The Honorable Roger Vinson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

STATE OF FLORIDA, by and through BILL McCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

Case No. 3:10-cv-91

MOTION OF GOVERNORS OF WASHINGTON, COLORADO, MICHIGAN, AND PENNSYLVANIA FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF DEFENDANTS

I. UNIQUE INTERESTS AND PERSPECTIVES OF MOVANTS

Governor of Washington Christine O. Gregoire, Governor of Colorado Bill Ritter, Jr., Governor of Michigan Jennifer M. Granholm, and Governor of Pennsylvania Edward G. Rendell ("the Governors") respectfully request leave to participate as *amici curiae* in support of the Defendants' Motion for Summary Judgment. The Governors have led health reform initiatives in their respective states, have managed state health care programs, and have observed the effects of rising health care costs on state budgets and the economies in their states. The Governors also have had direct experience with the costs to their states of caring for the indigent and uninsured and with the numbers of uninsured who regularly cross state borders to seek health care in regional trauma centers, emergency departments, and other medical facilities. These experiences informed the Governors' recognition that continuing the status quo would have been unsupportable in the face of the effects of continually rising health care costs on state budgets and economies, that state initiatives alone could not address the problem, and that a national solution was needed to address the high costs of health care and the wide unavailability of affordable health insurance coverage.

Additionally, the Governors have administered state Medicaid programs that deliver health care to low-income children, families, and seniors who need long term care. By virtue of the scope and depth of the Governors' involvement in administering such programs, they recognized the benefits that could accrue to the states from changes to the Medicaid program.

The Governors can explain how the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively, "PPACA" or the "Act") borrows from and builds upon the lessons learned from state initiatives to reform the health care and health insurance markets. For example, Washington can describe its experience with the "death spiral" that occurred in its individual health insurance market during the 1990s when insurance coverage for preexisting conditions was required under state regulations without universal coverage, a lesson directly reflected in the universal coverage provisions of the federal Act. The Governors, who have been responsible for the administration and budgeting of the numerous state health care programs and initiatives affected by the Act, also can speak directly to the longstanding state-federal cooperation in the Medicaid program and the reasons, from a state perspective, they supported passage of the Act.

As participants in the process, the Governors have direct and relevant knowledge of the ways in which the Act was developed and adjusted to respond to the input of the states. In February 2009, when the bipartisan National Governors Association formed a Health Care Reform Task Force designed to identify and define gubernatorial priorities and advise the work of Congress and the Administration on health care reform, Governor Granholm was appointed to co-chair the Task Force and Governors Rendell and Gregoire participated as members of the Task Force. Governors Granholm and Gregoire each co-hosted a regional White House Forum on Health Reform in 2009, bringing together hundreds of diverse stakeholders to provide input on needed changes in the nation's health care system. In June 2009, Governors Granholm and Gregoire were part of a

bipartisan group of Governors that met with President Obama and members of the Administration to discuss health care reform and brief them on the results of the regional fora. Following those meetings, Governor Gregoire stated: "We have seen success in reforming health care on the state level. But this is an issue that cries out for a national solution."[1] Similarly, Governor Ritter has stated:

> Our focus the past few years has been to control healthcare costs, improve quality and increase access to care and coverage. We are making tremendous strides, but we can't do it alone.... Colorado and all states need national reform to ensure that people with pre-existing illnesses do not lose coverage or are denied coverage. We need national reform to drive down costs, and we need national reform to stop annual double-digit insurance premium increases that are devastating small businesses and families alike.[2]

As a result of their experiences and efforts the Governors have "unique information or perspective[s] that can help the court beyond the help that the lawyers for the 'already well represented' parties are able to provide." Order on *Amicus Curiae* Filings, June 14, 2010 (Doc. 50), at 4. The Court's Order recognizes that *amicus* briefs are appropriate in cases of general public interest where the briefs may assist the court "by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Id.*, quoting *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir. 1991). A presentation of the issues that does not include the perspectives of Governors who worked with Congress and the Administration to craft a law that would address shared state and federal goals would not be a "complete and

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[1] http://www.governor.wa.gov/news/news-view.asp?pressRelease=1268&newsType=1 "Gov. Gregoire meets with President Obama on health care reform" (June 24, 2009) (last viewed Nov. 11, 2010).
[2] http://www.colorado.gov/cs/Satellite/GovRitter/GOVR/1251573389482 "Gov. Ritter Criticizes Attorney General's Bid to Block Reform" (March 22, 2010) (last viewed Nov. 11, 2010).

plenary" presentation of the issues.[3] The court would not be presented with the perspectives of state officials who view the reforms embodied in the Act as an opportunity for a strong federal/state partnership. As the Washington legislature found, 2009 Wash. Laws ch. 545 § 1:

> [T]he principles for health care reform articulated by the president of the United States in his proposed federal fiscal year 2010 budget to the congress of the United States provide an opportunity for the state of Washington to be both a partner with, and a model for, the federal government in its health care reform efforts. The legislature further finds that the recommendations of the 2007 blue ribbon commission on health care costs and access are consistent with these principles.

The Governors' proposed *amicus* brief would include background information, from their state perspectives, relevant to review of the Act under a "rational basis" or similar judicial standard. The information presented would be appropriate for consideration in conjunction with the defendants' Motion for Summary Judgment where the question is whether Congress had an adequate basis for the exercise of a constitutional power. This inquiry appropriately considers publicly available information, as illustrated by the Supreme Court's reference in *Gonzales v. Raich,* 545 U.S. 1, 21 (2005), to the submissions of *amici* and a government publication when it considered the dimensions of the marijuana market.[4]

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[3] Plaintiffs have "consent[ed] to the filing of an *amicus curiae* brief by a sovereign State or Governor if it is otherwise consistent with the applicable Orders of this Court." Plaintiffs' Statement of Position on Motions for Leave To File Briefs As *Amici Curiae,* (Doc. 85-1), filed November 8, 2010, at 1.

[4] *See also Castle Rock v. Gonzales,* 545 U.S. 748, 762, 780-82 (2005)(affirming dismissal of constitutional claim on motion to dismiss while distinguishing studies cited by the dissent); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); Wright & Graham, Federal Practice and Procedure: Evidence 2d § 5103.2. The role of *amici* in presenting such information has also been recognized. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 330-331 (2003) (law school's claim of compelling interest in student body diversity was "bolstered by its *amici*, who point to the educational benefits that flow from student body diversity" and citing briefs of *amici curiae* when concluding "[t]hese benefits are not theoretical but real");

That is precisely the type of information the Governors will present in their *amicus* brief. The Governors have real experience with the issues of health care costs and have pursued health care initiatives in their own states.

- The Governors are knowledgeable about the impacts of spiraling health care costs on commerce in their several states and the need that existed for a national solution to the problem.
- The Governors have studied the impacts of the uninsured on state resources and the economies of their states, including the elevated costs public agencies and the insured pay because of health care provided to the uninsured.
- The Governors are aware of the impacts on interstate commerce when uninsured residents in states without specialized hospitals are transported to other states for care.
- The Governors are knowledgeable about the history of the federal-state partnership under the Medicaid program and the continued flexibility and considerable benefits afforded to the states under the Act as a whole.

Based on this experience and knowledge, the Governors concluded the problems of health care costs needed to be addressed by Congress and participated in the national political process to shape the federal law to meet states' needs. The Governors worked with Congress and the Administration to craft a law that would allow for flexibility in implementation and financial and programmatic support for their own state initiatives. The policy choices embodied in the Act, including, but not limited to, provisions on Medicaid expansion and universal coverage, were the result of a political process of legislative craftsmanship in which the states and their citizens had ample opportunity to be heard. The Governors believe their *amicus curiae* brief would be one that presents a unique perspective to the Court and "brings to the attention of the Court relevant matter

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Daggett v. Commission on Governmental Ethics & Election Practices, 172 F.3d 104, 112 (1st Cir. 1999) (recognizing role of *amicus* in presenting "'legislative facts' which go to the justification for a statute").

not already brought to its attention by the parties [and] may be of considerable help to the Court." Supreme Court Rule 37.

II. IDENTITY AND STANDING OF EACH OF THE *AMICI*

Christine O. Gregoire is Governor of Washington. Washington Constitution Article III, § 2 provides that "[t]he supreme executive power of this state shall be vested in a governor...." The Washington Supreme Court has held that "the Governor, under our Constitution, is the highest executive authority." *State ex rel Hartley, Governor v. Clausen*, 264 P. 403, 405 (Wash. 1928). The Court went on to hold, *id.* at 406:

> [T]he Attorney General may act in any matter such as this upon his own initiative or at the request of the Governor, but upon his failure or refusal to act, the Governor, because of the provisions of section 2, art. 3, of our Constitution, granting him the supreme executive power of the state, is entitled to maintain an action such as this.

Bill Ritter, Jr. is the Governor of Colorado. Article IV, § 2 of the Colorado Constitution provides that "[t]he supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." Under Colorado law, the Governor may appear in a matter to take positions contrary to those argued by the Attorney General. The Attorney General does not have "the exclusive right to prosecute and defend civil actions on behalf of the state." *Colorado State Bd. of Pharmacy v. Hallett*, 296 P. 540, 542 (Colo. 1931). Rather, the Governor, in exercising his supreme executive authority under the state Constitution, is, "[f]or litigation purposes . . . the embodiment of the state." *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008); *Cf. People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003).

Jennifer M. Granholm is the Governor of Michigan. The executive power of the State of Michigan is vested solely in the Governor, who has the primary responsibility to take care that the laws be faithfully executed. Mich. Const. 1963, art 5, §§ 1, 8. Article 5, § 8 of the Michigan Constitution expressly authorizes the Governor to "initiate court proceedings in the name of the state ...." Where, as here, the Attorney General has chosen to assert positions adverse to other state departments and officials including the Governor, those departments and officials can properly appear through independent counsel appointed by the Attorney General. *Attorney General v. Michigan Public Serv. Comm'n*, 625 N.W.2d 16, 33 (Mich. App. 2001).

Edward G. Rendell is the Governor of Pennsylvania. Article IV, § 2 of the Pennsylvania Constitution states, "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed ...." Pennsylvania law provides that the General Counsel may represent the interests of the Governor in litigation where, as here, the litigation position of the Attorney General does not accurately reflect the position and policies of the Governor of the Commonwealth. *See* 71 Pa. Stat. Ann. §§ 732-301, 732-303.

The United States Supreme Court also has recognized that two officials of the same state with differing interests may litigate in the same case, particularly when represented by separate counsel. In *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 460 n.1 (1967), the Court held that it could "properly deal" with a dispute between two agencies of the same State which were "represented by special counsel appointed by the Attorney General to advocate the divergent positions of the parties."

Thus, the Governors have the authority to request participation in this case as *amici*, notwithstanding the appearance as plaintiffs of the Attorneys General of their states.

IV. THE CRITERIA FOR PARTICIPATION AS *AMICI*.

As explained above, the Governors satisfy each of the criteria listed at page four of the Court's Order for participation as *amici*. First, as the chief executive officers of four of the plaintiff states, the Governors have an interest in the outcome of the case. Secondly, without an *amicus* brief the Court would not receive a full picture of the posture of the Act in the federalist framework, as a legislative program that grew out of state recognition of a problem of national dimensions that required federal intervention and that itself built on the varied initiatives, experiments, and experiences that have taken place at the state level. As such, the Governors' *amicus* brief would be "desirable and relevant to the disposition of the case." Order, at 4. Thirdly, the Governors have "unique information or perspective that can help the Court beyond the help that the lawyers for the 'already well represented' parties are able to provide." *Id.* The federal defendants cannot be expected to represent the perspectives of these state executives, even if they share a belief in the constitutionality of the Act, while the plaintiffs obviously do not represent the perspective of Governors whose experiences and involvement leading up to passage of the Act cause them to believe that the Act is a constitutional product of, rather than antithetical to, our federalist form of government.

Moreover, in *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128 (3rd Cir. 2002), then-Judge Alito explained in detail why Federal Rule of Appellate Procedure 29 should not be given too restrictive an interpretation. Rejecting

the argument that an *amicus* must show that the party to be supported is inadequately represented, he wrote, at 132:

> Even when a party is very well represented, an *amicus* may provide important assistance to the court. "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. . . ." Luther T. Munford, *When Does the Curiae Need An Amicus?* 1 J. App. Prac. & Process 279 (1999).

The Governors are uniquely positioned to serve that role here, because they possess direct experience with the problems in the health care markets in their states that contributed to the call and need for federal reform.

V. CONCLUSION

For the reasons stated above, the Governors of Colorado, Michigan, Pennsylvania and Washington respectfully ask this Court to grant leave to participate in this case as *amici curiae*.

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