

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA**

**Pensacola Division**

<b>STATE OF FLORIDA, by and through</b>	)
<b>BILL McCOLLUM, <i>et al.</i>,</b>	)
	)
<b>Plaintiffs,</b>	)
	)
<b>v.</b>	)
	) Case No.: 3:10-cv-91-RV/EMT
	)
<b>UNITED STATES DEPARTMENT OF</b>	)
<b>HEALTH AND HUMAN SERVICES, <i>et al.</i>,</b>	)
	)
<b>Defendants.</b>	)
	)

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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to this Court's Order on *Amicus Curiae* Filings (June 14, 2010) and Federal Rule of Appellate Procedure 29, United States Senate Republican Leader Mitch McConnell; Senators John Barrasso, John Cornyn, Saxby Chambliss, Orrin Hatch, James Risch, Pat Roberts, and Roger Wicker; and additional Senators to be named in the submitted brief ("Proposed *Amici*") respectfully move for leave to file a brief as *amici curiae* in support of Plaintiffs' Motion for Summary Judgment dated November 4, 2010.

**I. INTEREST OF *AMICI***

As United States Senators, Proposed *Amici* have a keen interest in the constitutional issues at stake in this litigation, as well as in the long-term effects that the Court's decision in this case may have on the legislative process, notwithstanding any

opposition Proposed *Amici* may have voiced to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter “PPACA”), on policy grounds. Members of Congress are constitutional officers who have taken oaths to uphold the Constitution of the United States in discharging their official duties, including in enacting federal legislation. While our constitutional system is built on both vertical and horizontal checks and balances, Members of Congress, by virtue of their oath, have an independent responsibility to uphold the Constitution of the United States and to ensure that the Legislative Branch stays within the bounds of the powers afforded it by the Constitution.

As Senators, Proposed *Amici* also have a particular interest in preserving the proper balance of power between the federal and state governments to safeguard our constitutional system of dual sovereignty, the Senate being the branch of Congress whose very structure was designed to ensure the representation of the States themselves within the federal legislature. To the extent that the Commerce Clause is expanded beyond its proper boundaries, the Senate will undoubtedly institute more legislation that is tangential to or outside of its actual constitutional mission, distracting from its central function as envisioned by the Founders and intruding on the general police power reserved to the States.

Proposed *Amici* are cognizant of their responsibility to uphold the Constitution, and as a result they raised two constitutional points of order during consideration of the health care bill. On December 23, 2009, Senator Ensign raised a point of order that the bill would exceed the Constitution’s enumerated powers in Article I, section 8 because

they do not provide Congress the authority to mandate that the American people engage in commercial activity (i.e., buy insurance meeting federal requirements) or be fined. The same day, Senator Hutchison raised a point of order that the bill would violate the Tenth Amendment, which states that “The 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.” U.S. CONST. amend. X. Each point of order received the support of all senators who voted against the legislation (with the exception of one senator who was absent from the votes on these two points of order).

**II. AMICI HAVE A UNIQUE PERSPECTIVE AND THEIR BRIEF WILL BE RELEVANT AND DESIRABLE TO THE DISPOSITION OF THE CASE**

In their brief, Proposed *Amici* will focus on the core basis for their constitutional points of order raised during consideration of the PPACA: The lack of authority for the Individual Mandate under the Commerce Clause. This constitutional defect is the subject of the first point of order and central to the second, as the lack of federal authority for the Individual Mandate places it within the Tenth Amendment reservation of power to the states and to the people. Proposed *Amici* submit that the views on the constitutionality of the law of those who voted on it should be relevant and of interest to the Court, especially given the fact that Senators have an independent obligation, per their oath, to follow the Constitution in discharging their duties.

Proposed *Amici* would argue in their brief that Members of Congress are ideally suited to comment on the analyses of Congress’ independent, non-partisan offices, like the Congressional Budget Office and the Congressional Research Service. In their brief,

Proposed *Amici* would explain the significance of the reports by these organizations finding no legislative precedent for the Individual Mandate and calling into question the very arguments raised by Defendants in this case to defend the Individual Mandate. In particular the most recent Congressional Research Service report, issued immediately after this Court’s Order and Memorandum Opinion on Motion to Dismiss, should be of interest to the Court and has not been raised or discussed by the parties to the case. That report points out that the Individual Mandate is different in kind, not just in degree, from the type of power that Congress in the past has exerted under the Commerce Clause. It also opines that requiring individuals to enter the health insurance market could be seen as a “bootstrap” if that forced commercial activity was itself the basis for bringing the Individual Mandate under the Commerce Clause. *See* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, October 15, 2010, at 11-12.

Proposed *Amici* also would argue in their brief that Defendants’ interpretation of the Commerce Clause to encompass the Individual Mandate transforms that limited federal authority into an impermissible federal police power that would intrude on the police power constitutionally reserved to the States. The brief would show that the epitome of the police power is its ability to impose affirmative legal obligations, and would demonstrate how the Individual Mandate is indistinguishable from this type of power.

Proposed *Amici* respectfully submit that they are in the best position to underscore that where Congress legislates without authority, as in this case with respect to the

PPACA's Individual Mandate, it damages its institutional legitimacy and precipitates divisive federalism conflicts like those already seen in this litigation. The long term harms that the PPACA may do to our governmental institutions and constitutional architecture are at least as important as are the specific consequences of the PPACA.

### **III. CONCLUSION**

For all the foregoing reasons, Proposed *Amici* respectfully submit that their motion for leave to file a brief as *amici curiae* should be granted.

November 12, 2010

Respectfully submitted,

/s/ Carrie L. Severino  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of November, 2010, a copy of the foregoing Motion for Leave to File Brief as *Amici Curiae* was served on counsel of record in this case through the Court's Notice of Electronic Filing system.

/s/ Carrie L. Severino  
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Chief Counsel  
Judicial Crisis Network

Counsel for *Amici Curiae*