IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION

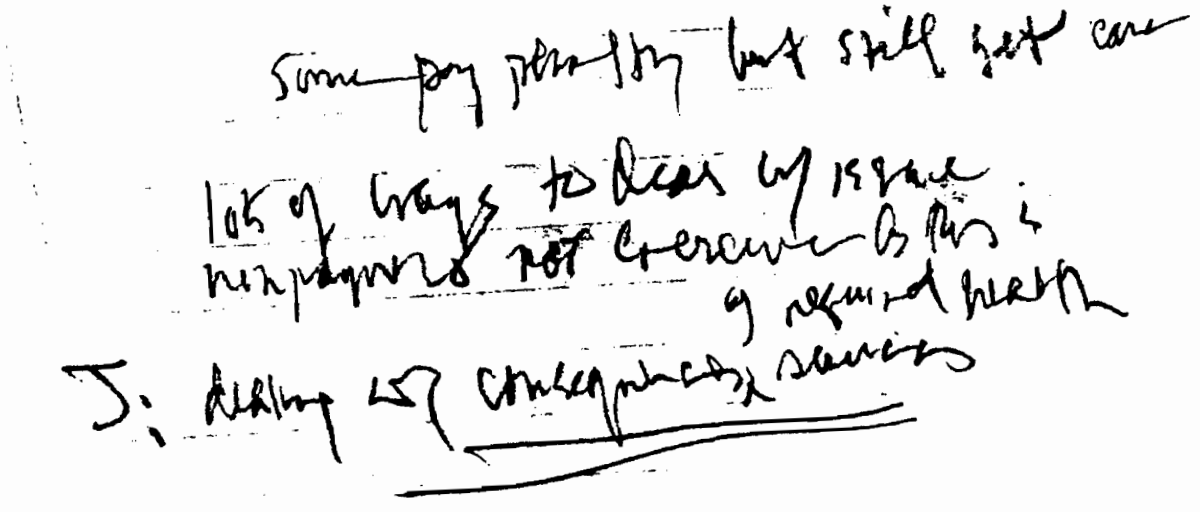
STATE OF FLORIDA etc., et al,	)	
Plaintiffs,	)	Case No. 3:10-cv-0091-RV-EMT
vs.	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN RESOURCES et al.,	)	
Defendants.	)	

MOTION BY PRO SE APPELLANT SMITH, FRAP 10(c) and (e), FOR AN ORDER REMEDYING THE INCOMPLETE TRANSCRIPT (DOC. No. 146) OF ARGUMENTS RECEIVED DEC. 16, 2010, ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, BY RECORDING OR RESTORING THE COURT'S QUERY OF MR. GERSHENGORN WHETHER CONGRESS WAS "DEALING WITH THE CONSEQUENCES OF REQUIRED HEALTH CARE"

ROBERT P. SMITH, JR., the first-to-file a Notice of Appeal (11th Cir. No. 11-10894), and thereby "the appellant" in the Court of Appeals, FRAP 28.1(b) ref. FRAP 30 and 34, shows unto the Court that through inadvertence, accident or redaction a highly significant omission from the December 16, 2010 transcript record (Doc. No. 146) has occurred, which can and must be remedied by Order of this Court, FRAP 10(c) and (e); wherefore SMITH:

MOVES THE COURT pursuant to FRAP 10(c) and (e) to order recorded or restored to the Record the question posed by Your Honor Judge Vinson to DOJ counsel Mr. Gershengorn as he argued the individual mandate point for the defendants, in words or essential sense as follows: BY JUDGE VINSON: "Should the Act be understood as dealing with the consequences of required health services?" To which Mr. Gershengorn answered only "Yes," and did not elaborate.

Although FRAP 10(c) allows this motion to embody a statement of "the appellant's recollection," this Motion is no mere declaration of appellant's recollection two and a half months after the event. The "best available means" of invoking Your Honor's consciousness of the missing question is, rather, SMITH's contemporaneous notes of that utterance – his *past recollection recorded*, if you will, one second after Your Honor was seen and heard uttering the question from SMITH's seat behind the rail:



Your Honor's question captured exactly the conception of regulated "activity" that was in fact targeted by the Act, never yet bespoken by DOJ defenders, which SMITH, having been excluded by Orders twice denying his motions to intervene, could only yearn to urge to Your Honor and will now urge to the Court of Appeals.

The "required health services" to which Your Honor referred are, of course, the "necessary stabilizing treatment for emergency medical conditions" and "ancillary" care required of all Medicare-participating hospitals by the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 USC sec. 1395dd: their duty to treat all emergency room comers, including the financially capable who neither pay therefor nor reliably

promise to pay. "The consequences" of Congress so burdening the interstate healthcare system are that, inevitably, a gigantic class of financially capable Americans, ever quick to seize upon a government-enacted "entitlement," who exploit and do not pay for the "emergency" healthcare they demand and get from our hospitals. They find it laughably easy to game the system by the simple "activity" of presenting themselves for treatment with no intention to pay for it. These are the self-described "self-pay" who were extolled for their ostensible self-reliance by Messrs. Rivkin and Casey (Rivkin emerged last Summer as lead counsel for plaintiffs, and argued the mandate point on December 16) in a copyrighted *Wall Street Journal* article on Sept. 18, 2009. That article "fixated" Florida Attorney General McCollum (so he told the *New York Times*) on gathering this cohort of, eventually, 26 state attorneys general, all but one Republicans, to sue. See SMITH's Renewed Motion to Intervene, Doc. No. 63 filed June 29, 2010, at p. 12. The article is not printer-reproducible because it is copyrighted, but remains accessible online (Google "Rivkin and Casey Wall Street Journal September 2009"). Plaintiffs' leaders-to-be there declared to the receptive *Wall Street Journal* world that the House Bill then in early process would unconstitutionally impinge upon the self-reliance of the noninsured:

> "Certainly some uninsured use emergency rooms in lieu of primary care physicians, but the majority are young Americans who do forgo insurance because they do not expect to need such medical care. ***When they do, these uninsured pay full freight, thereby actually subsidizing insured Americans*** (emph. added)."

The first sentence is correct; the second is utterly false, and was later negated later by a finding in the Act itself. Messrs. Rivkin and Casey spoke out too early to be

accurate, but early enough to generate the partisan cohort who filed this lawsuit on the very day, March 23, 2010, the Patient Protection and Affordable Health Care Act became law, Pub. Law 111-148 as amended, 124 Stat. 119-249 and 124 Stat. 907 et. seq. with codification in 42 USC and 26 USC as reported by *United States Code Service* (May 2010 USCS interim "pamphlet"). The key finding is in Sec. 1501(a)(2)(F), 124 Stat. 908:

> ***"(F) The cost of providing uncompensated care to the uninsured was $43,000,-000,000 in 2008. To pay for this [$43 Billion] cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums."***

Your Honor, this finding by Congress refutes Mr. Rivkin's sanguine assertion six months earlier that the uninsured "self-pay" patients – they being the majority, by Rivkin's reckoning, of emergency room users, as opposed to the poor who use those facilities "in lieu of primary care physicians" – ***"pay full freight"*** for the care they receive there, thanks to EMTALA, 42 USC sec. 1395dd.

It was that contrary Congressional finding, obviously – and the unavailability of proof for Rivkin's false threshold thesis – which account for the cohort ***omitting*** Rivkin's September 2009 assertion from their Complaint filed March 23, 2010 (Doc. No. 1), the very day the Health Care Act became law, and ***omitting same*** from their Motion for Summary Judgment with attached "undisputed material facts" (Doc.80). The plaintiff cohort resolved instead to induce the Department of Justice to debate the constitutionality of the individual mandate in the abstract terms of "activity" vs. "inactivity" in the "young

Americans who do forgo insurance because they do not expect to need such medical care" (Rivkin's demographic "majority" who deem themselves invulnerable). Unfortunately, the DOJ has consistently acquiesced in that formulation of the decisive issue. Appellant SMITH begs to differ.

Make no mistake about this: The $ 43 Billion loss thus targeted by Congress for redress includes the cost of treating more classes of patients than the defaulting "self-pay" alone, but the "bad debt" of patients who could not present themselves as charity-eligible is a significant element in the total: just 20 percent of the total would amount to a loss of $8.6 Billion in unrecovered costs in treating the financially capable who did not pay or reliably promise to pay. Obviously, Congress would have had no occasion to impose the individual mandate on "young Americans who . . . forgo insurance because they do not expect to need such medical care," and then fall victim to a catastrophic accident or illness (a motorcycle or skiing accident, perhaps), if in fact those self-imagined invulnerables paid "full freight" for their emergency treatment. Now surely, Congress might have redressed this shortfall by amending the self-pay out of EMTALA, but doing so would destroy the traditional practice of hospitals providing care to all – which EMTALA was enacted to prevent. *See Reynolds v. Mercy Hospital*, 861 F. Supp. 214 (N.D.N.Y. 1994).

It was this Congressional finding, no doubt, together with Your Honor's consciousness of EMTALA, 42 USC sec. 1395dd, that induced Your Honor's momentary recognition of the possibility, in the December 16 arguments, that perhaps it was not the ***inactivity*** of people ***not buying insurance*** that Congress targeted by the Health Care Act, but rather ***the detrimental ACTIVITY of the so-called self-pay who in consequence of***

EMTALA demand and take $43 Billion worth of medical care from the system without paying for it: their "bad debt".

And so, Your Honor put the question to Mr. Gershengorn of the Department of Justice: ***"Should this Act be considered as dealing with the consequences of required health services?"*** That Mr. Gershengorn, being unprepared, returned an uninspired "Yes," did not reduce the power of Your Honor's question by one jot or tittle. SMITH was stunned by Your Honor's revelation and wrote it down exactly in his notes.

The issue before Your Honor now is ***not*** whether the Act should thus be regarded as aimed at remedying genuine "activity" that is detrimental to healthcare commerce, and so within the purview of the Commerce Clause (Congress has the same power to address the adverse consequences of EMTALA as it had to enact EMTALA). Your Honor's Final Judgment, now under Smith's appeal, and the recent Order on DOJ's "Motion for Clarification" – a *de facto* and forceful brief by Your Honor attesting the correctness of the Final Judgment (given the issue as defined by the parties) – put that question beyond reach in this Court. That question is for the 11th Circuit.

The question here and now is whether Your Honor's fleeting recognition of that potentiality, so succinctly voiced by Your Honor's question to Mr. Gershengorn, should now be recorded or restored to a Record whose transcript now entirely omits that question. SMITH's Motion asks, nay insists, that this be done. Others served with this Motion will no doubt have their say.

2.

SMITH can well imagine the hoots of derision now arising in the law offices of counsel for the plaintiff cohort. WHAT? SMITH WANTS JUDGE VINSON TO

DECLARE BY FRAP (c) ORDER THAT HE, JUDGE VINSON – THE SAME JUDGE WHO TWICE DENIED SMITH INTERVENTION AND THEN SOUGHT TO EXCLUDE SMITH'S NOTICE OF APPEAL FROM THE DOCKET – THAT HE, JUDGE VINSON, DID INDEED UTTER THAT TRUANT QUESTION IN COURT ON DECEMBER 16?

HOW DROLL! HOW QUAINT! HOW FUTILE! HOW QUIXOTIC!

SMITH's response is to say:

JUDGE VINSON, who last month entered the solemn ranks of septuagenarians (an order of which SMITH too is a member, since somewhat earlier), is of a generation in which one was "called" to the bar. JUDGE VINSON knows his "calling."

JUDGE VINSON knows that it is not for nothing, and of no effect, that we address him as *Your Honor*. There was a magazine advertisement years ago, possibly for life insurance, that pictured a judge in his robes taking his chair behind the bench, and a caption, "We call him Your Honor to remind us of our own."

Your Honor will grant this Motion because it is the honorable thing to do.

A man does not rise to the Presidency of the American Camellia Society without a finely honed sense of beauty. And a man of Your Honor's generation will remember as a youngster learning "Ode to a Grecian Urn" by John Keats, "Beauty is truth, truth beauty, that is all / ye know on earth, and all ye need to know." That linkage of truth and beauty is pertinent to the office and mission of a United States District Judge in these circumstances. FRAP R. 10(c) and (e).

Your Honor will grant this Motion because granting it will speak the TRUTH. *Noblesse oblige* may be an unreasonable expectation, today, of our elected politicians in

Congress – they are designedly subject to political influence. But it is not unreasonable to expect *Noblesse oblige*! of judges of the United States judiciary, notably Your Honor.

SMITH did not fabricate his fragment note recording Your Honor's question. SMITH was not hearing other and ephemeral "voices" in the courtroom, a la Ingrid Bergman playing *Joan of Arc* again on Turner Classic Movies. The voice SMITH heard and the lips he saw move were Your Honor's. SMITH is not now lying under oath.

SMITH has done his due diligence in preparing this Motion. He has asked lawyers on both sides of this case whether they can and will corroborate his past recollection recorded by the handwritten fragment. Brian Kennedy of the DOJ replied, "I didn't save my notes" and has no independent memory. Blaine Winship, the chief resident attorney for the plaintiff cohort, said he made no notes of the argument and has no independent memory of Your Honor's question, but: "Mr. Rivkin might have notes or memory." David Rivkin has not responded to SMITH's voicemail inquiry 10 days ago, or to SMITH's follow-up appeal to Rivkin's secretary/assistant, or to SMITH's Office Depot fax inquiry of March 4, copy attached. ***Mr. Rivkin chooses not to respond.***

A newspaper reporter who covered the December 16 argument, and who SMITH thought would likely have accurate notes of the proceeding, replied "Can't help you, sorry." (This ambiguous response might mean the reporter's notes don't record Your Honor's question, or, more likely, that the reporter's newspaper told him not to get involved.)

3.

Then there is the matter of how Your Honor's question came to be missing now from the transcript (Doc. No. 146). SMITH first noted its absence on January 27, when

at the public access terminal in the Clerk's Tallahassee office he searched unsuccessfully for the question, but found a four or five inch gap in the reported text where context suggested the question would be found. On February 1, after driving to Pensacola to file his Notice of Appeal, he again gleaned the transcript at the public access terminal, and with help from Deputy Clerk Travis Green, conducted a computer word-search for "consequences" in the transcript. No finding, and no gap either; the text appeared seamlessly coherent. At the mid-day recess of the trial Your Honor was then conducting, SMITH asked court reporter Mary Bolton if she had any explanation or independent memory, and she did not. She later reported that she had erased her aural record of the December 16 argument to make room in the machine for new trial recordings.

SMITH finally has entertained the possibility of the missing fragment having been redacted from the transcript from Your Honor's Chambers, and has asked himself how this might have been done honorably by Your Honor (or on Your Honor's authority) consistently with scruples against editing a transcript substantively. The following scenario suggests itself:

Your Honor had second thoughts about the propriety of having voiced in court an alternate conception of the Act's regulatory target – a conception more closely attuned to the Commerce Clause than the abstract debate, long prevailing in this case, over whether a person's decision ***not*** to buy insurance constitutes "activity" impacting Commerce within the meaning of Art. I Sec. 8(c). It must have been somewhat troubling to contemplate that the alternate suggestion might bring into the case a factual issue preventing summary judgment for either party. And it was not in Your Honor's province, after all, to compose DOJ's argument for its lawyers, and especially not to suggest a

highly significant revision of the argument DOJ had so long focused on: the "activity" or inactivity in one's decision to buy insurance or not. Your Honor's question stumped Mr. Gershengorn, who was not prepared to exploit it.

What, then, to do with the question, hanging out there in the transcript? Your Honor certainly realized that neither in this Court nor in the Court of Appeals would DOJ be permitted to change its position as Your Honor's question, properly understood, suggested; that under the time-honored precedent of *Railway Company v. McCarthy*, 96 U.S. 258, 267-68 (1877), no party having taken a firm position in litigation, as DOJ had done in defining the decisive issue, can thereafter take a materially different position: a party "is not permitted thus to mend his hold;" he is "estopped."

And so, since the plaintiff cohort wouldn't and the defense couldn't pursue the rationale suggested by Your Honor's question, Your Honor honorably would have thought it was his duty to excise the comment from the transcript as an unfortunate and sterile digression, an uninvited bit of dross that Mr. Gershengorn could not properly have seized upon even if he had been prepared to so; for at that point counsel for the plaintiff cohort would properly have objected. Your Honor's question therefore did not belong in the Record – so Your Honor would honorably have concluded – surviving only to mislead DOJ and confuse the Court of Appeals. So, under the Court's redaction power, the question came out of the transcript. Honorably done. But now, honor requires the recording or restoration of the question interjected by Your Honor.

Obviously Your Honor hasn't been thinking about the clear and proper availability of Your Honor's question to SMITH, who having been denied party status was excluded from the debate defining the decisive issue, and who had never acquiesced

in focusing the activity/inactivity debate on someone's decision not to buy insurance, as opposed to a "self-payer" deciding to game the EMTALA system by adding to the $ 43 Billion bad debt burden in America's hospitals. SMITH the aggrieved intervenor-movant will not be constrained by *Railway Company v. McCarthy* from arguing to the Court of Appeals, as he certainly shall, that Congress had the same Commerce Clause power to redress the adverse consequences of EMTALA as it had to enact EMTALA in the first place.

Your Honor having now been relieved by the Eleventh Circuit of having misunderstood SMITH's entitlement to appeal (Doc. No. 152, "You are not a party to this action. . . . There is no legal basis for filing an appeal"), Your Honor's clear duty now is to record or restore Your Honor's December 16 question to the Record, by the FRAP 10(c) and (e) Order here prayed for. How the omission/deletion occurred – whether by unexplained inadvertence, accident, or redaction – is now of no importance whatsoever. It is vastly important, however, that the record of Your Honor's question be perfected for SMITH's use in arguing the merits to the Court of Appeals.

Respectfully submitted,

Robert P Smith

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Certificate of Service

I DO CERTIFY that I furnished a copy hereof to counsel for plaintiffs on March 10, 2011, by delivering a complete copy to Blaine Winship, Esq., Special Counsel, Office of the Attorney General of Florida, in Tallahassee; and by sending copies by overnight delivery to David Rivkind, Esq., of Baker & Hostetler, and to Brian G. Kennedy et al. of the Department of Justice at their respective addresses of record in Washington, D.C.

Robert P. Smith, Jr., Pro Se

STATE OF FLORIDA

COUNTY OF LEON:

PERSONALLY APPEARED BEFORE ME ON THIS DAY, March 10, 2011, Robert P. Smith, Jr., identified to me by his Florida driver's license, who being duly sworn says that the statements of fact in the foregoing document (12 pages) are true.

SWORN TO AND SUBSCRIBED before me this March 10, 2011.

SAMUEL P. YOZVIAK
Notary Public, State of Florida
Commission# DD801122
My comm. expires June 26, 2012

Notary Public, State of Florida

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Fr Robert Smith
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3 pages including my
notes 12/16/10 argument
Gershengorn argument WJ
J Vinson's question at end.

Do you have notes or memory
of this q by J. Vinson?

No leg funding Act will fail w/o mandate

Wrightup Medicaid bait + switch
coercion no offsets
cannot vs State Dole
251 million

Note: No limit on Congress spending power
Individ mandate not severable

Conclusion

CBO mandate novel unprecedented
breach new legal ground,

if you participate in ins Congress can regulate
healthcare inact = transaction inact in scope

people still do this — pay for health
people cannot opt out of healthcare mkt

Judge – his intent does not cover major catastrophic

no funding for healthcare is unfair

decisions on how to pay a farmer is

arbitrary

some pay penalty but still get care

lots of ways to deal w/ issue
nonpayment not coercive by this is
of required health

J: dealing w/ consequences services