

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

PENSACOLA DIVISION

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

**MOTION AND MEMORANDUM IN SUPPORT THEREOF
FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE ARC OF
THE UNITED STATES, BREAST CANCER ACTION, THE FAMILY VIOLENCE
PREVENTION FUND, FRIENDS OF CANCER RESEARCH, THE MARCH OF DIMES
FOUNDATION, MENTAL HEALTH AMERICA, NATIONAL BREAST CANCER
COALITION, THE NATIONAL ORGANIZATION FOR RARE DISORDERS, THE
NATIONAL SENIOR CITIZENS LAW CENTER, THE NATIONAL WOMEN’S LAW
CENTER, THE NATIONAL WOMEN’S HEALTH NETWORK, AND THE OVARIAN
CANCER NATIONAL ALLIANCE
IN SUPPORT OF DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

FINANCIAL DISCLOSURE

The Internal Revenue Service has determined that all *Amici* for this brief are organized and operated exclusively for charitable or educational purposes pursuant to Section 501(c)(3) or (4) of the Internal Revenue Code and are exempt from income tax.

MOTION

Pursuant to Fed. R. App. P. 29(b) and Fed. R. Civ. P. 83(b), *amici curiae* The American Association of People with Disabilities, *et al.* (collectively "*amici*") respectfully move this Court for leave to file an *amicus* brief in support of Defendant's Motion for Summary Judgment.

MEMORANDUM IN SUPPORT OF MOTION

Amici are leading organizations dedicated to reducing the incidence of and the devastation wrought by major diseases, disorders, and disabilities, and engaged in advocacy on behalf of individuals affected with such conditions. *Amici* have amassed invaluable knowledge of the impact of these conditions and of the history of remedies and policies aimed at lessening these impacts. *Amici* represent the interests of individuals who are at risk of serious financial and medical consequences, if they cannot obtain insurance to cover the costs of their medical care. Such individuals are thus tangibly and profoundly harmed by health insurers' practice of denying coverage to persons with pre-existing medical conditions and other abuses that are prohibited by the insurance reforms in the Patient Protection and Affordable Care Act ("ACA"), to which the minimum coverage provision is integral and essential. Moreover, the barriers to affordable coverage eliminated by the ACA increase financial costs and compound medical threats for the entire population, since lack of access to affordable health insurance impedes timely diagnosis and treatment, postponing remedial action until remedies are both more expensive and less effective. Hence, *amici* have both a strong interest in preserving the

insurance reforms in the ACA and the capacity to offer information that illuminates the soundness of Congress' conclusion that the minimum coverage provision is critical to the success of these vital reforms.¹ Therefore, *amici* respectfully submit this motion for leave to file an *amicus* brief.²

I. AMICI HAVE INTERESTS THAT ARE AFFECTED BY THE DECISION IN THIS CASE

Amici Curiae are non-profit organizations that work nationwide to promote the independence and well-being of persons affected with a variety of health risks and disabilities, and to reduce those risks for all people. *Amici* have long served these populations and encouraged awareness of these risks and of preventive and remedial policies, through activities such as research, community services, education, litigation, administrative advocacy, legislative advocacy, and coalition-building.

Amici serve people with specific diseases, such as cancer and cerebral palsy, people with disabilities, women, children, and older individuals who are more likely to have a greater number of pre-existing conditions by virtue of having lived longer.

This problem cuts across the entire U.S. population. An estimated 57.2 million Americans under the age of 65 are affected by a pre-existing condition. Christine Sebastian et al., *Health Reform: Help for Americans with Pre-Existing Conditions*, Families USA, May 2010, at 2, available at <http://www.familiesusa.org/assets/pdfs/health-reform/pre-existing-conditions.pdf> (“Help for Americans”). About 13.5 million children have special health needs, Ha T. Tu & Peter J. Cunningham, *Public Coverage Provides Vital Safety Net for Children with Special Health Care Needs*, Center for Studying Health Sys. Change, Sept. 2005, at 1, available at

¹ “Minimum coverage provision” is the phrase employed in this motion for the ACA’s requirement to carry minimum levels of insurance or pay a penalty – what is elsewhere sometimes termed the “individual mandate.”

² Additional non-profit organizations serving people with specific diseases may sign the final Brief, assuming the Court grants this motion. To the extent necessary, leave of the Court is requested to add these signatories.

<http://www.hschange.com/CONTENT/778/778.PDF>. But pre-existing conditions are most common among older Americans. Nearly half of all adults between the ages of 55 and 64 are affected by a pre-existing condition, and thus could be denied insurance coverage absent the ACA's pre-existing conditions provision. Help for Americans at 3.

A congressional investigation conducted after passage of the ACA found that the four largest U.S. for-profit health insurers denied policies to one out of every seven applicants based on their prior medical history. H. Comm. on Energy and Commerce Memorandum, 111th Cong., *Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market* 1 (Oct. 12, 2010). Congress also found that pregnant women, fathers-to-be and those attempting to adopt children are generally unable to buy policies on the individual insurance market (i.e., the market for persons not covered by employer-sponsored or other group health plans). *Id.* Insurance companies have denied coverage to women based solely on their history of having had a Cesarean section or required them to show proof of sterilization. Denise Grady, *After Caesareans, Some See Higher Insurance Cost*, N.Y. Times, June 1, 2008, at A26. Survivors of domestic violence may also face pre-existing condition coverage denials, National Women's Law Center, *Nowhere to Turn: How the Individual Health Insurance Market Fails Women* 8 (2008), *available at* <http://nwlc.org/reformmatters/NWLCReport- NowhereToTurn-WEB.pdf>.

The denial of health insurance due to pre-existing conditions can have catastrophic consequences. A recent Harvard Medical School study found that nearly 45,000 deaths every year are associated with a lack of health insurance. Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289, 2295 (2009). Another study estimates that "62.1% of all bankruptcies have a medical cause," and the share of bankruptcies attributable to such causes increased by 50 percent between 2001 and 2007. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. of Med. 741, 742

(2007). If the minimum coverage provision is invalidated, then ACA's prohibition on exclusions for pre-existing conditions and other consumer protections will be imperiled, which will in turn place the populations served by *amici* in great jeopardy.

II. *AMICI'S BRIEF IS DESIRABLE AND RELEVANT*

The short summary of *amici's* proposed brief *infra* demonstrates both the relevance and importance of the brief. The brief will provide more citations and details to further support the information encapsulated below. *Amici* submit that their brief adds highly probative information that will aid the Court in its determination of Defendant's Motion for Summary Judgment.

A. *The Experience of the States Demonstrates that Ensuring Coverage for Persons with Pre-existing Medical Conditions Has Worked Only With a Complementary Requirement that Persons Who Can Afford It Carry Health Insurance*

Congress' judgment that the minimum coverage provision is integral to barring exclusions of coverage based on pre-existing conditions and other insurance reforms was based on considerable and peer-reviewed evidence demonstrating that, without such a requirement, "many individuals will not choose to obtain coverage ... [and] adverse selection will occur" Linda J. Blumberg & John Holahan, *Do Individual Mandates Matter?*, Urban Institute, Jan. 2008, *available at* http://www.urban.org/uploadedpdf/411603_individual_mandates.pdf. In hearings before Congress, testimony on behalf of the National Association of Insurance Commissioners noted that due to the "severe adverse selection" resulting from the "elimination of pre-existing condition exclusions for individuals, State regulators can support these reforms to the extent they are coupled with an effective and enforceable individual purchase mandate and appropriate income-sensitive subsidies to make coverage affordable." *Roundtable Discussion on Expanding Health Care Coverage: Hearing Before the Senate Finance Committee*, 111th Cong. 3 (2009) (statement of Sandy Praeger, Chair of the Health Insurance and Managed Care Committee, National Association of Insurance Commissioners).

But Congress' judgment was not merely supported by research and analysis. The need to couple insurance reform with a minimum coverage provision had been demonstrated by the actual experience of states which have tried to do otherwise and – without exception – failed.

Kentucky, Maine, New Hampshire, New Jersey, New York, Vermont, and Washington enacted legislation that requires insurers to offer coverage to all consumers in the individual market, including those with pre-existing conditions, but does not require all participants in the market to obtain minimum coverage. *See* Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (West 1994) (Kentucky, repealed); Me. Rev. Stat. Ann. Tit. 24-A. § 2736-C(3) (Maine); N.H. Rev. Stat. Ann. § 420-G:6 (1994) (New Hampshire); N.J. Stat. Ann. § 17B:27A-22 (West) (New Jersey); NY CLS Ins § 3231, 3232 (New York); Vt. Stat. Ann. tit. 8, § 4080B(d)(1) (Vermont); Wash. Rev. Code § 48.43.012(1) (Washington). All of these laws have had detrimental effects on the insurance markets in those states. All seven states suffered from sky-rocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers.

In contrast, Massachusetts enacted both a prohibition on excluding pre-existing conditions and a minimum coverage provision. Mass. Gen. Laws Ch. Ch. 111M §§ 1–5; 176M § 2(c)(1) (Massachusetts). Although nationwide individual premiums increased an average of 14 percent over the next few years, “the average individual premium in [Massachusetts] fell from \$8537 at the end of 2006 to \$5143 in mid-2009, a 40% reduction while the rest of the nation was seeing a 14% increase.” Jonathan Gruber, Massachusetts Institute of Technology, *The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates 1* (2009).

Without the minimum coverage provision, the pre-existing conditions provision will be more than just ineffective—it will be self-destructive. Premiums in 2019 are likely to rise 27% without the minimum coverage provision. Jonathan Gruber, “Health Care Reform is a ‘Three-Legged Stool,’” (2010), *available at* http://www.americanprogress.org/issues/2010/08/pdf/repealing_reform.pdf.

Moreover, when a nationwide pre-existing conditions provision for children went into effect in September 2010, several large insurance companies stopped offering new child-only insurance policies. A.C. Aizenman, *Major Health Insurers to Stop Offering New Child-Only Policies*, Washington Post (Sept. 20, 2010). A health insurance industry spokesperson explained that “[w]ith no ... mandate currently in place, ... the result over the next several years [until 2014, when the minimum coverage provisions takes effect] could be that the pool of children insured by child-only plans would rapidly skew toward those with expensive medical bills, either bankrupting the plans or forcing insurers to make up their losses by substantially increasing premiums for all customers.” *Id.*

B. Individuals Who Choose to Forego Insurance Shift Billions of Dollars of Costs to Other Participants in the Health Insurance and Services Market

Uninsured individuals fall into three categories: some individuals cannot afford insurance coverage, some are denied coverage because of pre-existing conditions, and some choose to forego purchasing insurance in the hope that they will never require expensive medical treatment or that if they do, it will be available in any event. Uninsured individuals seeking care for pre-existing conditions or who have unexpected health care costs due to illness or injury can lead to increased costs for other, insured Americans. This is because “[t]hose who are uninsured are less likely to get the care that they need when they need it and are more likely to delay seeking care—often until a condition becomes so serious that treatment can no longer be put off.” Help for Americans at 9.

When an uninsured individual cannot afford to pay for the care that he or she receives, the cost of that care is passed along to those who are insured. According to a recent study, this “hidden tax” on health insurance accounts for roughly 8 percent of the average health insurance premium. Ben Furnas & Peter Harbage, *The Cost-shift from the Uninsured*, Center for Am. Progress, March 24, 2009, available at http://www.americanprogressaction.org/issues/2009/03/pdf/cost_shift.pdf. This

cost-shift added, on average, \$1,100 to each family premium in 2009 and about \$410 to an individual premium.

For those who can afford health insurance coverage, and choose not to purchase care, the decision to remain uninsured is clearly an economic calculation with adverse consequences for other market participants. Those who opt to self-insure can virtually never guarantee that, when faced with a life-threatening illness or traumatic injury, that they will bear all their health care costs or forego necessary treatment. According to a recent study, the cost of active treatment for prostate cancer had an average 2-year cost of \$59,286. E.D.Crawford et al., *A Retrospective Analysis Illustrating the Substantial Clinical & Economic Burden of Prostate Cancer*, 13 *Prostate Cancer & Prostatic Diseases* 162 (2010). For colorectal cancer patients, the cost of treatment can exceed hundreds of thousands of dollars. The cost of drugs alone can range from \$150,000 to \$200,000 for a course of treatment. Neal J. Meropol & Kevin A. Schulman, Kevin, A., *Cost of Cancer Care: Issues and Implications*, 25 *J. Clinical Oncology* 180 (2007), available at <http://dceg.cancer.gov/files/genomicscourse/meropol-011007.pdf>. In comparison, U.S. Census Bureau data shows, median household income for 2007 was \$50,740, and median household net worth in 2007 was \$120,300. U.S. Census Bureau, 2010 Statistical Abstract: Income, Expenditures, Poverty & Wealth (2009), available at http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html.

By enhancing access to insurance, the pre-existing conditions provision increases the likelihood that patients will seek treatment early, and thus will not pass on elevated costs to other consumers. Also, as the brief will demonstrate, the minimum coverage provision, together with the prohibition on exclusions for pre-existing conditions, can be expected to prevent medical bankruptcies, encourage fluidity in the job market, and eliminate the economic costs from thousands of deaths each year.

III. AMICI'S BRIEF HAS UNIQUE INFORMATION

Because this brief would serve the "classic role" of "bring[ing] relevant matter to the attention of the Court that has not already been brought to its attention by the parties," *amici's* motion should be granted. Fed. R. App. P. 29 Advisory Comm. Note; *Funbus Systems, Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986) (citation omitted); *see also Neonatology Assocs. v. Commissioner*, 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J.) (discussing standards for acceptance of *amicus* briefs). As demonstrated by the summary of the brief, *supra*, *amici* will provide a distinct and relevant analysis of the issues addressed in Defendant's Motion for Summary Judgment. *Cf. In re Heath*, 331 B.R. 424, 430 (B.A.P. 9th Cir. 2005) (noting that, even under a different circuit's "restrictive" approach, an *amicus* brief is accepted if "the amicus has unique information or perspective that can help the court").

CONCLUSION

For these reasons, *amici* respectfully submit that the Court should grant this Motion for Leave to File an *Amicus* Brief.

Dated: November 10, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2010, the foregoing document was filed with the clerk of the court via the CM/ECF system, causing it to be served on all counsel of record.

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CERTIFICATE OF LOCAL RULE 7.1(B) COMPLIANCE

Plaintiffs' counsel has indicated that plaintiffs reserve the right to respond to this motion. Counsel for the Defendants has stated that defendants neither consent nor object to this motion.

DATED: November 10, 2010

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