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No. 84483-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, Washington State,

Respondent.

PETITIONER'S SUPPLEMENTAL INFORMATION

PETER S. HOLMES, WSBA #15787
Seattle City Attorney

LAURA WISHIK, WSBA, #16682
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ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

SUPPLEMENTAL INFORMATION

During oral argument today, counsel informed the Commissioner that Governor Gregoire is seeking to file an amicus brief in the Florida case. The court should be aware that the Plaintiffs in the Florida case, including the State of Washington represented by Attorney General McKenna, have opposed the filing of any amicus briefs.

On June 14, 2010, the federal judge hearing the Florida case, Judge Vinson, issued an order barring submittal of any amicus briefs prior to the summary judgment phase. Declaration of Laura Wishik, Ex.A (Order on Amicus Curiae Filings).

On June 23, 2010, the Attorneys General for the States of Oregon, Iowa, and Vermont asked Judge Vinson to clarify the order and allow them to file amicus briefs. Wishik Decl., Ex. B (Motion for Clarification).

On the same day, the Governors of the States of Washington, Colorado, Michigan, and Pennsylvania also filed a motion seeking leave to file amicus briefs. Wishik Decl. Ex. C (Motion of Governors). The Governors explained their reasons for wanting to file amicus briefs:

The Governors, as the chief executive officers of their states, are in a unique position to respond to the plaintiffs' erroneous allegations that the Act unconstitutionally deprives their states of their sovereignty. For example the Governors are responsible for the administration and budgeting of the numerous state health care programs and initiatives affected by the Act and can speak directly to the longstanding state-federal cooperation in the Medicaid program, a program in

which the states participate as partners and not through coercion or commandeering.

Id. at 2. They described the factual information they could provide the court, for example, “In Washington, health care costs account for more than \$5 billion of the states’ general fund budget, or 28% of the operating budget, annually.” *Id.* p.5, n.7. “In Washington, uncompensated care by hospitals and other providers adds at least \$917 a year to the medical bills of insured families (including state employees whose insurance is purchased by the state).” *Id.* p.6, n.8.

As required by the local court rules, counsel for the Governors consulted with counsel for the Plaintiffs before filing the motion to determine whether or not they objected to it. Counsel for the Plaintiffs did not agree that the motion should be granted. *Id.* p. 10 (Certificate of Local Rule 7.1(B) Compliance).

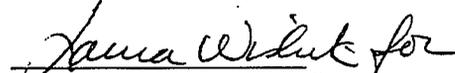
The Plaintiffs collectively filed a response to the Motion for Clarification in which they said, “Plaintiffs oppose the motion and any other such motions at this stage of the litigation.” Wishik Decl., Ex. C (Plaintiffs’ Response to Motion for Clarification). Although the Plaintiffs’ response did not explicitly mention the request made by the Governors, it was, according to the order of documents in the court’s docket, filed after the Governors filed their motion.

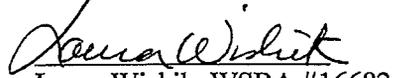
Thus, Attorney General McKenna has joined with the other Plaintiffs in opposing the filing of an amicus brief by the Governor of the State of Washington.

RESPECTFULLY SUBMITTED this 24th day of June, 2010.

Peter S. Holmes
Seattle City Attorney

By:


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Seattle City Attorney


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Attorneys for Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE,)	
a municipal corporation,)	
)	DECLARATION OF LAURA
Petitioner,)	WISHIK RE AUTHENTICITY
)	OF EXHIBITS
v.)	
)	
ROBERT M. MCKENNA, Attorney)	
General, Washington State,)	
)	
Respondent.)	

1. I am an Assistant City Attorney for the City of Seattle, and represent the Petitioner in this matter.

2. The documents attached as exhibits are true and correct copies of the originals. They are:

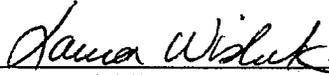
Exhibit A – Order on Amicus Curiae Filings, June 14, 2010

Exhibit B – Motion for Clarification of the Court’s June 14th Order

Exhibit C – Motion of Governors for Leave to File Amicus Brief

Exhibit D – Plaintiffs’ Response to Motion for Clarification

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and of my own knowledge, and that I executed this declaration at Seattle, Washington, in the County of King, this 24th day of June, 2010.



Laura Wishik

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.

ORDER ON AMICUS CURIAE FILINGS

Over the last several weeks, this court has received numerous inquiries from organizations and individuals expressing an interest in filing amicus curiae briefs in support of one position or another in this litigation. Such briefs are recognized as appropriate in some cases:

"Amicus curiae is a latin phrase for 'friend of the court' as distinguished from an advocate before the court. It serves only for the benefit of the court, assisting the court in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision."

Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J., 940 F.2d 792, 808 (3d Cir. 1991) (citation omitted). Amici curiae typically appear at the appellate level, and are not usually necessary or helpful at the trial level. Consequently, there is no provision in the Federal Rules of Civil Procedure or in the Local Rules of this court pertaining to such appearances. However, district courts have broad discretion and the inherent authority to allow amici to participate in appropriate cases. Because an

EXHIBIT A

amicus curiae participates 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." See id. (citation omitted); accord, e.g., Leal v. Secretary, U.S. Dep't of Health and Human Services, 2009 WL 1148633, at *1 (M.D. Fla. Apr. 28, 2009); Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991).

Although there are no formal rules or guidelines for the use of amicus curiae briefs in district courts, Rule 29 of the Federal Rules of Appellate Procedure and Rule 37 of the United States Supreme Court Rules govern amicus curiae briefs in those appellate proceedings, and they are instructive. Rule 29 provides that an amicus curiae may file a brief only with leave of court and only after the movant states his interest in the case and explains "why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Rule 37 of the Supreme Court Rules states that an amicus curiae brief which "brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." However, the circumstances under which an amicus curiae brief will be deemed "desirable" and "helpful" are very limited. As the Seventh Circuit Court of Appeals has stated:

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party . . . An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers

for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.; chambers opinion). The First Circuit has similarly cautioned that district courts "should go slow in accepting [amicus curiae briefs] unless . . . the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). It is "particularly questionable" to allow an amicus brief when the existing parties are "already well represented." Id. While the parties in this case are certainly well represented, I recognize that there possibly may be helpful contributions from amicus curiae on the merits of the important claims presented here. Accordingly, an orderly procedure for providing an opportunity to do so is appropriate.

With the foregoing in mind, it is hereby ORDERED that in this case:

(1) Amicus curiae briefs will not be allowed in support of, or in opposition to, the defendants' anticipated motion to dismiss, as it is expected that motion will raise discrete legal or procedural issues for which amici involvement would not be helpful or beneficial. Rather, an amicus may only seek to file a brief on the merits, which for purposes of this litigation will be at the summary judgment stage. If the case survives dismissal, the plaintiffs have already indicated an intent to promptly seek summary judgment, but either side may move for summary judgment within the time frame to be set. I will consider allowing amicus briefs (in support of, or in opposition to, either side) at that point in the proceedings.

(2) Any organization or individual desiring to file an amicus brief in support of, or in opposition to, a summary judgment motion filed by either side must first seek leave of court by an appropriate motion. The motion may not exceed ten (10) pages, and must be filed no later than seven (7) days after the filing of either the motion or brief that the amicus supports. The proposed amicus brief should not be

attached to the motion for leave to file.

(3) Any motion for leave to file must demonstrate (1) that the amicus has an interest that may be affected by the decision in this case; (2) that the amicus brief is desirable and relevant to the disposition of the case; and (3) that the amicus has 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.

(4) Any motion for leave to file an amicus curiae brief that does not meet the foregoing standard will be summarily denied.

(5) If leave to file an amicus curiae brief is granted --- and, it should be noted, it is perhaps unlikely that leave will be granted in this case --- the brief shall be filed within seven (7) days from the date of the order granting leave to file. The brief shall not exceed a total of fifteen (15) pages. No appendix or attachments shall accompany the brief. The brief shall be in the form set out in Rule 29(c) of the Federal Rules of Appellate Procedure (except no cover shall be required), and it may be filed electronically or in paper form, with copies to the parties of record. An amicus curiae may not file a reply brief.

DONE and ORDERED this 14th day of June, 2010.

/s/ Roger Vinson
ROGER VINSON
Senior United States District Judge

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 FOR CLARIFICATION OF THE COURT'S JUNE 14, 2010 ORDER
and IN THE ALTERNATIVE FOR LEAVE TO APPEAR AS AMICUS CURIAE
and MEMORANDUM IN SUPPORT**

The Attorneys General of the States of Oregon, Iowa, and Vermont ("Amici States") respectfully request clarification of this Court's June 14, 2010 Order on *Amicus Curiae* Filings (Doc # 50). The Amici States seek clarification because the Court did not specifically address filings by states, and states (like the federal government) are typically given broad latitude for purposes of amicus filings. If the Court did intend its Order to limit filings by states, the Amici States request leave to file a joint¹ *amicus curiae* brief during the motion to dismiss phase of these proceedings because no party to this proceeding fairly represents the perspective and interests of the Amici States and this case may be resolved prior to the summary judgment stage.

¹ The joint *amicus* brief would be a single brief from the three moving states and a number of other state attorneys general.

I. STATES ARE GENERALLY GIVEN GREATER LATITUDE TO PARTICIPATE AS *AMICI* THAN INDIVIDUALS AND ORGANIZATIONS.

The Court's June 14, 2010 Order provides that "[a]ny organization or individual" desiring to file an *amicus curiae* brief in this matter must wait until the summary judgment phase. The use of the phrase "organization or individual" suggests that the Order does not apply to amicus filings by states. Such an interpretation of the Order would be consistent with the Federal Rules of Appellate Procedure, which this Court has called "instructive." The Rules allow a state to "file an amicus-curiae brief without the consent of the parties or leave of court." FRAP 29(a); *see also* Supreme Court Rule 37(4) ("No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of *** a State, *** when submitted by its Attorney General***."). In the experience of the Amici States, federal district courts routinely allow states to file *amicus* briefs, even though the Federal Rules of Civil Procedure do not expressly provide for such filings.

States are typically given broader latitude to participate as *amici* than private organizations and individuals, because of the states' unique role in representing the interests of their citizens. The role of the Amici States is particularly important here, where the plaintiff states are trying to block, on federalism grounds, a federal law that the Amici States believe is both constitutional and important to the health and welfare of their citizens. The Amici States thus ask the Court to clarify that its June 14, 2010 Order does not apply to states so as to allow the filing of an *amicus curiae* brief by the Amici States.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE AMICI STATES LEAVE TO FILE, BECAUSE THE AMICI STATES HAVE A UNIQUE AND CRUCIALLY IMPORTANT PERSPECTIVE ON THE CONSTITUTIONAL CLAIMS ASSERTED BY THE PLAINTIFF STATES.

A. An *amicus curiae* brief from the Amici States is desirable and relevant to the disposition of this case.

Plaintiffs in this matter include twenty states that challenge a federal law that will have a profound impact on all fifty states. Because of the broad impact of the Court's ruling, it will be helpful to the Court to hear not just from those state officials who oppose the PPACA, but also from states that believe the Act is constitutional and will have a positive impact on their citizens. As discussed below, the perspective of the Amici States will assist the Court in evaluating whether the PPACA strikes an appropriate balance between national requirements that promote the goal of expanding access to health care in a cost-effective manner and state flexibility in designing programs to achieve that goal.

B. The Amici States have unique information and a unique perspective that can help the Court beyond the guidance that will be provided by the parties' counsel.

The Amici States bring a unique and crucial perspective to this case – a perspective not advanced by the parties. The Amici States have long been leaders and innovators in the health care policy arena and anticipate continuing to play that role under the PPACA. As a result, the Amici States are intimately familiar with the complex and longstanding relationship between the federal government and the states in the healthcare arena, and are similarly familiar with the strengths and limitations of a state-by-state approach to health care reform. Furthermore, the Amici States have long been involved in the day-to-day administration of the Medicaid program, wrestled on a face-to-face basis with the challenges of uncompensated care, and assume significant on-the-ground responsibility for protecting the health of their citizens—all experiences unique to state

governments. Thus, the Amici States are singularly positioned to assist the Court in evaluating the legal issues presented in this case.

Allowing the Amici States to participate at this stage of the litigation is particularly important because the states' perspectives as sovereign states are quite different from those of the federal government, particularly on questions of state sovereignty and the federal-state balance of power. The federal government has a strong interest, if not an obligation, to defend its own laws and its own broad authority to act. The Amici States have a similar, if not identical, interest in protecting their own sovereignty and proper spheres of authority. The Amici States bring a balanced perspective on principles of federalism, informed by decades of experience administering cooperative federal-state programs. Because the plaintiff states have framed this case as a dispute between states and the federal government over the bounds of federal authority, the Court should not exclude, even at the motion to dismiss stage, the perspective of states with sharply differing views from those of the plaintiffs.²

C. The Amici States have significant interests that will be affected by the decision in this case.

Despite their differing positions on the validity and impact of the PPACA, the interests of the Amici States are quite similar to the interests of the plaintiff states—they both have sovereign interests in protecting the health and welfare of their citizens. The Amici States believe that the PPACA is constitutional and that it will have a positive impact on the delivery of health care in all fifty states—and the Amici States will suffer negative consequences if the PPACA is struck down.

² The Amici States have reviewed the defendants' memorandum in support of their motion to dismiss and believe that the views and perspectives that would be voiced in the Amici States' *amicus* brief would complement and not be repetitive of the federal defendants' brief.

Without national health care reform, states will see rising numbers of uninsured citizens coupled with substantial increases in state spending for uncompensated care, Medicaid, and the State Children's Health Insurance Program.³ These increases threaten to overwhelm already overburdened state budgets. Furthermore, absent the PPACA, these spending increases would be coupled with ever-increasing numbers of non-elderly individuals without access to health insurance.⁴ In summary, without a national solution to the health care crisis, for the foreseeable future the Amici States would be forced to spend more and more on health care and yet slide farther and farther away from their obligation to protect the health and well being of their citizens.

III. Conclusion

For the foregoing reasons, the Amici States respectfully request that this Court clarify its June 14 Order and if necessary, grant leave to the Amici States to file an *amicus curiae* brief at this time.

June 23, 2010

Respectfully submitted,

John Kroger
Oregon Attorney General

Tom Miller
Iowa Attorney General

William H. Sorrell
Vermont Attorney General

³ Bowen Garrett et. al., *The Cost of Failure to Enact Health Reform: Implications for States* at 51 Robert Wood Johnson Foundation and the Urban Institute, September 2009. Available at: http://www.urban.org/uploadedpdf/411965_failure_to_enact.pdf (last viewed 5/11/2010).

⁴ *Id.*

/s/ Keith S. Dubanevich

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2010, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on all counsel of record.

/s/ Keith S. Dubanevich
KEITH S. DUBANEVICH

DM# 2099405/3

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-RV/EMT

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

EXHIBIT C

MOTION

The Governors of Colorado, Michigan, Pennsylvania and Washington (the "Governors") move and respectfully request leave to participate as *amici curiae* in connection with Defendants' Motion to Dismiss because their important interests in this case will not be otherwise represented.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The Governors have studied and are respectful of the Court's "Order on *Amicus Curiae* Filings" (the "Order"). They believe the intent, and possibly the terms, of the Order would not apply to the chief executive officers of those four states where the plaintiff Attorneys General have filed a lawsuit that does not represent the Governors' views. State law allows each of these Governors to present a different position in court when there is disagreement with the actions of the state's Attorney General.¹ See section II *infra*. Such a disagreement exists here. Unlike the plaintiff Attorneys General, the Governors believe the Patient Protection and Affordable Care Act (the "Act") is constitutional. The Governors, as the chief executive officers of their states, are in a unique position to respond to the plaintiffs' erroneous allegations that the Act unconstitutionally deprives their states of their sovereignty. For example the Governors are responsible for the administration and budgeting of the numerous state health care programs and initiatives affected by the Act and can speak directly to the longstanding state-federal cooperation in the Medicaid program, a program in which the states participate as partners and not through coercion or commandeering.

¹ Attached to this Motion and Memorandum as Exhibit "A" is a letter from Rob McKenna, Attorney General of the State of Washington and one of the plaintiffs in this case, agreeing to this legal principle.

The Governors did not to seek to intervene in this case in order to prevent procedural complications, believing their views could be presented efficiently and effectively through amicus participation.²

The Governors have reviewed the Defendants' Motion to Dismiss. This motion focuses on issues of vital concern to the Governors, including the proper balance between federalism and state sovereignty in addressing health care and insurance. The Governors' proposed amicus brief would include background information, from their state perspectives, relevant to review of a law under a "rational basis" or similar judicial standard. The information presented would be appropriate for consideration in conjunction with the defendants' motion to dismiss.³

Judicial consideration of such background information is particularly appropriate when the question is whether Congress had an adequate basis for the exercise of a constitutional power. In assessing the scope of Congress's authority under the Commerce Clause, the Supreme Court stressed "the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Gonzales v. Raich*, 545 U.S. 1, 20-23 (2005) (citations omitted). This inquiry appropriately considers publicly available information, as illustrated by the Supreme Court's reference in *Gonzales* to the submissions of *amici* and a government publication when it considered the dimensions of the marijuana market. *Id.* at 21.⁴

² The Order indicates Federal Rule of Appellate Procedure 29 and Rule 37 of the United States Supreme Court are instructive. Under these rules, leave of court is not required for a State to file an amicus brief. The Supreme Court does not require a motion for a brief filed by a state when submitted by its Attorney General. The undersigned counsel hold appointments as special assistant attorneys general for the purpose of representing the Governors of Michigan and Washington in this matter, and also have been appointed to represent the Governors of Colorado and Pennsylvania by their General Counsel pursuant to state law. *See also* attached letter from Attorney General Rob McKenna (suggesting Governor Gregoire could appear in this matter as "State of Washington, by and through Christine O. Gregoire, Governor").

³ *See, e.g., 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.

⁴ *See also 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"); *Daggett*

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 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 the insured pay because of health care provided to the uninsured.
- The Governors know 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.

Unlike the Attorneys General of their respective states who are plaintiffs in this action, the Governors believe the health care reforms found in the Act are critical to the future affordability of health care for residents and businesses, state agencies, public employees, and tribal governments⁵ in their states and are constitutional. They 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.⁶ The Governors believe their amicus curiae brief will be one that "brings to the attention of the Court relevant matter 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...."

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").

⁵ The Act reauthorizes the Indian Health Care Improvement Act (ICHIA), which "will modernize the Indian health care system and improve health care for 1.9 million American Indians and Alaska Natives." <<http://www.whitehouse.gov/health-care-meeting/proposal/titlex>>

⁶ Thus, in February 2009, the bipartisan National Governors Association formed a Health Care Reform Task Force, with six Republican and six Democratic Governors, co-chaired by Governor Granholm and including Governors Rendell and Gregoire, that was designed to identify and define gubernatorial priorities and advise the work of Congress and the Administration on health care reform.

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.

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 the General Counsel may represent the interests of the Governor in litigation, as here, where 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.

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).

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.

III. TOPICS WHICH THE AMICUS CURIAE BRIEF WILL ADDRESS

A. The Challenges Confronting The Health Care Programs Operated By The States.

As chief executive officers, the Governors exercise supervisory authority over state programs that provide health care or health insurance to significant portions of the states’ populations, and which comprise a substantial portion of their state budgets.⁷ Each state administers programs that deliver health care to low-income children, families, seniors who need long term care, and others under the Medicaid program. The states procure health care for injured workers through their workers’ compensation programs and prisoners in their corrections systems. Each is a major employer in its own right and purchases health care or health insurance

⁷ In Washington, health care costs account for more than \$5 billion of the state’s general fund budget, or 28% of the operating budget, annually. In Michigan, 28% of the state’s operating budget is spent on Medicaid alone, while in Colorado, Medicaid expenditures account for more than 20% of the operating budget, in addition to the costs of purchasing health care for state employees and the Department of Corrections. In Pennsylvania, health care costs, excluding administrative costs, account for \$23 billion or 35% of the Commonwealth’s operating budget.

for large numbers of public employees and retirees. Washington and Pennsylvania also provide subsidized insurance to residents of low or moderate means, above and beyond their Medicaid programs.

These are the very programs whose budgets and administration will be affected by the Act. The plaintiffs' Amended Complaint presents a simplistic view of these impacts that ignores the substantial financial and other benefits that will accrue to the states from the Act. By virtue of the scope and depth of the Governors' involvement in administering health care programs, the Governors will be able to inform the Court as to the need for and likely effects of federal reform.

B. The Impacts Of Shifting The Costs Of Caring For The Uninsured To All Paying Participants In The Health Care System.

The states of the four Governors herein have approximately 3.8 million residents without medical insurance. The fact that these individuals are uninsured, however, does not mean they do not require health care services. The states must reimburse hospitals that provide uncompensated treatment to large numbers of the uninsured. Private and public purchasers of health care and insurance, including the states, pay higher bills to help cover the cost of caring for the uninsured.⁸ The uninsured place increased demands on hospitals, emergency responders, public health departments, and other social service agencies funded by the states.

The Governors understand the role of universal coverage in reducing these cost shifts from the uninsured to taxpayers and those who pay for health care or insurance. They can explain how the Medicaid expansion to 133% of FPL will pick up a significant number of the uninsured, largely at federal expense and at manageable cost to the States. The Governors also

⁸ In Michigan, each family with insurance pays an estimated \$900 per year for emergency room care for the uninsured, the most expensive form of health care available. In Pennsylvania, roughly 6.5% of every health insurance premium dollar goes to cover the costs of the uninsured. In Washington, uncompensated care by hospitals and other providers adds at least \$917 a year to the medical bills of insured families (including state employees whose insurance is purchased by the state). This issue has been studied by the states, for example by Washington Insurance Commissioner Mike Kreidler. *E.g.*, Washington Office of the Insurance Commissioner, *A Problem We Can't Ignore; The hidden and rapidly growing costs of the uninsured and underinsured in Washington State* 1-2, 8 (Nov. 2009).

understand the necessary coupling of universal coverage with requiring insurers to cover preexisting health conditions. 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.⁹

C. The Effects Of Health Care Costs On Commerce In And Among the States.

The Governors have an interest in measures that will eliminate the stifling effects of uncontrolled health care cost increases on small business growth, economic development, and industries vital to the economic well-being of the states. For example, health care costs currently contribute an estimated \$1,200 to \$1,600 to the price of every vehicle manufactured by the domestic automobile industry, negatively impacting its ability to compete. Stabilizing the insurance market and making health care affordable will contribute to the potential for economic growth and increased revenues for the states. Notably, thousands of small businesses will be eligible for tax credits under the Act to make insurance more affordable. In Michigan, health care reforms could lead to the creation of 8,300 to 13,300 jobs each year, while in Colorado, expanding insurance coverage could add as many as 23,000 jobs by 2019.¹⁰

D. The Act’s Consistency With The Existing Federal-State Partnership Under Medicaid And Continued Flexibility For Innovation By The States.

The type of federal-state partnership embodied in the Act has already served the states well, a reality acknowledged by plaintiffs. Amended Complaint at ¶ 5. The Governors will provide the Court with factual information regarding the development and expansion of the

⁹ See Final Bill Report, E2SSB 6067, 2000 Wash. Laws Ch. 79, 56th Legislature (2000).

¹⁰ Additionally, the Governors are aware of direct effects uninsured patients have on interstate commerce. For example, many uninsured residents of states neighboring Washington seek emergency treatment at the Harborview Medical Center of the University of Washington, while many residents of southwestern Pennsylvania rely on access to West Virginia University Hospital for trauma care. This results in interstate transfers of funds as state governments subsidize the cost of care for their uninsured through disproportionate share hospital payments to providers in other states. See *West Virginia University Hospitals, Inc. v. Rendell*, 2009 WL 3241849, 1 (M.D. Pa. 2009).

Medicaid program in their states, as well as the ways in which the Act's expansion of health care access and coverage will be similarly beneficial.

In response to the narrow analysis in plaintiffs' Amended Complaint, the Governors also will inform the Court regarding the financial benefit to the states from provisions in the Act that extend Medicaid coverage to all adults up to 133% of FPL. The Governors also have an interest in explaining the long term impact of delivery system reforms supported by the Act on medical costs now borne by the states. For example, the Act carries the potential for significant savings to the states through its promotion of managed and coordinated care for individuals with chronic disease, as well as community based care for many individuals now being cared for in institutional settings. These are the kinds of programs familiar to the Governors from their own state-level initiatives.¹¹

IV. THE CRITERIA FOR PARTICIPATION AS *AMICI*.

The Order at page three "expected" that defendants' "anticipated motion to dismiss" would "raise discrete legal or procedural issues for which *amici* involvement would not be helpful or beneficial." Having read the motion, the Governors respectfully suggest that it raises legal issues on which their involvement would be helpful. In *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128 (3rd Cir. 2002), then-Judge Alito explained in detail why RAP 29 should not be given a restrictive 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).

¹¹ The Governors advocated for federal action to reform the nation's health care system and worked with Congress and the Administration to craft a law that would provide the flexibility to enable these and other state initiatives and experiments to proceed. The Governors therefore have an interest in describing for the Court the flexibility and increased opportunities for reform that they helped to create under the Act, in contrast to plaintiffs' allegation that the Act "commandeers" executive department employees of the states.

The Governors are uniquely positioned to serve that role here, because they, not the Attorneys General nor the federal defendants, possess direct expertise in the administration of health care in their states.

The Governors satisfy each of the criteria listed at page four of the Order. First, as the chief executive officers of four of the plaintiff states, the Governors have an interest in the outcome of the case which is at least equal to the interests of the Attorneys General of the same four states who joined as plaintiffs in this case. Secondly, without an Amicus Brief the Court would not be aware of what Amici believe are the real interests of these four states or that those interests differ markedly from the position advanced by the plaintiff Attorneys General.¹² As such, this Amicus Brief “is desirable and relevant to the disposition of the case.” Order, p. 4. Thirdly, these Amici 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.* For example, the Governors have specific information about the Act’s positive impact on state Medicaid programs and provision of care for the low-income and uninsured. That information likely is not possessed by the defendants, who do not directly administer that program, nor is it likely to be conveyed to the Court by the plaintiff Attorneys General because it is inconsistent with their litigation position.

V. CONCLUSION

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

¹² For example, the Defendants often present the plaintiffs’ position as being the position of their states. *E.g.*, Mot. to Dismiss at 8 (“In Count Four, the State plaintiffs allege that the ACA converts Medicaid into a ‘federally imposed universal healthcare regime’ in which their ‘discretion is removed’ and new expenses are ‘forced upon them in derogation of their sovereignty.’”). Without an Amicus Brief by the Governors, this Court would not know that the Governors of at least four of the “State plaintiffs” completely disagree based on their actual administration of state and federal programs.

CERTIFICATE OF LOCAL RULE 7.1(B) COMPLIANCE

Counsel for the Plaintiffs were consulted before this motion was filed, and they do not agree to the granting of this Motion.

DATED: June 23, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 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 and further by serving all counsel by U.S. Mail.

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May 12, 2010

The Honorable Christine Gregoire
Washington State Governor
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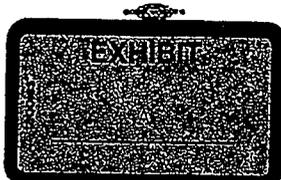
Dear Governor Gregoire:

I am in receipt of your letter dated May 7, 2010. You request that in the matter of *State of Florida, et. al. v. United States Department of Health and Human services, et.al.*, I list the plaintiff as "Robert M. McKenna, Attorney General of the State of Washington." As presently drafted, however, the proposed caption will list the plaintiff State of Washington as "STATE OF WASHINGTON, by and through, ROBERT M. McKENNA, ATTORNEY GENERAL OF THE STATE OF WASHINGTON."

I have reviewed the case cited in your letter, *State ex. rel. Hartley, Governor v. Clausen*, 146 Wash. 588, 264 P. 403 (1928). While I readily acknowledge the case recognizes that the office of the Governor is the chief executive office of the State of Washington, I do not read it to lend support to your proposition that the caption "State of Washington" cannot be used over the objection of the Governor. I must decline your offer for three reasons.

First, as a means of identifying the parties in interest to this suit, the proposed caption puts the court on notice that this matter is being maintained by an independently elected constitutional officer in a *representational capacity*, rather than being maintained in an *individual capacity* by a state official. This legal distinction is an important one and I believe that your proposal would have the possibility of suggesting the latter.

Second, I note that in the proposed Amended Complaint, for states where the Attorney General is not appearing on behalf of the State (e.g. Georgia, Mississippi, Arizona, and Nevada), the caption denotes the State acting through its Governor as the party in interest. For example, Georgia will be listed as "STATE OF GEORGIA, by and through SONNY PERDUE, GOVERNOR OF THE STATE OF GEORGIA." Since you have stated it is your intent to file legal pleadings adverse to the legal arguments that will be advanced in this multi-state action, I believe this simple and consistent format will better serve the judge in determining who is



ATTORNEY GENERAL OF WASHINGTON

The Honorable Christine Gregoire
May 12, 2010
Page 2

maintaining the suit and who is making what arguments, and will serve to avoid unnecessary confusion.

Third, you note that that you have examined Washington law and found nothing that would provide the Attorney General the authority to maintain an action in the name of the State of Washington over the objection of the Governor. However, my research has yielded nothing that would require the approval of the Governor before a pleading may bear the caption "STATE OF WASHINGTON". Moreover, I believe the fact that the Attorney General is a separately elected constitutional officer and statutorily may bring and maintain actions on behalf of the state confers this right, if not this obligation. *See generally*, Const. art. III, § 1, 21; RCW 43.10.030; .040.

Recognizing our differences in this matter, I committed to facilitate the appointment of a Special Assistant Attorney General to represent your interests as Governor. That has been accomplished through the appointments of SAAGs Gary Burns and Rebecca Roe. Similarly, I understand and appreciate your desire to distinguish your interests and arguments in this matter as Governor, from mine as Attorney General. In the interest of comity, I will continue to affix my signature to pleadings in this matter bearing the caption above. However, in this instance, I would also fully agree to your appearance in this matter as "STATE OF WASHINGTON, by and through CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON." In this manner, we each should be able to accomplish our respective goals of protecting the interests of the State of Washington. Please call me with any further concerns.

Sincerely,



ROB MCKENNA
Attorney General

RMM/kw

IN THE UNITED STATES DISTRICT COURT
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.

**PLAINTIFFS' RESPONSE TO
MOTION FOR CLARIFICATION OF THE COURT'S JUNE 14, 2010 ORDER
AND IN THE ALTERNATIVE FOR LEAVE TO APPEAR AS AMICUS CURIAE**

Plaintiffs hereby respond to the "Motion for Clarification of the Court's June 14, 2010 Order and in the Alternative for Leave to Appear as Amicus Curiae," filed today on behalf of the Attorneys General of the States of Oregon, Iowa, and Vermont. Plaintiffs do not believe that the relief now requested is consistent with the Court's June 14 Order, and consequently, Plaintiffs oppose the motion and any other such motions at this stage of the litigation.

Respectfully submitted,

**BILL MCCOLLUM
ATTORNEY GENERAL OF FLORIDA**

/s/ Blaine H. Winship
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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of June, 2010, a copy of the foregoing Plaintiffs' Response to Motion for Clarification was served on counsel of record for all Defendants through the Court's Notice of Electronic Filing system and on counsel for movants through email attachment and first class mailing.

/s/ Blaine H. Winship
Blaine H. Winship
Assistant Attorney General
Office of the Attorney General of Florida

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STATE OF WASHINGTON
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OFFICE RECEPTIONIST, CLERK

To: Worthy, Michele
Cc: Wishik, Laura
Subject: RE: City of Seattle v. Robert M. McKenna No. 84483-6

Rec. 6-24-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Worthy, Michele [mailto:Michele.Worthy@seattle.gov]
Sent: Thursday, June 24, 2010 4:45 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Wishik, Laura
Subject: City of Seattle v. Robert M. McKenna No. 84483-6

Attached please find the following to the Supreme Court of the State of Washington for filing today, regarding City of Seattle v. Robert M. McKenna, case no. 84483-6.

1. Petitioner's Supplemental Information.
2. Declaration of Laura Wishik Re Authenticity of Exhibits.

Thank you,



Michele Worthy
Legal Assistant

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