Clause programs that the States establish and administer. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 11-14 (1981). It can also authorize the monitoring federal agencies to cut off the federal funding to a State's program if the State does not satisfy the conditions imposed. *See, e.g., id.* at 14.

State legislatures that decide to participate in Spending Clause programs allocate state funds to meet the conditions that the programs impose. They are responsible to their constituents for how these state funds are spent. They can fulfill this responsibility by monitoring the state agencies that establish and administer Spending Clause programs. Thus, Spending Clause programs satisfy accountability concerns because (1) Congress makes federal funds available to the States under its Spending Clause authority to support the programs, (2) state legislatures allocate state funds to satisfy the conditions that the programs impose, (3) both federal and state governments can fulfill their responsibilities to their constituents with

respect to the allocated funds by monitoring the state agencies that administer the programs, and (4) both federal and state governments remain accountable for the consequences of their own decisions.

The clawback does not comport with this model. It requires the States to hand state funds over to a federal agency, CMS, to finance a federal program that CMS will administer. The States have no more control over the clawback's amount or the manner in which CMS spends the clawback funds than they do over the amount of taxes that Congress imposes on their citizens or the manner in which Congress spends those federal taxes. The clawback therefore thwarts accountability in a way that traditional Spending Clause legislation does not.

Congress's disregard for the fundamental principle of accountability is destructive to our federal system: "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). For the system to function properly, "citizens must have some means of knowing which of the two governments to hold accountable." *Id.* at 576-77. If the lines of political accountability become blurred because the federal government oversteps its bounds, "[t]he 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." *Id.* at 577.

## III. The Clawback Contravenes the Constitution's Command that the Federal Government Guarantee the States a Republican Form of Government.

The Constitution requires that the federal government "guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. The clawback contravenes this command and the fundamental principles of federalism that underlie the Constitution as a whole, *see supra* parts II(A) and (B), by disregarding the States' role as independent sovereigns in our federal system. It does this by removing a substantial portion of each State's funds from the budgeting process that state legislatures engage in with respect to all of the funds that they are responsible for apportioning. This is a serious infringement on state sovereignty because "the power to make decisions and to set policy is what gives [a] State its sovereign nature." *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761 (1982). Once the States remit the clawback funds to CMS, CMS will make the decisions and establish the policies that will govern how the funds are to be used. Thus, the clawback authorizes a federal agency over which the States have no control to determine how a substantial portion of state funds are to be allocated and spent. Nothing could be more antithetical to the republican form of government that the Constitution promises the States.

## IV. The Court Should Exercise Its Original Jurisdiction Because the Complaint Raises Claims of Great Constitutional Significance, No Alternative Forum for Adequately Resolving the Claims Is Available, and No Impediments to the Exercise of Original Jurisdiction Exist.

This Court decides whether a case is appropriate for the exercise of its original jurisdiction by examining two factors: (1) the "seriousness and dignity" of the complaining State's claim and (2) the existence of an alternative forum in which the State may litigate the issues raised and obtain appropriate relief. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). Both factors establish that this is an appropriate case.

### A. The Case Raises Grave Constitutional Issues Concerning the States' Continued Existence as Independent Sovereigns.

The Plaintiff States' claims involve the federal government's unprecedented, substantial intrusion into essential state budgetary processes through the imposition of a discriminatory, direct tax on the States as States. The claims raise grave constitutional questions, including the primary one – whether the States retain any immunity from federal taxation. In addition to violating the States' right as independent sovereigns to be free from federal interference with their core budgetary function of allocating limited state resources, the clawback seriously disrupts the States' finances and fiscal processes.

The critically important constitutional questions that the clawback raises and the clawback's deleterious effects on state budgetary processes establish that the Plaintiff

States are asserting claims of substantial seriousness and dignity. Their claims are at least equal in that regard to the claims that prompted this Court to exercise its original jurisdiction in *South Carolina v. Regan*, 465 U.S. 367 (1984). In that case, South Carolina invoked the Court's original jurisdiction and challenged an Internal Revenue Code provision that stated that the federal income tax exemption for interest on state bonds would not apply to most bonds issued in bearer rather than in registered form. *See id.* at 370-71. South Carolina claimed that the provision violated the Tenth Amendment and the inter-governmental-tax-immunity doctrine. *Id.* at 370. Justice Brennan's plurality opinion stated that the Court should exercise its original jurisdiction because South Carolina had asserted that the provision would materially hamper and infringe upon its authority to borrow funds and because twenty-four States had submitted an amicus brief that supported South Carolina and established that the issue raised was "of vital importance to all fifty States." *Id.* at 382; *see also id.* at 384 (Blackmun, J., concurring) (agreeing that the Court's exercise of original jurisdiction was appropriate because the case raised a substantial issue that was "of concern" to several States and resolving the issue swiftly would benefit everyone involved).

This case raises issues of similar import and impact. The clawback materially infringes on the States' right as independent sovereigns to be free from direct federal taxation and hampers their ability to control their own budgetary processes. Moreover, the nine States submitting this amicus brief attest that the case raises issues of vital importance to all States. Consistent with *Regan*, the Court should exercise its original jurisdiction in this case.

### B. There Is No Adequate Alternative Forum that Can Timely and Finally Resolve the Plaintiff States' Claims.

The clawback became effective on January 1, 2006, and the direct tax that it imposes on the States is projected to require payment of billions of dollars of state funds to the federal government over the next two years alone. *See* Kaiser Commission on Medicaid and the Uninsured, *The "Clawback:" State Financing of Medicare Drug Coverage* (June 2004), http://www.kff.org/medicaid/upload/The-Clawback-State-Financing-of-Medicare-Drug-Coverage (last visited March 1, 2006). The clawback is therefore already violating the States' constitutional right as independent sovereigns to make policy decisions concerning the allocation of limited state resources without federal interference. Consequently, resolving the issue of the clawback's constitutionally is of great and *immediate* importance to the States.

The Court may exercise its original jurisdiction in this case because the Plaintiff States' Complaint presents questions that urgently concern the whole country and that call for a definitive resolution by this Court in the first instance. *See South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966). Moreover, resolving the issues that the case raises will not require extensive discovery or testimony because the issues primarily concern the Court's interpretation of a federal statute's unambiguous language. Thus, the Court will not need to engage in substantial fact-finding, which it has acknowledged that it is "ill-equipped" to perform. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). The amici States therefore urge the Court to grant the Plaintiff States' request that it both exercise its original jurisdiction and enter an injunction

suspending the clawback's operation until the claims that the Complaint raises are resolved.

There is no adequate alternative forum that can timely and finally resolve the Plaintiff States' claims. If the Plaintiff States initially seek relief in the district courts, they will face years of litigation in the trial and appellate courts before they can ask this Court in a petition for writ of certiorari to finally resolve their claims. Even if the Plaintiff States succeed in having a lower court enjoin the clawback's operation until they can ask this Court for a final resolution, their legislatures will not know in the interim whether they owe the federal government huge amounts of money under the clawback. Moreover, if the Plaintiff States do not succeed in having a lower court enjoin the clawback's operation, they will suffer the federal government's unconstitutional interference with their essential budgetary functions for years before they can seek a final resolution from this Court.

### C. Nothing in the Case Impedes the Court's Exercise of Original Jurisdiction.

Finally, nothing in the case impedes the Court's exercise of original jurisdiction. The Court will not exercise original jurisdiction where a complaint does not present a justiciable controversy, *see California v. Texas*, 437 U.S. 601 (1978); where the complaining State is not the real party in interest, *see Puerto Rico v. Iowa*, 464 U.S. 1034 (1984); or where the State lacks standing, *see Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). This case presents none of those problems.

First, whether the clawback is unconstitutional for any of the reasons that the Plaintiff States contend is a justiciable question because it arises out of the federal government's infringement of the States' constitutionally

guaranteed autonomy. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing the factors that make a claim a political question that the courts are not equipped to resolve rather than a justiciable issue). The Court has previously reviewed three of the four types of claims that the Plaintiff States are presenting here. *See New York*, 326 U.S. at 573-84 (considering claim that Congress had imposed an unconstitutional tax on State of New York); 584-86 (Rutledge, J., concurring) (same); 586-90 (Stone, C.J., concurring) (same); 590-97 (Douglas, J., dissenting) (same); *see also New York*, 505 U.S. at 174-77 (invalidating law under anticommandeering principles); *Printz*, 521 U.S. at 932 (same); *Dole*, 483 U.S. at 206-08 (identifying limits to Congress's Spending Clause power). Although the Court has left open the question whether the Guarantee Clause will support justiciable claims, *see New York*, 505 U.S. at 183-86, this case demonstrates why the courts must enforce the Guarantee Clause's prohibition against federal interference with state autonomy instead of treating Guarantee Clause claims as political questions. State governments, not Congress, are responsible for safeguarding the States' sovereign interests. The federal political process therefore will not protect state sovereignty from the type of affront that the clawback inflicts. This is especially true because if allowed to stand, the clawback will undoubtedly serve as a model that will enable Congress to accomplish its own ends while shifting what would otherwise have been federal monetary and political costs to the States. This case demonstrates the need for a judicial check on the federal government's encroachment on the States' right to a republican form of government.

Next, the Plaintiff States are the real parties in interest, and they all have standing because they have all suffered and will continue to suffer "an invasion of a legally protected interest which is (a) concrete and

particularized and (b) actual and imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). This is so because the clawback imposes a direct tax on the States as States that (1) infringes on their sovereignty and (2) inflicts substantial monetary losses on them by unconstitutionally requiring them to remit state funds to finance a federal program.

Finally, sovereign immunity does not bar this suit against Secretary Leavitt because the suit seeks to enjoin the Secretary from enforcing a federal statute that the Plaintiff States contend is unconstitutional. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949).

## CONCLUSION

The Court should grant the motion for leave to file the complaint.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General
KATHLEEN P. SWEENEY*
Assistant Attorney General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-3333

*Counsel for Amicus Curiae, State of Arizona*

[Additional Counsel Listed On Inside Front Cover]

**Counsel of Record*

March 3, 2006