

**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.*,

Defendants.

**MOTION OF THE FAMILY RESEARCH COUNCIL
FOR LEAVE OF COURT TO FILE A BRIEF AS *AMICUS CURIAE*
SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Consistent with this Court's Order dated June 14, 2010, and after conferring with counsel for both Parties pursuant to N.D. FLA. LOC. R. 7.1, the Family Research Council respectfully moves for leave of this Court to file a Brief as *Amicus Curiae* in the instant case. Neither Party takes any position on this Motion requesting this Court's permission to file a Brief.

The Family Research Council ("FRC") is one of America's premier public-policy organizations dedicated to advocating issues in the United States pertaining to families, marriage and religious liberty. FRC has vital interests at stake in the instant case.

FRC has vigorously opposed various provisions of the Patient Protection and Affordable Care Act ("PPACA") that are detrimental to the interests of families in the United States. These provisions are policy judgments adopted by Congress of a nature that does not render them amenable to constitutional challenge. Nonetheless, these provisions would be invalidated if this Court were to find both: (1) that the individual mandate is constitutionally infirm, and (2) that the mandate cannot be severed from the remainder of the Act. Given FRC's months of research on the issue of severability, research related to the fact that severability is an issue incidental to the core interests pursued by the Plaintiffs in this case but central to FRC's organizational mission, and also given that FRC's interests are implicated in other pending litigation that may look to this Court's opinion as persuasive authority, FRC can offer this Court valuable legal analysis to aid this Court in reaching a correct judgment in the instant case. Plaintiffs

devote only four pages to the question of appropriate relief, and Defendants do not address alternative forms of relief at all.

FRC is mindful of this Court's Order dated June 14, 2010 pertaining to the submission of Briefs as *Amicus Curiae* [Doc. No. 50], and after careful examination believes that for the reasons set forth in this Motion, FRC's proposed Brief fully satisfies the elements set forth in this Court's Order. FRC's interest in this litigation would be more fully represented by a Brief exclusively considering whether the entirety of PPACA should be enjoined and declared unconstitutional. Given the underdeveloped state of severability doctrine, a Brief examining severability is both relevant to this litigation and desirable for this Court in determining appropriate relief. Given FRC's leading role in exploring severability, a Brief tendered by FRC would assist this Court in considering this critical issue beyond the material provided by the Parties' able and learned counsel in their Briefs. Accordingly, FRC respectfully requests this Court's permission to file a Brief as *Amicus Curiae* supporting Plaintiff's Motion for Summary Judgement.

I. INTEREST OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL

The Family Research Council is a 501(c)3 nonprofit public-policy organization headquartered in Washington, D.C., that exists to develop and analyze governmental policies that affect families in the United States.¹ Founded in 1983, FRC advocates legislative and regulatory enactments that protect and strengthen family rights and autonomy, and assists in legal challenges of statutes and administrative actions

¹ *Amicus Curiae* Family Research Council has no parent company and no subsidiary. It has issued no stock or public debt, and no company owns 10% or more of FRC.

detrimental to family interests. FRC informs and represents the interests of 39 state organizations and over 500,000 citizens on a daily basis.

For the reasons set forth in this Motion, various provisions of PPACA are contrary to family values, family interests, and religious liberty. For example, there are specific provisions that will result in funding abortions under the precedent of at least one circuit, either through Federal spending or through fees imposed upon employers and individuals. *See Planned Parenthood Affiliates v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996) (holding that for statutes providing funding for medical services, executive or administrative orders denying the use of such funds for abortion are of no effect because only Congress can impose such limitations through statutory language). Additional provisions in PPACA impair the ability of families to make medical decisions in consultation with their healthcare providers, both by imposing mandates upon employers that reduce their autonomy, and also by encumbering the decisionmaking of physicians. Moreover, other provisions discriminate between adherents of different faiths, by allowing a religious exception to the individual mandate for followers of certain religions, but excluding adherents of others. All of these interests are central to FRC's organizational mission, but of merely secondary significance to Plaintiffs' interests and thus only briefly noted in Plaintiff's Motion for Summary Judgment.

II. THE PROPOSED BRIEF OF FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* IS DESIRABLE AND RELEVANT TO THE DISPOSITION OF THE INSTANT CASE.

As this Court has already noted, the Parties to this case are exceptionally well-represented. The issues raised by Plaintiffs are of extraordinary national significance, and the two counts for which this Court denied Federal Defendants' Motion to Dismiss are

constitutional issues with profound implications for the reach of the Federal government and the separation of powers in the Federal system.

Plaintiffs' thorough presentation of compelling arguments regarding the invalidity of various provisions of PPACA left little space to advise this Court on the optimal remedy in the Memorandum accompanying Plaintiffs' Motion for Summary Judgment. Plaintiffs appear to have made a reasonable tactical decision by devoting the bulk of their Memorandum to the core issues: the invalidity of the individual mandate and the Federal government's coercion of the states. If arguments on those two issues result in this Court upholding both the individual mandate and the sweeping changes to Medicaid, then the question of severability becomes moot.²

As the Parties' Briefs make clear, PPACA is a sweeping statute of well over 2,000 pages in length. The vast reach of PPACA has implications for every person, every business, and every state in the United States. Of its many provisions, only two aspects of the Act are now subject to challenge in this Court. This naturally raises the question of whether any portions of PPACA can be preserved if this Court invalidates the individual mandate—which is undeniably the centerpiece of the Act—or finds the Act's Medicaid reforms impermissibly coercive.

Given the dearth of discussion on the vitally-important question of whether this Court can properly excise the challenged provisions of PPACA, versus whether this

² Interestingly, Federal Defendants devote not a single paragraph of their fifty-page Brief to the issue of severability. Given that only two provisions of the statute are being challenged in this Court and that Plaintiffs raise the possibility—albeit briefly—that this Court might invalidate this entire statute, it is somewhat surprising that Defendants do not bring any arguably-favorable precedents to this Court's attention in an attempt to preclude the possibility that PPACA could be fully enjoined.

Court must invalidate the Act *in toto*, this Court would be substantially aided by a full examination of this issue of severability. Should this Court invalidate one of the challenged provisions, this Court will be required to determine which portions of PPACA are no longer valid.

As FRC will demonstrate if this Court grants leave to file a Brief as *Amicus Curiae*, under these facts, controlling precedent dictates that the proper remedy is to invalidate PPACA in its entirety. Although individual provisions in most statutes are severable from the statute in whole or in part—even in the absence of a severability clause—the same is not true of PPACA. In the inevitable appeal that will follow this Court’s consideration of the instant case, the circuit court will likewise benefit from the question of severability being fully ventilated in this Court, reducing the possibility of remand to consider the question of appropriate relief.

Resolving the issue of severability is essential to determine what relief is just and proper in this litigation. Therefore a Brief that adequately presents severability case law is relevant and desirable for this Court in adjudicating the instant case.

III. AMICUS CURIAE FAMILY RESEARCH COUNCIL POSSESSES SPECIALIZED KNOWLEDGE THAT CAN ASSIST THIS COURT BEYOND THE ABLE ASSISTANCE ALREADY PROFFERED BY LEARNED COUNSEL FOR THE PARTIES IN THE INSTANT CASE.

Amicus Curiae FRC fully supports this Court’s rule regarding *Amicus* Briefs, in that the “vast majority of *amicus* briefs . . . duplicate the arguments made in the litigants’ brief. Such briefs should not be allowed. They are an abuse.” [Doc. No. 50.] Consistent with FED. R. APP. P. 29 and SUP. CT. R. 37, *Amicus* Briefs should only be filed if they present valuable supplemental information to the Court by way of scholarship or analysis

of relevant facts, or by fully ventilating alternative legal theories to assist the tribunal in reaching the correct conclusion in the case at bar. Briefs that do not meet either of these criteria unnecessarily burden the Court.

The Brief proffered by *Amicus Curiae* FRC satisfies this Court's criteria. Counsel for FRC has analyzed, written about, and publicly debated the constitutional infirmities of PPACA since 2009. *See, e.g.*, J. Kenneth Blackwell & Kenneth A. Klukowski, *Why the ObamaCare Tax Penalty is Unconstitutional*, WALL STREET JOURNAL, July 22, 2010; Orrin G. Hatch, J. Kenneth Blackwell, & Kenneth A. Klukowski, *Why the Health-Care Bills Are Unconstitutional*, WALL STREET JOURNAL, January 2, 2010; Ken Klukowski, *Health Insurance Isn't Car Insurance, Mr. President*, WASHINGTON EXAMINER, Dec. 18, 2009; Ken Klukowski, *An Open Letter to Nancy Pelosi and Robert Gibbs*, FOX NEWS, Oct. 30, 2009; Ken Klukowski, *Individual Mandate Insurance is Unconstitutional*, POLITICO, Oct. 20, 2009. Counsel for FRC has also lectured on and debated these constitutional issues at law schools nationwide, and is writing law review literature examining these issues. Moreover, counsel for FRC has coauthored the only book in print known to FRC that discusses the constitutional flaws in PPACA, including the implications of the individual mandate not being severable from the remainder of the statute. *See* KEN BLACKWELL & KEN KLUKOWSKI, THE BLUEPRINT 117–34, 140–41 (Lyons Press 2010).

Severability is an underdeveloped doctrine. However, applying controlling precedent to the specific facts in the record of the instant case, as well as to the specific

language of PPACA, clearly resolves the question of whether the individual mandate can be severed from the Act, answering that question in the negative.

The question of the proper remedy in the instant case is an issue on which this Court would benefit greatly from additional briefing. Although Plaintiffs do an excellent job of setting forth part of the controlling case law, there are additional precedents that form the governing framework for severability that have not yet been brought to this Court's attention. Among other issues, it is necessary to fully consider whether the challenged provisions can be partially severed from the statute, versus completely severed, an aspect of the issue not explored in Plaintiffs' Brief.

This case law, which includes a recent case decided by the Supreme Court earlier this year, makes clear that the individual mandate cannot be severed from the statute either in whole or in part. Moreover, it is likely that the vast changes to Medicaid are likewise not severable from the remainder of the statute, either in whole or in part. Therefore should this Court find for the Plaintiffs on either of their claims, it would be extraordinarily beneficial in fashioning appropriate relief for this Court to have a full and thorough examination of how severability doctrine applies in the instant case.

CONCLUSION

For the foregoing reasons, the Family Research Council respectfully requests leave of this Court to file a Brief as *Amicus Curiae* to provide additional legal authorities and analysis that will assist this Court in determining whether the challenged provisions are severable from the remainder of the Act.

Respectfully submitted,

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November 11, 2010

CERTIFICATE OF SERVICE

The undersigned counsel for Movants hereby certifies that on this 11th day of November, 2010, a true and accurate copy of the foregoing Motion for Leave of Court to File a Brief as *Amicus Curiae* Supporting Plaintiffs' Motion for Summary Judgment was filed with the Clerk of the U.S. District Court for the Northern District of Florida by being submitted through the CM/ECF system, and thereby served on counsel of record requiring service through the Court's Notice of Electronic Filing system.

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