

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

STATE OF FLORIDA, by and )  
through BILL McCOLLUM, *et al.*, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT )  
OF HEALTH AND HUMAN )  
SERVICES, *et al.*, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 3:10-cv-91-RV/EMT

**MOTION OF STATE LEGISLATORS FOR LEAVE TO FILE BRIEF  
OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS  
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Elizabeth B. Wydra  
(D.C. Bar # 483298; admitted in N.D. Fla.)  
*Counsel of Record*  
Douglas T. Kendall  
CONSTITUTIONAL ACCOUNTABILITY CENTER  
1200 18<sup>th</sup> Street, N.W.  
Suite 1002  
Washington, D.C. 20036  
Tel.: (202) 296-6889  
Fax: (202) 296-6895  
email: elizabeth@theusconstitution.org

*Counsel for Proposed Amici Curiae State Legislators*

**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.	)	
<hr style="width:45%; margin-left:0;"/>		

**MOTION OF STATE LEGISLATORS FOR LEAVE TO FILE  
BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANTS**

Proposed *Amici Curiae*, a bi-partisan group of seventy-one State Legislators from twenty-six States, through undersigned counsel, hereby respectfully move the Court for leave to file a brief of *amici curiae* in support of the Defendants in the above-captioned matter. As grounds for granting this Motion, *Amici Curiae* State Legislators state:

1. Proposed *Amici Curiae* are: Sen. Johnny Ellis (Alaska); Rep. Matt Heinz (Arizona); Rep. Phil Lopes (Arizona); Sen. Morgan Carroll (Colorado); Rep. Steve Fontana (Connecticut); Rep. Matthew Lesser (Connecticut); Rep. David McCluskey (Connecticut); Rep. Mary Mushinsky (Connecticut); Rep. Pat Gardner (Georgia); Sen. Nan Orrock (Georgia); Rep. Roy Takumi (Hawaii); Rep. Donna Boe (Idaho); Sen. Sue Errington (Indiana); Sen. Jack Hatch (Iowa); Sen.

Lawrence Bliss (Maine); Sen. Margaret Craven (Maine); Rep. Mark Eves (Maine); Rep. Melissa Walsh Innes (Maine); Speaker of the House of Rep. Hannah Pingree (Maine); Sen. Jamie Raskin (Maryland); Del. Samuel Rosenberg (Maryland); Rep. Rebekah Warren (Michigan); Sen. Bob Hawks (Montana); Rep. Sue Malek (Montana); Rep. Robert Bridgham (New Hampshire); Rep. Robert Cushing (New Hampshire); Rep. Rich DiPentima (New Hampshire); Rep. Pamela Hubbard (New Hampshire); Rep. Donna Schlachman (New Hampshire); Sen. Cisco McSorley (New Mexico); Rep. Mimi Stewart (New Mexico); Assemblymember Richard Gottfried (New York); Assemblymember Felix Ortiz (New York); Sen. Liz Krueger (New York); Rep. Susan Fisher (North Carolina); Rep. Rick Glazier (North Carolina); Sen. Tim Mathern (North Dakota); Sen. Diane Rosenbaum (Oregon); Rep. Chip Shields (Oregon); Rep. Brad Witt (Oregon); Sen. Jim Hundstad (South Dakota); Sen. Frank Kloucek (South Dakota); Rep. Larry Lucas (South Dakota); Rep. Garnet Coleman (Texas); Rep. Jessica Farrar (Texas); Rep. David Litvack (Utah); Rep. William Frank (Vermont); Rep. Patsy French (Vermont); Rep. Helen Head (Vermont); Rep. Martha Heath (Vermont); Rep. Mark Larson (Vermont); Rep. Joan Lenes (Vermont); Rep. Lucy Leriche (Vermont); Rep. Steven Maier (Vermont); Rep. Jim McCullough (Vermont); Rep. Ann Pugh (Vermont); Rep. Kesha Ram (Vermont); Rep. George Till (Vermont); Rep. Suzi Wizowaty (Vermont); Rep. Scott Wheeler (Vermont); Rep. Maralyn Chase (Washington); Rep. Steve Conway (Washington); Sen. Lisa Brown (Washington); Sen. Karen Keiser

(Washington); Sen. Adam Kline (Washington); Sen. Jeanne Kohl Welles (Washington); Sen. Phil Rockefeller (Washington); Del. Don Perdue (West Virginia); Sen. Dan Foster (West Virginia); Sen. Jeffrey Kessler (West Virginia); Rep. Pete Jorgensen (Wyoming).

2. The above-captioned lawsuit challenges the constitutionality of the Patient Protection and Affordable Care Act (ACA or “the Act”). *Amici* State Legislators believe that the Act is constitutional and are working hard in their States to implement the Act in a timely, efficient, and effective manner. They have a substantial interest in having this matter resolved expeditiously and in favor of the constitutionality of the Act.
3. *Amici* State Legislators have already started preparing for implementation of the Act’s provisions and will continue to do so in conjunction with other State officials and employees. These implementation and appropriation efforts require time and resources, and many of *Amici*’s constituents are relying upon the expanded coverage and access to care that will ultimately be provided. *Amici* State Legislators would like to express their support for the Defendants’ Motion for Summary Judgment so that these substantial efforts and appropriations can be undertaken with confidence that the Act will remain good law and that the promised expansion of health care coverage becomes a reality for *Amici*’s constituents.
4. Among the *Amici* State Legislators are legislators from twelve of the States represented by the Plaintiffs. These legislators disagree with the Plaintiffs’ legal

arguments regarding coercion and commandeering. They have a particular interest in appearing as *amici curiae* in this case in order to represent their constituents and many other residents and State leaders in the Plaintiffs' respective States who support health care reform and believe the Act is constitutional.

5. All of the *Amici* State Legislators have an interest in presenting their view of the federalism issues in this case, given that the Plaintiffs—with whom *Amici* disagree—have purported to represent the interests of the States generally in this lawsuit.
6. Because the Plaintiffs claim that the Act violates constitutional principles of federalism and intrudes upon State sovereignty through coercion and commandeering, *Amici* State Legislators are well-situated to provide the Court with a perspective on these issues; this perspective is not represented by the federal Defendants or other state executive-branch *amici*. *Amici* State Legislators have been engaged in legislative implementation and consideration of the reforms contained in the Act, and can provide this Court with a view of the sovereignty issues from the state legislative perspective. As State leaders themselves, *Amici* State Legislators have a strong interest in the manner in which the interests of their States and the rights of the States in general are represented in this lawsuit. *Amici* State Legislators believe that the Act respects constitutional principles of federalism and benefits the States and their citizens.

Per the Court's Order on *Amicus Curiae* Filings (Jun. 14, 2010) (Docket Entry 50), *Amici* respectfully submit that their brief will not be duplicative; that their participation will assist the Court by providing a state legislative perspective on the Plaintiffs' claims on commandeering and coercion; and that *Amici's* interests in implementing the Act and planning for future reforms will be affected by the Court's decision. In compliance with this Court's Order on *Amicus Curiae* Filings, *Amici* State Legislators' brief is not attached to this Motion, but is ready for filing should the Court grant this Motion. *Amici* hereby move for leave to file a brief of *amici curiae* in support of the Defendants' Motion for Summary Judgment.

#### **MEMORANDUM OF LAW IN SUPPORT OF MOTION**

While Federal Rule of Appellate Procedure 29 and Supreme Court Rule 37 provide for the filing of *amicus curiae* briefs, the Federal Rules of Civil Procedure lack a parallel provision regulating *amicus* appearances at the trial level. "The district court, however, has the inherent authority to appoint *amici curiae*, or 'friends of the court,' to assist it in a proceeding." *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991) (granting motion to appear as *amicus curiae*) (citations omitted); *see also DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1284 (N.D. Ga. 2001). "Inasmuch as an *amicus* is not a party and 'does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*.'" *News & Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D. Fla. 1988) (citations omitted).

“An *amicus* brief should normally be allowed . . . when the *amicus* has unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide.” *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) (quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062-3 (7th Cir. 1997) (Posner, J.)). In this case, *Amici* State Legislators have a “unique . . . perspective,” *id.*, beyond that represented by the federal Defendants, whom *amici* support. *Amici* State Legislators will provide the Court with the legislative perspective of the States from state leaders who (1) believe the Act—in particular, its expansion of Medicaid—is constitutional and (2) are actively working on implementing the Act and preparing for future reform efforts.

Of course, as the Court noted in its prior order, the parties in this case are “already well represented.” Order on *Amicus Curiae* Filings, June 14, 2010 (Docket Entry 50). However, as then-Judge Samuel Alito has explained, “[e]ven when a party is very well represented, an *amicus* may provide important assistance to the court.” *Neonatology Assocs., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002). “Some *amicus* briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case.” *Id.* at 132 (quoting Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. App. Prac. & Process 279 (1999)).

These factors, which echo the Court’s articulation of relevant criteria for granting leave to file, *see* Order on *Amicus Curiae* Filings at 4, support *Amici* State Legislators’ Motion for Leave to File. The Legislators’ particular experiences in the state legislatures

give them a perspective on state sovereignty interests and the implementation of the Act that is not shared by the federal Defendants nor the state Attorneys General and Governors. Given the Plaintiffs' emphasis on state sovereignty, the views of State Legislators should not be excluded, particularly since the Plaintiffs purport to represent the interests of state sovereigns in general—when, in fact, many States and their citizens do not agree with Plaintiffs' view of the Act and, specifically, the expansion of Medicaid.

The Plaintiffs' Medicaid and other federalism claims appear to seek a judicial “do-over” of the Act, attempting to get this Court to craft a health care reform bill that is more to the Plaintiffs' liking. That is an effort that belongs in the political arena, not the courts. State leaders must now choose whether to comply with the new Medicaid requirements, or opt out of the program altogether. *Amici* State Legislators have chosen to begin the work of implementing the Act in a timely and effective manner and thus have a strong interest in the outcome of this case. *Amici* State Legislators believe the Act is consistent with the principles of federalism reflected in our Constitution and in the best interests of the people they were elected to represent.

## CONCLUSION

For the foregoing reasons, the State Legislators listed in ¶ 1 of the Motion, *supra*, respectfully ask the Court to grant their Motion for leave to file a brief of *amici curiae*.



Dated: November 10, 2010

Respectfully submitted,

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra (D.C. Bar # 483298; admitted in N.D. Fla.)

*Counsel of Record*

Douglas T. Kendall

CONSTITUTIONAL ACCOUNTABILITY CENTER

1200 18<sup>th</sup> Street, N.W., Suite 1002

Washington, D.C. 20036

Tel.: (202) 296-6889; Fax: (202) 296-6895

email: [elizabeth@theusconstitution.org](mailto:elizabeth@theusconstitution.org)

*Counsel for Proposed Amici Curiae State Legislators*

**CERTIFICATE OF LOCAL RULE 7.1(B) COMPLIANCE**

Pursuant to Local Civil R. 7.1, counsel for Proposed *Amici Curiae* states: per their statement regarding *amicus* filings lodged with the Court, Docket Entry 85, Plaintiffs' counsel takes no position on this Motion; Defendants' counsel also takes no position on this Motion.

Dated: November 10, 2010

/s/ Elizabeth B. Wydra  
Elizabeth B. Wydra

**CERTIFICATE OF SERVICE**

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

Dated: November 10, 2010

/s/ Elizabeth B. Wydra  
Elizabeth B. Wydra