

**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 ECONOMIC SCHOLARS FOR LEAVE TO FILE
AMICUS CURIAE BRIEF AND MEMORANDUM IN SUPPORT THEREOF**

Pursuant to the Court’s Order of June 14, 2010, the economists listed at the end of this Motion (the “Economic Scholars”)¹ hereby respectfully request leave to file a Brief Amicus Curiae in support of the Defendants’ Motion for Summary Judgment on the constitutionality of the provisions of Section 1501 of the Patient Protection and Affordable Care Act,² as amended by the Health Care and Education Reconciliation Act of 2010³ (collectively “ACA”).

¹ The Economic Scholars anticipate that additional economists may wish to join in the brief to be filed. We request that, if the Court grants leave to file an amicus curiae brief, the Court permit other economists to join the brief without further leave of Court.

² Pub. L. No. 111-148, 124 Stat. 119 (2010).

³ Pub. L. No. 111-152, 124 Stat. 1029 (2010)

Interests of the *Amici Curiae*

Amici Curiae are professors and scholars in economics who have taught, studied, and researched the economic forces operating in and affecting the health care and health insurance markets. The Economic Scholars include internationally recognized scholars in economics, including three Nobel laureates, two winners of the John Bates Clark Award for the outstanding American economist aged 40 and younger, and former high-ranking economists in a number of former administrations. Some of these *Amici* supported the passage of ACA, and, while others did not, they all believe that reform of the health care system is essential to constraining the growth of health care spending and providing security to all Americans. Unconstrained, health care costs will result in unsustainable fiscal burdens, diminish cash compensation, perpetuate waste, and undermine the prospects for universal access to needed health care. The *Amici* all also believe that broadly-based insurance coverage is essential in any reform of the health care system in this country. They consequently have a significant interest in assisting the Court in its understanding of the underlying economics that are at the heart of the minimum coverage provisions of ACA.

The Economic Scholars' Amicus Brief will provide this Court insight into the key economic factors, including the significant distortions in the markets for medical care and health insurance, that led to the long-running health care crisis in this country, and the ultimate adoption of Section 1501 of the ACA. Those market failures lead to the conclusion that universal insurance coverage, such as required by Section 1501, is necessary to achieving Congress' goal of reforming the national health insurance market and making quality medical care available to millions of Americans. The Economic

Scholars will also explain why the unique economics of health care distinguish it from virtually every other business and demonstrate that upholding the constitutionality of that provision will not serve as a basis for an unlimited expansion of the federal government's powers under the Commerce Clause.

**Consideration of Amici's Views Will Assist the Court in Addressing the
Constitutionality of Section 1501 of ACA**

The plaintiffs' complaint in this matter alleges, *inter alia*, that the "individual mandate" to purchase health insurance exceeds the scope of the Commerce Clause by regulating economic inactivity. Am. Comp. ¶ 71. Central to this claim is the presumption that an individual does not participate in the relevant health care market by deciding to forego health insurance coverage. The Economic Scholars will demonstrate why this position does not take account of the fundamental economic forces that govern health care and health insurance.

The Economic Scholars will discuss the economic literature and learning that describe the essential characteristics of the markets for health care services and health insurance. In combination, those characteristics distinguish health care from any other sector of the economy. Unlike nearly any other market for goods or services, no person can truly leave the market for medical services, either because of illness, accident or age. Everyone gets sick, suffers an injury at some point in their life, or must address the vicissitudes of aging and seek medical care. These medical costs typically arise at unpredictable times and, when they occur, often exceed the ability to pay of all but the very wealthiest of Americans. Even routine medical procedures, such as MRIs, CT scans, colonoscopies, mammograms, and childbirth, to name a few, cost more than many

Americans can afford. In 2007, the average person used over \$6,100 in health care service, which is more than 10% of the median family income.

The Economic Scholars will show how the economics of health care are significantly affected by a societal judgment -- reflected in the longstanding practice of charity care and enshrined in federal legislation such as the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd -- that no person will be denied a minimal level of health care because of inability to pay. This factor does not apply to any other sector of the economy and shapes the purchasing incentives of no other sector. The costs of providing that care to the uninsured, which exceeds \$40 billion a year, must be borne by others, either taxpayers or those who purchase insurance. When people are eligible to purchase health insurance and can afford to, but do not, the costs of uncompensated care is shifted to the insured. And, since those who are currently uninsured will certainly need and use medical care at some point in their lives, they may end up receiving care that is uncompensated in whole or in part, or they may buy insurance only when they anticipate a need for medical services. In either case, the economic consequence is that costs are shifted to those who have previously purchased health insurance or to the taxpayer.

Significant market distortions result from these factors. When those seeking health insurance are primarily those with greater needs for more costly care, insurance carriers naturally respond by raising premiums, limiting the scope of coverage and denying coverage to more risky individuals, such as those with pre-existing conditions. These factors have produced significant market distortions which have resulted in a health insurance market in which the risk is not spread widely, with some people who want insurance unable to obtain it while others pay more than they would if the risk was

spread across a broader spectrum of those who use or will use health care services. As a result, many who want health insurance cannot afford it or are denied coverage entirely.

ACA seeks to address that market failure through a variety of mechanisms, including requiring all who can afford it to contribute, through the purchase of a minimum level of insurance coverage, to the payment of the medical costs they will at some point incur. The Economic Scholars will show this requirement is an economically sound way of assuring that the Act's goal of expanded coverage could be achieved in light of the market failures that affect this industry.

The Economic Scholars will also explain why this minimum coverage requirement is a necessary and appropriate response to the unique economic features of the health care market, and does not open the door to an unlimited assertion of federal authority or to potential future mandates to purchase other goods or services. Notably, with the support of empirical evidence, the brief will highlight the distinguishing characteristics of health care: the unavoidability of the need for medical services, the unpredictability of the timing of demand, the exorbitant costs of medical care that make it impossible for most to guarantee payment in cases of serious injury or illness, and the magnitude of economic externalities created by individuals who fail to purchase health insurance. The interaction of these distinguishing factors create a unique economic dynamic that is inapplicable to virtually any other sector of the economy.

Because this matter raises critical issues that are central to the work and teaching of the Economic Scholars, and because they are uniquely situated to provide guidance on the special characteristics of health care financing, we request that this Court grant leave to file the Economic Scholars' Amicus Brief.

Respectfully submitted,

Dr. David Cutler
Otto Eckstein Professor of Applied
Economics
Harvard University*

Dr. Henry Aaron
Senior Fellow
Economic Studies
Bruce and Virginia MacLaury Chair
The Brookings Institution

Dr. Kenneth Arrow
Joan Kenney Professor of Economics
and Professor of Operations Research
Stanford University
1972 Nobel Laureate

Dr. George Akerlof
Koshland Professor of Economics
University of California-Berkeley
2001 Nobel Laureate

Dr. Susan Athey
Professor of Economics
Harvard University
2007 Recipient of the John Bates Clark
Medal for the most influential American
economist under age 40

Dr. Linda J. Blumberg
Senior Fellow
The Urban Institute, Health
Policy Center

Dr. Leonard E. Burman
Daniel Patrick Moynihan
Professor of Public Affairs at the
Maxwell School
Syracuse University

Dr. Amitabh Chandra
Professor of Public Policy
Kennedy School of Government
Harvard University

Dr. Michael Chernew
Professor, Department of Health Care
Policy
Harvard Medical School

Dr. Philip Cook
ITT/Sanford Professor of Public Policy
Professor of Economics
Duke University

Dr. Claudia Goldin
Henry Lee Professor of Economics
Harvard University

Dr. Tal Gross
Department of Health Policy and
Management, Mailman School of Public
Health
Columbia University

Dr. Jonathan Gruber
Professor of Economics
MIT

Dr. Jack Hadley
Associate Dean for Finance and
Planning, Professor and Senior Health
Services Researcher
College of Health and Human Services
George Mason University

Dr. Vivian Ho
Baker Institute Chair in Health
Economics and Professor of Economics
Rice University

Dr. Jill Horwitz
Professor of Law and Co-Director of the
Program in Law & Economics
University of Michigan School of Law

Dr. Lawrence Katz
Elisabeth Allen Professor of Economics
Harvard University

Dr. Frank Levy
Rose Professor of Urban Economics
Department of Urban Studies and
Planning
MIT

Dr. Peter Lindert
Distinguished Research Professor
of Economics
University of California, Davis

Dr. Eric Maskin
Albert O. Hirschman
Professor of Social Science at the
Institute for Advanced Study
Princeton University
2007 Nobel Laureate

Dr. Alan C. Monheit
Professor of Health Economics
School of Public Health
University of Medicine & Dentistry of
New Jersey

Dr. Marilyn Moon
Vice President and Director
Health Program
American Institutes for Research

Dr. Richard J. Murnane
Thompson Professor of Education and
Society
Harvard University

Dr. Len M. Nichols
George Mason University

Dr. Harold Pollack
Helen Ross Professor of Social Service
Administration
University of Chicago

Dr. Matthew Rabin
Edward G. and Nancy S. Jordan
Professor of Economics University of
California-Berkeley

2001 Recipient of the John Bates Clark
Medal for the most influential American
economist under age 40

Dr. James B. Rebitzer
Professor of Economics, Management,
and Public Policy
Boston University School of
Management

Dr. Michael Reich
Professor of Economics
University of California at Berkeley

Dr. Thomas Rice
Professor
UCLA School of Public Health

Dr. Christopher Ruhm
Jefferson-Pilot Excellence Professor of
Economics
University of North Carolina at
Greensboro

Dr. Jonathan Skinner
Professor of Economics
Dartmouth College, and
Professor of Community and Family
Medicine
Dartmouth Medical School

Dr. Katherine Swartz
Professor
Department of Health Policy and
Management
Harvard School of Public Health.

Dr. Kenneth Warner
Dean of the School of Public Health and
Avedis Donabedian Distinguished
University Professor of Public Health
University of Michigan

Dr. Paul N. Van de Water
Senior Fellow
Center on Budget and Policy Priorities

Dr. Stephen Zuckerman
Senior Fellow
Urban Institute

By:



Richard L. Rosen
D.C. Bar No. 307231
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000
Attorney for the Economic Scholars

November 12, 2010

* Institutional affiliations listed for identification purposes only.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, a copy of the foregoing "Motion for Leave to File Amicus Curiae Brief and Memorandum in Support Thereof" was filed with the Clerk of the Court through the CM / ECF system, causing it to be served on counsel of record for all Defendants and Plaintiffs.

A handwritten signature in black ink, appearing to read "Richard L. Rosen", is written above a horizontal line.

Richard L. Rosen
Arnold & Porter LLP

Attorney for the Economic Scholars