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.	)	Case No. 3:10-cv-91-RV/EMT
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	)	Judge Vinson
Defendants.	)	

MOTION OF AMERICAN HOSPITAL ASSOCIATION ET AL. FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to this Court's Order of June 14, 2010 ("Amicus Order"), the nation's six leading associations of hospitals and health systems—the American Hospital Association, Federation of American Hospitals, National Association of Public Hospitals and Health Systems, National Association of Children's Hospitals, Catholic Health Association of the United States, and Association of American Medical Colleges (the "Hospital Associations")—respectfully seek leave to file a joint brief amici curiae in the above-captioned case.

The Hospital Associations' proposed brief meets the standard articulated by the Court. The Hospital Associations have "an interest that may be affected by the decision in this case," Amicus Order at 4, because their members provide much of the health care received by the nation's uninsured—tens of billions of dollars of uncompensated care per year—in fulfillment of the hospitals' community obligations. The Hospital Associations also have "unique information or perspective" beyond that offered by the parties, and accordingly their proposed brief "is desirable and relevant to the disposition of the case." Id. Most particularly, the Hospital

Associations can shed light, through data and descriptions of real-world medical treatment decisions, on whether the uninsured Americans who will be affected by the individual mandate are engaged in relevant "activity"—a question this Court identified as "perhaps the most significant one" in the case. Docket No. 79 (Order & Mem. Op. at 63) (Oct. 14, 2010). For these reasons, leave to file the proposed brief should be granted.[1]

MEMORANDUM IN SUPPORT

I. THE HOSPITAL ASSOCIATIONS HAVE AN INTEREST THAT MAY BE AFFECTED BY THE DECISION IN THIS CASE.

The proposed amici's interests will be demonstrably—and dramatically—affected by the decision in this case. The Hospital Associations' member hospitals and health systems provide much of the health care for Americans' millions of uninsured (and underinsured) patients, and the bulk of that care is unreimbursed. In 2008 alone, America's hospitals absorbed $36.4 billion in uncompensated care costs. This is a disturbing upward trend in uncompensated care, and Congress' attempt to reverse it through the Patient Protection and Affordable Care Act ("ACA") is precisely what is at issue in this litigation.

1. The Proposed Amici. The six proposed amici are, collectively, the voice of American hospitals and healthcare systems. The American Hospital Association represents the interests of nearly 5,000 hospitals, health care systems, networks and other care providers. The Federation of American Hospitals is the national representative of investor-owned or managed community hospitals and health systems, and as such speaks for hundreds of hospitals. The National Association of Public Hospitals and Health Systems is comprised of 140 of the nation's largest urban "safety net" hospitals and health systems—facilities committed to providing health

[1] Counsel for defendants stated that they take no position on any amicus brief proposed for filing in this case. Plaintiffs have adopted the same approach as to proposed briefs filed by any amicus other than a state. See Docket No. 85-1 (Nov. 8, 2010).

care services to all individuals without regard to ability to pay. The Catholic Health Association represents more than 2,000 members from all 50 states, forming the nation's largest group of nonprofit health care systems, hospitals, and long-term care facilities. The National Association of Children's Hospitals is a trade organization of 141 children's hospitals. And the Association of American Medical Colleges represents approximately 300 major nonfederal teaching hospitals and health systems and the clinical faculty and medical residents who treat patients there.

2. How Amici Are Affected. The six Hospital Associations represent the overwhelming majority of American hospitals and health systems, and their members come in all shapes and sizes—urban and rural; large and small; teaching, public, and children's hospitals; investor-owned and non-profit. But they have something in common: They dedicate massive resources to caring for the uninsured. The uninsured, after all, need—and seek out—health care like everyone else. And hospitals and related healthcare systems are often their best option. Nearly every hospital with an emergency department is required by law to provide certain emergency services to anyone, regardless of ability to pay. In addition, hospitals are committed to the well-being of their communities and offer substantial charity and community-benefit services. And even when an uninsured patient arrives planning to pay his or her own way, that patient may struggle to pay for an extended hospital stay. The upshot: America's hospitals absorbed $36.4 billion in uncompensated care for the uninsured and underinsured in 2008 alone—a figure double that of just a decade ago.

The receipt of health care by the uninsured also has other significant ramifications for hospitals. Hospitals do all they can to help patients who walk in the door seeking care, and for uninsured patients, that includes determining whether they are eligible for financial assistance. Hospitals have charity-care programs in place to take care of those most in need without

recompense. For patients with greater means, hospitals have adopted procedures to help them understand and meet their financial obligations. These include financial counseling, financial assistance, sliding-scale payment policies, flexible payment plans, interest-free loans, and initiatives that help patients apply for grants and Medicaid. All of these initiatives advance hospitals' missions to serve the community and their patients—but all of them require substantial time and resources that add to the already massive costs hospitals absorb to treat the uninsured.

In short, the participation of uninsured and underinsured patients in the healthcare market affects every aspect of hospital operations. That is precisely why this litigation and its outcome will have such a fundamental effect on the Hospital Associations and their members. The ACA represents a comprehensive effort to extend coverage to millions more Americans to make care available to patients in doctors' offices, clinics and other settings, keeping them out of emergency departments and hospitals unless they need to receive care there. For these reasons, the Hospital Associations and their members arguably will be more directly affected by the decision in this case than any other institutional group in the nation.

II. THE HOSPITAL ASSOCIATIONS HAVE UNIQUE INFORMATION AND PERSPECTIVE BEYOND THAT OFFERED BY THE PARTIES.

The Hospital Associations' proposed brief likewise "is desirable and relevant to the disposition of the case" because the Associations have "unique information or perspective" beyond that offered by the parties. Amicus Order at 4. The Associations can offer specific empirical data and real-world examples—from the perspective of the institutions that regularly provide care to patients, regardless of ability to pay—illuminating what the Court called "perhaps the most significant" question in the case: whether the individual mandate actually seeks to regulate "inactivity" in a way that past congressional enactments have not. Docket No. 79 at 63. Thus the Association's brief would explain exactly what sorts of relevant "activity" the

uninsured undertake—what healthcare services they seek, and when and in what quantities they seek them. It would explain how the decision made by some uninsured Americans to delay or forgo routine preventive care actually increases the amount, and the cost, of the care they need when an avoidable illness eventually brings them to the hospital. It would explain exactly what happens when an uninsured patient seeks health care: What processes are followed when the patient arrives at the hospital without coverage? How is financial assistance determined? And it would explain how the costs of caring for the uninsured are absorbed not just by hospitals but also by private insurers and taxpayers. These data are relevant both to the question whether Congress has sought through the ACA to regulate "inactivity" and to Congress' authority under *Gonzales* v. *Raich*, 545 U.S. 1 (2005), to enact the individual mandate as part of its broader realignment of the nation's healthcare payment system

The Hospital Associations likewise can offer unique perspective on a second key question presented by this case: whether the ACA's changes to the Medicaid program are so different in kind from previous Medicaid revisions that they amount to unlawful "coercion" of the participant states. The Hospital Associations have functioned in a constantly evolving Medicaid regime for more than four decades. They can assist the Court in assessing the parties' competing claims regarding the significance, and novelty, of the Medicaid adjustments ACA has prescribed. They also can explain the likely effects on healthcare providers of the holding the states seek—a holding that would give participant states an effective veto power over future congressional improvements to the Medicaid system.

CONCLUSION

The Hospital Associations have read and understand the requirements this Court articulated in the Amicus Order. They will strive to file a concise brief that avoids duplicating

the arguments advanced by the parties and that offers data and perspectives not currently before the Court. For these reasons, and those articulated above, the Hospital Associations ask that the Court grant leave to file the proposed brief amici curiae.

Respectfully submitted,

/s/ Catherine E. Stetson

Melinda Reid Hatton
Maureen D. Mudron
American Hospital Association
325 Seventh Street, N.W., Suite 700
Washington, D.C. 20004
(202) 638-1100

Sheree R. Kanner
Catherine E. Stetson*
Dominic F. Perella
Sara A. Kraner
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Jeffrey G. Micklos
Federation of American Hospitals
801 Pennsylvania Avenue, N.W., Suite 245
Washington, D.C. 20004
(202) 624-1521

Larry S. Gage
President
National Association of Public Hospitals and Health Systems
1301 Pennsylvania Ave N.W., Suite 950
Washington, D.C. 20004
(202) 585-0100

Lawrence A. McAndrews
President and Chief Executive Officer
National Association of Children's Hospitals
401 Wythe Street
Alexandria, VA 22314
(703) 684-1355

Lisa Gilden
Vice President, General Counsel/ Compliance Officer
The Catholic Health Association of the United States
1875 Eye Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 296-3993

Ivy Baer
Karen Fisher
Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037
(202) 828-0499

Counsel for amici curiae
*Counsel of record

November 11, 2010