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TESTIMONY

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HEALTH CARE POLICY AND CONSTITUTIONAL RIGHTS: THE HEALTH CARE FREEDOM ACT

By Dave Roland

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Chairman Pergason, Chairman Jones, and members of each committee, I thank you for the opportunity to testify before you today. My name is Dave Roland, and I am a policy analyst for the Show-Me Institute, a nonprofit, nonpartisan, Missouri-based think tank that supports free-market solutions to the state's social challenges. Prior to joining the Show-Me Institute, I spent several years in Washington, D.C., gaining expertise in constitutional law as a litigator with the Institute for Justice, a public-interest law firm that specializes in the protection of Americans' liberties. The ideas I will offer today are my own, and should not be taken as necessarily representative of the organizations with which I am affiliated.

Among the elements of the health care reform bill being considered by Congress is a requirement that almost every adult would either have to purchase a health insurance policy or face punitive fines to be collected by the Internal Revenue Service. There has been widespread debate in legal circles about whether the courts would uphold such a requirement, but lawmakers in at least 33 states are trying to do what they can to insulate their citizens from such a requirement. In Missouri, members of this legislature are considering SJR 25 and HJR 57, also known as the Health Care Freedom Act, which would offer citizens the opportunity to modify the Missouri Bill of Rights to formally recognize their right to decide for themselves whether they will participate in any private health care system. Under this amendment, the government would not be permitted to prevent citizens from offering or accepting direct payment for health care services, and neither could it substantially limit the purchase or sale of health insurance in private health care systems.[1]

Dave Roland is a policy analyst for the Show-Me Institute.

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My testimony today is not intended as an endorsement of any bill, but rather as an explanation of the policies implicated by the bills just mentioned. I will particularly address the constitutional issues raised by one element of the federal health care reform bill, the way that courts would likely resolve those constitutional issues, and the likely impact of the Health Care Freedom Act on the courts' resolution.

SHOULD EVERYONE HAVE HEALTH INSURANCE?

The linchpin of the current federal health care reform bill is a requirement that almost every adult in the nation must obtain a health insurance policy that would meet certain requirements imposed by Congress. In addition to the fact that many Americans currently carry health insurance policies that would not fit the requirements Congress is considering, there are also many who have reasons for choosing to remain uninsured. A brief look at the basic mechanics of the health insurance industry will help illustrate why some people make these choices.

Insurance is gambling, both for the insurers and the insured. The insurer looks at your profile and makes a careful statistical determination of how much your health care is likely to cost them over a given period of time. They then charge you a premium that — if their calculations are correct — would allow them not only to cover your expenses, but also to pay their employees and to make a profit on top of that. Their risk lies in the possibility that you might incur costs greater than they expect and/or sooner rather than later. But the odds are heavily stacked in their favor. These companies are very good at making their guesses, and the large pool of resources that results from their customer base means that, just like a casino, they almost always come out ahead.

For the insured, there is also a gamble involved. If, in fact, the insurance companies are correct (as they usually are), the insured will end up paying far more for their health care than they would have if they had remained uninsured. This is the risk they assume in order to gain peace of mind that, should a catastrophic injury or illness occur sooner rather than later, they will be taken care of. But, financially speaking, the great majority of people would be better off putting 85 percent of the amount they would have paid toward an insurance premium into a savings account earmarked for health care expenses.[2] Then, whenever health care costs emerge, the money is ready to be used — and, importantly, it can be used for any procedure and any health care provider the insured prefers.[3]

Health insurance entails a tradeoff: The insured sacrifices extra money and a significant range of choice in the providers and procedures available to them in exchange for the assurance that they will have their expenses covered if they should need treatment sooner than they would otherwise be able to pay for it. Insurance is not a necessity, and a large majority of people would ultimately be better off if they simply saved their money instead of giving it to insurance companies. That is why it very easily could make economic sense to forgo health insurance.

Although some people may not carry health insurance because it is unaffordable, many Americans *choose* not to purchase health insurance. Some people's religions

may not permit the use of modern medicine, while others may not believe it to be effective. Still others are simply confident enough in their propensity for health that they are willing to risk the costs of illness or injury in order to direct their money toward other concerns that they believe to be more pressing for themselves and their families. And there are some who, recognizing that most people pay far more to insurance companies than they are ever likely to need for their own treatment costs, would prefer to self-insure by creating their own health fund. For each of these people, a congressional directive to purchase a health insurance policy would mean giving up a huge amount of money — as well as a significant amount of autonomy and privacy — committing themselves to a contract for goods and services that they do not want, and in some cases may be prohibited from using.

THE FEDERAL CONSTITUTION

As we all remember from high school, congressional authority is limited to those powers explicitly granted by the Constitution. In this case, the question would be whether the Constitution gives Congress the authority to punish citizens for refusing to purchase health insurance.

Those backing the bill suggest that this authority is part of part of Congress' power "to regulate commerce … among the several states[.]"[4] It is true that courts have generally interpreted this power very broadly, resulting in a U.S. Supreme Court decision that a farmer named Filburn was bound by agricultural regulations even though he was not taking his grain to market.[5] More recently, the Supreme Court also held that Angel Raich was subject to federal drug laws even though her medical marijuana was homegrown and neither bought nor sold.[6]

But courts have also recognized limits to congressional authority under the Commerce Clause. In *U.S. v. Lopez*, the Supreme Court held that the Commerce Clause did not permit Congress to create a federal law banning possession of firearms in a school zone.[7] In *U.S. v. Morrison*, the court struck down a law that addressed the subject of gender-based violent crime.[8] The court struck down the laws in *Lopez* and *Morrison* primarily because the subjects that Congress sought to regulate lacked a clear nexus with commerce among the states.

Even though much of the health insurance industry is handled within the bounds of individual states,[9] courts will likely find that health insurance as a whole is an issue with a sufficient connection to interstate commerce to permit congressional regulation. However, if Congress passes a bill mandating that individuals must either buy health insurance or face financial sanctions, courts will still have to answer a very specific question: Does the power to regulate interstate commerce give Congress the authority to penalize citizens *who do not wish to engage in commerce*?

As Prof. Randy Barnett pointed out at a recent Heritage Foundation debate,[10] the Supreme Court has never faced such a question, so we cannot be certain of its answer. I tend to agree with Barnett that the Court's response will likely hinge on the solicitor general's ability to explain which aspects of citizens' lives (if any) would remain beyond the reach of congressional regulation if the Court permitted these mandates to be enforced. If the solicitor

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general offers a reasonable response that acknowledges clear limits to the powers available under the Commerce Clause, the Court may sustain the individual health insurance mandate. If not, I believe that the majority of justices will strike the mandate as unconstitutional.

Some professors have argued that even without relying on the Commerce Clause, authority for the health insurance mandate could be found in Congress' power "to lay and collect taxes … [to] provide for the … general welfare of the United States,"[11] or even in the Sixteenth Amendment's authorization of an income tax.[12] I disagree. While taxation power *might* permit the creation of a tax-based public health insurance system like Medicare, into which all workers pay, this is not what is anticipated in the insurance mandate under consideration; it is neither tax-based nor part of a public health insurance system, nor would the alleged "tax" be collected from all workers. Furthermore, even if the fees for failing to purchase health insurance were classified as a tax authorized by Article I, section 8, Congress is specifically denied the authority to impose capitation taxes "unless in proportion to the census,"[13] a requirement that this proposal does not seem to meet.[14] It might be theoretically possible to achieve the same basic effect intended by this bill by raising the general income tax rates by several percentage points, then offering tax credits or tax deductions to anyone participating in a qualified health insurance plan — but political considerations make this sort of approach unlikely.

The next question that courts would have to answer is whether the issue should be reserved to the states under the Tenth Amendment.[15] This is shakier grounds for a constitutional defense than one would really like to have. The Tenth Amendment applies only where courts have determined that a specific power has not been delegated to Congress — and if a court has already located congressional authority in either the Commerce Clause or the taxing power, there is a very strong possibility that it will also determine that the Tenth is inapplicable.

After considering the question of whether Congress generally has the authority to create an individual health insurance mandate, the question will then become whether such a mandate violates liberties preserved under the first nine amendments to the U.S. Constitution. The relevant provisions are contained in the First, Fifth, and Ninth Amendments.[16] The Supreme Court has previously recognized that the Constitution protects citizens' rights to associate with others of their choosing,[17] to enter into contracts, to make their own decisions regarding health care, and, of course, their right to privacy.[18] A violation of any one of these rights could be sufficient to invalidate the health insurance mandate.

Unfortunately, merely establishing an infringement of constitutional rights does not usually end the analysis. In fact, the Supreme Court has long permitted infringement of these kinds of liberty, as long as the government could advance an interest in doing so that a majority of the justices considered to be sufficiently important. In the case of the individual health insurance mandate, the government's interest is to make insurance premiums more affordable and, thus, to increase the number of people with access to health care. The courts will have to balance this interest against the liberty and privacy interests violated when citizens

are forced to purchase coverage that they do not want and may have no intention of using. My opinion is that, particularly given the extremely high value that several current justices place on protecting the privacy rights of individuals, it will be difficult for the solicitor general to convince a majority that the potential for lower health insurance premiums (because, in fact, there is no guarantee that the plan will work in the way Congress intends) can justify forcing someone to disclose private information about themselves and their health care.

THE HEALTH CARE FREEDOM AMENDMENT

If everything I've discussed above fails to persuade the courts to strike down the individual health insurance mandate, then the arguments will come down to state constitutional protections. This is one reason (but only one reason) why Missourians should take the Health Care Freedom Act seriously.

The Bill of Rights in the U.S. Constitution does not demarcate the outer limits of individual freedoms to which citizens are entitled. Rather, it merely establishes a baseline of liberty that cannot be violated by any level of government. The states, however, each have their own constitutions, and those documents can — and frequently do — provide an even higher level of protection for liberty than is afforded by the U.S. Constitution. Generally speaking, these additional protections are only applied against the actions of state and local governments, but if Congress tried to enforce a law that directly violated the terms of the Health Care Freedom Act (or some other freedom guaranteed under a state constitution), the courts would have to decide whether a state's guarantee of liberty to its citizens can protect them from actions of the federal government that would violate that liberty.

This is currently an open question. There are cases in which federal courts have noted that the application of a federal statute could result in a violation of certain freedoms secured under state constitutions. In several of these cases, the courts required the government to come up with a sort of alternative structure that would respect the state constitutions — but each of those cases also usually included indications from Congress that they wanted to avoid violating state constitutional freedoms. In the case of the individual health insurance mandate, it would seem clear that Congress is not concerned with respecting state constitutional protections. This would set up a battle under the U.S. Constitution's Supremacy Clause.

The Supremacy Clause, found in Article VI, reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

Of course, the central question here will be just how the courts will apply this language. The answer may not be as simple as it seems. Despite the text's indication that state laws and constitutions are subject to federal laws and treaties, a look into history shows that several important Founders rejected the idea that Congress could always enforce laws

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deemed unconstitutional by the states. When in 1798 Congress passed the Alien and Sedition Laws, which made it a criminal offense to criticize certain government officials publicly, James Madison — widely known as the Father of the Constitution — and Thomas Jefferson — author of the Declaration of Independence and the sitting vice president — drafted the Kentucky and Virginia Resolutions, in which those states rejected the constitutionality of the acts.[19] The U.S. Supreme Court was not called upon to resolve the question of whether states could legitimately deny congressional authority in this way, but up until the Civil War, different states repeatedly adopted similar measures.[20]

Without any directly applicable judicial precedent, some legal scholars have attempted to guess at how the justices might be inclined to resolve such a conflict between state constitutional liberties and federal laws. One of my colleagues, Clint Bolick, a cofounder of the Institute for Justice and the current leader of a constitutional litigation center at the Goldwater Institute in Arizona, has noted a recent judicial trend in which the Supreme Court has shied away from allowing federal laws to trump state constitutional requirements. This might well signal that the justices are inclined to protect freedoms enshrined in state constitutions, but the only way we will be sure is if the U.S. Supreme Court is presented with a direct conflict. The Health Care Freedom Act, if adopted by the people of this state, could provide just such a conflict.

SUMMING UP

I think it will take 2–3 years for a case evaluating the constitutionality of the individual health insurance mandate to reach the U.S. Supreme Court. The likely scenario is that a whole host of lawsuits will be filed in every federal circuit. The federal district courts are likely to deal with the issues quickly, render a decision, and kick the cases up to the circuit courts. Once the circuit courts have weighed in on the constitutional issues, the Supreme Court will choose the set of facts on which it will base its consideration of the law. Keep in mind that it doesn't have to take the first case to be resolved by a circuit court, although it only takes four justices agreeing in order to get a case in front of the Supreme Court.

When the issue is argued in front of the Supreme Court, I believe that proponents of the mandate (in other words, the solicitor general) will have to provide a satisfactory answer to at least two vitally important questions if they are to win a majority: 1) If the Commerce Clause permits Congress to force individuals to purchase goods and services that they do not want, where is the limit of that power — if, indeed, a limit can be articulated?; and, 2) is Congress's interest in (potentially) lowering the cost of health insurance premiums sufficiently compelling to justify forcing individual citizens against their will to associate with others and to divulge to them all sorts of private information about their health?

I believe, based on the current composition of the Supreme Court, that the individual health insurance mandate would probably be found unconstitutional, either as a violation of the Commerce Clause or the individual right to privacy. I cannot see any of the four conservative-leaning justices (Roberts, Alito, Scalia, or Thomas) approving such a mandate as an exercise of the Commerce Clause, nor can I see any of the four liberal-leaning

justices (Stevens, Ginsburg, Breyer, and Sotomayor) disapproving the mandate. The deciding factor, then, will be whether Justice Kennedy will decide for or against it, and I believe that will largely depend on how the solicitor general articulates which limits might remain on congressional authority if the mandate is approved.

A more interesting question is how the justices might vote on the question of whether the right to privacy precludes the imposition of an individual health insurance mandate. Justices Thomas and Scalia have both rejected the notion that there is any such right to be found in the constitution, making it unlikely that they would rely on this right to strike down legislation as unconstitutional. On the other hand, several of the more liberal justices have previously written passionately about the importance of the right to privacy. It is possible that the privacy question might result in a majority of justices voting to strike down the mandate, but with Scalia and Thomas dissenting on this point.

Either way, it is my opinion that the Supreme Court is likely to find that an individual health insurance mandate violates the provisions of the U.S. Constitution. Although the Supreme Court is thus unlikely to reach the question of whether the Health Care Freedom Act would be seen as an additional bulwark for liberty, the adoption of this amendment (and others like it in our sister states) would at a minimum offer the potential for a case that would test the boundaries of state sovereignty under our current constitutional system.

For more of the Show-Me Institute's research about health care issues, visit www.showmeinstitute.org.

NOTES

1. **It appears from the current text of the Health Care Freedom Act that the General Assembly would retain the ability to pass a comprehensive, tax-based, single-payer public health insurance system, so long as in doing so it did not either outlaw the sale or purchase of private insurance policies or restrict citizens' abilities to offer or accept direct payment for health care services.**
2. **Even the best of health insurance companies usually only apply about 85 percent of the premiums they receive on their clients' health care costs.**
3. **Most health insurance companies place limits on the doctors from whom a policy holder can receive treatment, as well as on the types of treatment that are covered.**
4. **U.S. Const. Art. I, § 8.**
5. ***Wickard v. Filburn*, 317 U.S. 111 (1942).**
6. ***Gonzalez v. Raich*, 545 U.S. 1 (2005).**
7. ***U.S. v. Lopez*, 514 U.S. 549 (1995).**
8. ***U.S. v. Morrison*, 529 U.S. 598 (2000).**
9. **In part as a result of federal law, it is very unusual for individuals to be able to purchase insurance from companies outside the state in which they are currently domiciled.**
10. **Video available online here: tinyurl.com/ybj4cmd**
11. **U.S. Const. Art. I, § 8.**
12. **U.S. Const. Amendment XVI.**
13. **U.S. Const. Art. I, § 9.**
14. **It might be argued that the penalties for failing to obtain health insurance could be considered an "income tax" of the sort that is exempted from the limitations of Article I, section 9. I think that such a penalty could not be considered an "income tax" because it would be selectively applied and collected separately from the general income tax authorized in the Sixteenth Amendment.**
15. **U.S. Const. Amendment X.**
16. **While the U.S. Supreme Court has rarely discussed the Ninth Amendment as a substantive source of individual liberties, its text — "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" — suggests that it should be seen as such. See Justice Arthur Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965).**
17. **U.S. Const. Amendment I.**
18. **U.S. Const. Amendments V and XIV (Due Process Clause).**
19. **Madison later said that, in his opinion, these resolutions were primarily useful as tools through which the power of Congress could be called into question — though not necessarily nullified. He believed that similar resolutions would signal to other states the potential necessity of modifying the current system of government to eliminate further abuses.**
20. **Indeed, South Carolina's attempted nullification of a tariff passed by Congress in 1832 nearly sparked secession and armed conflict.**

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