

IN THE 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.)

Case No.: 3:10-CV-91-RV/EMT

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

Defendants.)

**MOTION OF GOVERNORS TIM PAWLENTY AND DONALD L. CARCIERI
FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Pursuant to this Court's order on amicus curiae filings (Doc. 50), Local Civil Rule 7.1, and Rules 29(a) and (b) of the Federal Rules of Appellate Procedure, movants Tim Pawlenty, Governor of Minnesota, and Donald L. Carcieri, Governor Rhode Island, respectfully move the court for leave to participate as *amici curiae* and file an *amici curiae* brief in support of Plaintiffs' Motion for Summary Judgment.¹ The basis for this motion is set out in the attached memorandum.

Dated: November 11, 2010

Respectfully submitted,

/s/ Hans F. Bader

HANS F. BADER (D.C. Bar. No. 466545)

N.D. Florida Bar Member

Counsel of Record

SAM KAZMAN*

Competitive Enterprise Institute

1899 L Street, NW, 12th Floor

Washington, DC 20036

Telephone: (202) 331-2278

Facsimile: (202) 331-0640

E-mail: hbader@cei.org

Attorneys for Proposed *Amici Curiae*

Governors Tim Pawlenty and Donald L.

Carcieri

* Not Admitted in this Court

¹ Plaintiffs' counsel has consented to the filing of *amicus* briefs by governors and states in *Plaintiffs' Statement of Position on Motions for Leave to File Briefs As Amici Curiae*, Doc. 85 (Nov. 8, 2010). Following discussions pursuant to Local Civil R. 7.1(B), Defendants' counsel take no position on this motion.

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_____)

**MEMORANDUM IN SUPPORT OF MOTION OF GOVERNORS
TIM PAWLENTY AND DONALD L. CARCIERI
FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. Interest of *Amici* in this Litigation

Tim Pawlenty is the Governor of Minnesota. Donald L. Carcieri is the Governor of Rhode Island. As governors, *amici* have a direct interest in the issue before this Court. The Patient Protection and Affordable Care Act of 2010 (“ACA”) fundamentally transforms Medicaid and will effectively co-opt control over the States’ budgetary processes and legislative agendas, crowding out spending on other state priorities. Given their role in shaping and overseeing state appropriations and budgets, Governor Pawlenty and Governor Carcieri have a strong and distinct interest in ensuring that basic limits on the federal government’s spending power are maintained.² One of those requirements is that any conditions imposed by federal law must be unambiguous, so that the States may exercise their choice to accept or reject federal funds “knowingly, cognizant of the consequences of their participation.”³

Our constitutional system is built on vertical and horizontal checks and balances, chief among them the Federalism embodied in the Ninth and Tenth Amendments. Governors Pawlenty and Carcieri have both an immediate interest in protecting their States from the coercion of the ACA, and a longer-term interest in safeguarding Federalism against overreaching federal power. The Governors also have an obligation to their citizens to safeguard these protections against federal abuse of the spending power.

² See, e.g., *Rhode Island Const.*, Art. IX, § 15 (Governor “shall prepare and present” the state budget “to the general assembly”); *Minn. Const.*, Art. IV, § 23 (line-item veto).

³ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

II. The Proposed *Amicus* Brief Would Provide This Court With a Distinctive and Useful Perspective

An *amicus* brief by Governors Pawlenty and Carcieri would focus on a critical area that has not been extensively briefed by the parties: the failure of the ACA's amendments to Medicaid to meet one of the traditional restrictions on Congress's spending power, the requirement that statutes be clear and unambiguous in what they require of States.⁴

In their brief, plaintiffs note that the ACA "violates the principle that conditions on federal funds must be unambiguous, so as to 'enable the states to exercise their choice knowingly, cognizant of the consequences of their participation.'"⁵ Although they explain that the ACA includes "vast potential liabilities that cannot even be projected as of now,"⁶ their primary focus is in arguing that "the ACA's sweeping changes could not reasonably have been foreseen by the states when they started their Medicaid programs"⁷ and that they thus could not, at that time, have voluntarily and knowingly assumed the burdens and liabilities imposed on them many years later by the ACA.

Amici seek to focus more on the fact that, *even at present*, the ACA is so intolerably ambiguous and indefinite that it is facially unconstitutional. Moreover,

⁴ See *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) ("*amicus* brief should normally be allowed" when "the *amicus* has unique information or perspective" beyond what lawyers for the parties provide).

⁵ *Memorandum In Support of Plaintiffs' Motion for Summary Judgment* at 36.

⁶ *Id.* at 42.

⁷ *Id.* at 45.

this vagueness undermines political accountability and thus aggravates the ACA's unduly coercive aspects, in violation of the Tenth Amendment.⁸

The Supreme Court has repeatedly characterized legislation enacted pursuant to the spending power as “much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”⁹ “The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.” *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

But even if States could choose to stop participating in the Medicaid program, the ACA is so vague that it does not – and cannot – allow the States “to exercise their choice knowingly, cognizant of the consequences of their participation.” *Dole*, 483 U.S. at 207 (quoting *Pennhurst*). The ACA fails to speak “unambiguously,” *Pennhurst*, 451 U.S. at 17, about how a State can opt out of Medicaid’s expansion, and what State compliance may mean if it opts in. The Act itself is silent on opting out of the changes to Medicaid. And while it specifies the short-term division between increased State and federal funding, it says nothing of the long-term division of the increased costs.

⁸ See *New York v. United States*, 505 U.S. 144, 168 (1992) (Spending Clause legislation’s legitimacy is rooted in the fact that “where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”; “Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate.”).

⁹ *Pennhurst*, 451 U.S. 1, 17 (1981); see also *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Because the States are not given a clear and informed choice between participation and non-participation, the Act lacks the hallmarks of contractual enforceability. *See Matter of T & B General Contracting*, 833 F.2d 1455, 1459 (11th Cir. 1987) (“Without a meeting of the minds on all essential terms, no enforceable contract arises.”). The Act is indefinite in other key respects as well, so “we cannot fairly say that [a] State could make an informed choice.” *Pennhurst*, 451 U.S. at 25. “There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”¹⁰

The ACA is so mammoth, its provisions are so complex, and its passage was so irregular that the federal attorneys who have spent the past eight months defending it cannot even clearly identify its length. (*See* Tr. at 8.) Its sheer complexity is partially – but only partially – captured by the chart provided by minority staff of the Joint Economic Committee, which is attached as Exhibit 1.¹¹ This complexity accentuates its vagueness,¹² and makes it all but impossible to comprehend “from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that

¹⁰ *Id.* at 17-18; *see Arlington Cent. Sch. Dist.*, 548 U.S. at 296; *Barnes*, 536 U.S. at 186.

¹¹ *See* Joint Economic Committee, Republican Staff, *Your New Health Care System*, available at http://jec.senate.gov/republicans/public/?a=Files.Serve&File_id=5ee16e0f-6ee6-4643-980e-b4d5f1d7759a (visited Nov. 10, 2010); *Nebraska v. E.P.A.*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003) (taking judicial notice of agency materials on web); *Air Transport Ass’n v. U.S. Dep’t of Transp.*, 613 F.3d 206, 208 (D.C. Cir. 2010) (citing JEC report); *Livermore v. Heckler*, 743 F.2d 1396, 1403 (9th Cir. 1984) (report by JEC staff).

¹² *Cheek v. U.S.*, 498 U.S. 192, 199-200 (1991) (“complexity” of statutes can make “it difficult for the average citizen to know and comprehend” their requirements); *Hope Clinic v. Ryan*, 195 F.3d 857, 866-67 (7th Cir. 1999), *vacated*, 530 U.S. 1271 (2000) (“complex” provisions can result in “unfair surprise”).

go with those funds.” *Arlington Cent. Sch. Dist.*, 548 U.S. at 291. Certainly the Plaintiff States cannot be expected to “exercise their choice knowingly, cognizant of the consequences of their participation.” *Dole*, 483 U.S. at 207.

Even if the ACA’s text were fully understood, many of its requirements would ultimately be unknowable due to the unprecedented discretion granted to federal officials to implement key provisions. States, for example, will be required to “develop service systems” to provide long-term care that “allocate resources for services in a manner that is responsible to the changing needs and choices of beneficiaries” ACA § 2404(a). The substance of this vague mandate is delegated to the discretion of the Secretary of Health and Human Services. *Id.*

Similarly, states must provide individuals who are “newly eligible” for Medicaid with “benchmark” coverage. ACA § 2001(a)(2)(A). The substance of this mandate too is expressly delegated to the discretion of the Secretary. ACA §§ 2001(c)(3), 1302(a), (b). The Secretary is also empowered to determine, *inter alia*, state enrollment programs for Medicaid and CHIP, ACA § 1413(a), obstetric and smoking cessation services that must be provided by the states, ACA §§ 2301, 4107, and myriad data collection, evaluation, and reporting requirements that must be carried out by the states, *see, e.g.*, ACA §§ 2001(d)(1)(C), 2701, 2951. Even if these provisions provide an “intelligible principle” sufficient to support delegation, *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), they fail to provide any indication to the states of “the consequences of their participation,” *Dole*, 483 U.S. at 207. The indefinite nature of the States’ long-run financial

commitments to Medicaid make the ACA on its face contractually infirm and hence unconstitutional. It also undermines political accountability and aggravates the coerciveness and unduly burdensome nature of the Act.¹³

Although the Act indicates that the federal government will initially pay for some Medicaid expansions, the States are advised that they will pay for 10 percent of some unspecified costs in four years, and there is no indication that the States will not pay more in succeeding periods. Indeed, that has been the long-run history of Medicaid – States being gradually burdened with increasing costs for a program the scale and design of which are still firmly federally controlled. In the initial, spare introduction of Medicaid in 1965, there was no hint that the States 45 years later would be coerced to spend a substantial proportion of their budgets on Medicaid under the ACA.¹⁴ States also face considerable uncertainty as to the Medicaid cost-share ratio for a large new population of single adults without children that the ACA adds to Medicaid.¹⁵

¹³ *Virginia v. Riley*, 106 F.3d 559, 571 (4th Cir. 1997) (spending-clause legislation must speak “affirmatively and unambiguously, so that its design is known and the States may marshal their political will in opposition” to expropriations of sovereign rights); *cf. Reno v. ACLU*, 521 U.S. 844, 864 (1997) (“vagueness” relevant to “overbreadth inquiry”).

¹⁴ On average states spend 16.8 percent of their general-fund budgets on Medicaid, with Rhode Island spending 23.5 percent and Minnesota 16.8 percent. *See* Georgetown Health Policy Institute Center for Children and Families, “Medicaid and State Budgets: Looking at the Facts” (2008), available at <http://ccf.georgetown.edu/index/cms-file-system-action?file=ccf%20publications/about%20medicaid/nasbo%20final%205-1-08.pdf> (last visited Nov. 10, 2010). Plaintiff States overall spend similar percentages. *Id.* Those percentages will rise under the ACA’s expansion of Medicaid.

¹⁵ It is not clear whether the ratios will be drawn from the ACA itself, or other legislation, like the enhanced Federal Medical Assistance Percentages under the Health Care and Education Reconciliation Act of 2010, Pub L. No. 111-152

Even if there were some guarantee of a limitation on State obligations under the ACA's expansions of Medicaid, such a promise would be functionally meaningless. As the Defendants admit, any such promise could be changed at the Defendants' whims, without any limitations or any consent by the States. *See* Defs. Mem. Dis. at 16 (arguing that Congress has "full and complete power" under 42 U.S.C. § 1304 to make any alteration or amendments). For this reason too, as well as for obvious reasons of duress and contractual adhesion, the ACA does not propose a contractually enforceable deal with the States, and violates *Pennhurst's* well-accepted contractual conceptualization of Spending Clause conditions.

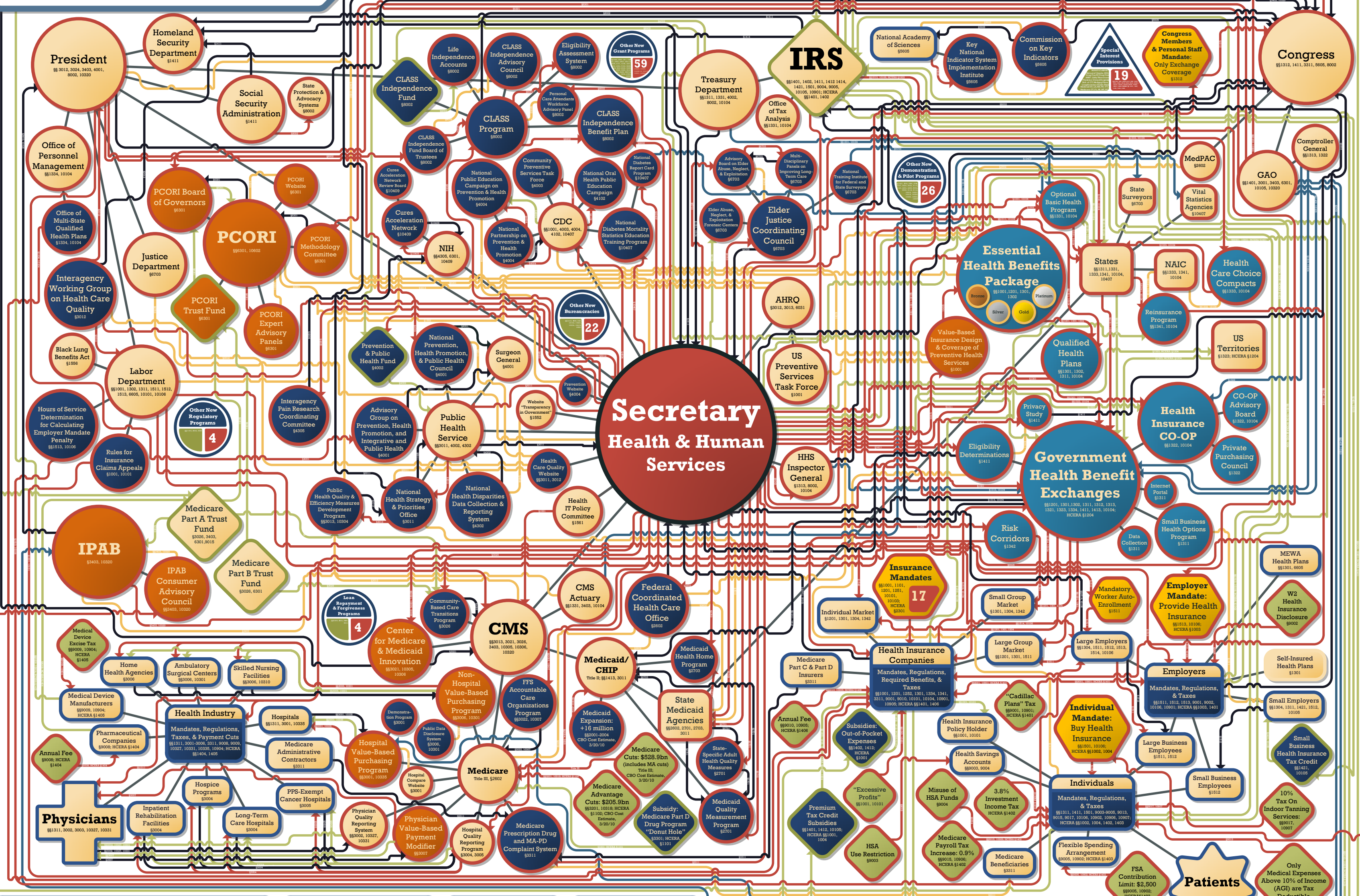
The Governors' proposed *amicus* brief would usefully examine these issues and, for this reason, leave to file such a brief should be granted by this Court.

Dated: November 11, 2010

Respectfully submitted,

/s/ Hans F. Bader
HANS F. BADER (D.C. Bar. No. 466545)
N.D. Florida Bar Member, *Counsel of Record*
SAM KAZMAN
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, DC 20036
Telephone: (202) 331-2278
Facsimile: (202) 331-0640
E-mail: hbader@cei.org
Attorneys for Proposed *Amici Curiae*
Governors Tim Pawlenty and Donald L.
Carcieri

EXHIBIT
1



New Government

- Rationing Potential
- Involvement in Health Insurance Market
- Other Expansions
- Represents Bundles of Additional Entities
- Mandates
- Taxes & Monetary Fees/Penalties/Cuts
- Trust Fund (Rationing Potential)
- Other New Trust Funds/Monetary Benefits

Expanded Government

- Government with Expanded Authority/Responsibility
- Government Financial Entity with New Inflows/Outflows
- State/Territory with Expanded Authority/Responsibility

Private

- Private Entity with New Mandates/Regulations/Responsibilities
- Unchanged Private Entity
- Special Interest Provisions

New Relationships

- Regulations/Requirements/Mandates
- Reporting Requirements
- Oversight
- Money Flows
- Consultation/Advisory/Info Sharing
- Structural Connections (Includes Existing)

AGI: Adjusted Gross Income
 AHRQ: Agency for Healthcare Research and Quality
 CDC: Centers for Disease Control and Prevention
 CHIP: Children's Health Insurance Program
 CLASS: Community Living Assistance Services & Supports
 CMS: Centers for Medicare & Medicaid Services
 CO-OP: Consumer Operated & Oriented Program
 FFS: Fee-for-Service
 FSA: Flexible Spending Arrangement
 GAO: Government Accountability Office
 HCERA: Health Care & Education Reconciliation Act
 HHS: Health & Human Services Department

HSA: Health Savings Account
 IPAB: Independent Payment Advisory Board
 IRS: Internal Revenue Service
 MA-PD: Medicare Advantage Prescription Drug
 MedPAC: Medicare Payment Advisory Commission
 MERD: Medical Early Risk Detection
 EALORS: Executive Auxiliary Linked Office Regional Systems
 MEWA: Multiple Employer Welfare Arrangement
 NAIC: National Association of Insurance Commissioners
 NIH: National Institutes of Health
 PCORI: Patient-Centered Outcomes Research Institute
 PPS: Prospective Payment System

Patient Protection & Affordable Care Act, P.L. 111-148; Health Care & Education Reconciliation Act, P.L. 111-152
 Prepared by: Joint Economic Committee, Republican Staff
 Congressman Kevin Brady, Senior House Republican
 Senator Sam Brownback, Ranking Member

CERTIFICATE OF SERVICE

The undersigned counsel for Movants certifies that on November 11, 2010, a true and correct copy of the foregoing Motion and Memorandum was filed electronically with this Court through the CM/ECF filing system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system.

The following counsel for the parties, among others, will receive notice of this filing through the Court's CM/ECF system:

David Boris Rivkin, Jr.	drivkin@bakerlaw.com
Lee Alfred Casey	lcasey@bakerlaw.com
Blaine H. Winship	blaine.winship@myfloridalegal.com
Katherine Jean Spohn	katie.spohn@nebraska.gov
William James Cobb, III	bill.cobb@oag.state.tx.us
Carlos Ramos-Mrosovsky	cramosmrosovsky@bakerlaw.com
Brian G. Kennedy	brian.kennedy@usdoj.gov
Eric B. Beckenhauer	eric.beckenhauer@usdoj.gov

/s/ Hans F. Bader

D.C. Bar No. 466545

N.D. Florida Bar Member

1899 L Street, NW, 12th Floor

Washington, D.C. 20036

Phone: 202-331-2278

Fax: 202-331-0640

Email: hbader@cei.org

Counsel for Proposed Amici Curiae Governors Tim Pawlenty and Donald L. Carcieri