

In The  
**Supreme Court of the United States**

—◆—  
FLORIDA, *ET AL.*,

*Petitioners,*

v.

DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, *ET AL.*,

*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

—◆—  
**BRIEF OF *AMICUS CURIAE*  
LAWRENCE J. DICKSON, PH.D.,  
IN SUPPORT OF PETITIONERS**

—◆—  
DAN LAWTON  
*Counsel of Record*  
Emerald Plaza  
402 West Broadway, Suite 1860  
San Diego, CA 92101  
(619) 595-1370  
dan@lawtonlaw.com

*Counsel for Amicus Curiae  
Lawrence J. Dickson, Ph.D.*

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**INTEREST OF *AMICUS CURIAE***<sup>1</sup>

Dr. Dickson has greater familiarity with the effect on particular rulings on persons other than the parties than the parties themselves. Unlike them, he is an individual; a man of modest means; and the father of three young adult children, two of whom are struggling in minimum-wage (or near-minimum wage) jobs. He and most of his family have lacked medical insurance for many years. Yet they have paid their medical bills (including for hospitalizations) out of their personal savings. Their share of the government-mandated insurance premiums threatened by the Patient Protection and Affordable Care Act<sup>2</sup> would have both exceeded those bills and made it very hard for the family to remain solvent. Dr. Dickson's family is a class of persons who would bear a disproportionate burden of the ACA compared to other persons who have enjoyed access to good medical insurance.

Dr. Dickson also is in a position to view the case from a broader or different perspective than the

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<sup>1</sup> The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Dr. Dickson hereby affirms that no counsel for any party has authored this brief in whole or in part; that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief; and that no persons other than Dr. Dickson and his counsel made any such monetary contribution.

<sup>2</sup> Publ. L. No. 111-148, as amended by the Health Care & Educ. Reconciliation Act of 2010, Publ. L. No. 111-152 (ACA).

parties. He is a citizen and an individual. He is a skilled mathematician who holds a doctoral degree in mathematics from Princeton University. During his career he has specialized in mathematical and scientific research. He is a holder and defender of several patents. Thus he is trained and experienced in the logic of complex documents. He has led citizen initiatives on matters of public interest in the past. He is able to capture the nature of complex problems and reduce them to their simple essence. In his brief, he combines these elements of his background to explain the demographic and financial consequences of the ACA from the perspective of an individual concerned about the inexorable results of the ACA for future generations of ordinary Americans.

## **I SUMMARY OF ARGUMENT**

### **A. Background.**

The Eleventh Circuit held the individual mandate provision of the ACA exceeded Congress's powers under the Commerce Clause and the Congress's Article I taxing power. It ruled the entire ACA severable from the individual mandate provision and held that the remainder of the ACA could stand. In so doing, it did not address petitioners' Fifth Amendment substantive due process challenge to the individual mandate provision (which plaintiffs asserted in the district court, but not on appeal).

In dissent, Judge Marcus noted petitioners' Fifth Amendment-based challenge to the individual mandate, which invoked Americans' "freedom from being forced to give their property to, or contract with, other private parties." *State of Florida v. Department of Health and Human Services*, 648 F.3d 1235, 1362 (11th Cir. 2011) (Marcus, J., dissenting). Judge Marcus went on to highlight the "small class of fundamental rights" protected today under the Fifth Amendment's guarantee of substantive due process, *i.e.*, the rights to marry, have children, and direct the education and upbringing of children, among others. *Id.* Judge Marcus rejected the notion that the individual liberty interest asserted by petitioners was a fundamental right. But neither he nor the majority discussed whether the individual mandate might violate any individual American's fundamental rights to have children and/or direct their education and upbringing.

**B. Whether the Individual Mandate Provision of the ACA Violates Young Americans' Right to Substantive Due Process Guaranteed by the Fifth Amendment Is an Important Question of Federal Law Which Has Not Been, but which Should Be, Settled by This Court.**

This case raises the issue of whether the individual mandate of the ACA violates the Fifth Amendment guarantee of substantive due process. The individual mandate burdens the rights to marry and raise children. These rights are fundamental. The

burden falls most heavily on the young and presently uninsured. This burden cannot and should not stand. This Court should grant *certiorari* to address this important issue.

## II ARGUMENT

### **A. The False and Iniquitous Logic Of The Individual Mandate.**

The individual mandate is supposedly a tool aimed at containing costs while simultaneously providing universal coverage and eliminating insurers' refusals to cover patients with preexisting conditions. The proffered logic posits a scenario in which healthy people forgo insurance until they are sick and purchase insurance just at the moment when the insurer will have to spend most on their care, thus assertedly triggering insurers' shifting of the costs to those they already insure. This, in turn, boosts premiums, discouraging healthy persons from purchasing insurance, and, in the end, leaving only the truly sick in the insurance pool. This is the so-called "death spiral." Making Health Care Work for American Families, Hearing Before the H. Comm. on Energy & Commerce, Subcomm. on Health, 111th Cong. (Mar. 17, 2009) (testimony of Princeton University Professor Uwe Reinhardt). The individual mandate and universal coverage required by the ACA supposedly eliminate the "death spiral."

This logic is false and iniquitous.



It disparately treats two types of persons. The first person may satisfy the individual mandate from the first day, yet always draw more from the pool than he pays into it. The second, perhaps poorer, never draws much and suffers a net loss from having to pay premiums without receiving care of equivalent value. The individual mandate forces the second person to carry the first.

The idea that, when patients need care, they will have been paying into the system, is wrong in two ways. First, it unjustifiably assumes that everyone is predictably sickly to the same degree. Thus it cloaks the injustice to people who are healthy but poor, and would more wisely decide not to buy. Second, and more subtly, it treats the dollar of payment at one time as equivalent to the dollar of care perhaps much later. This ignores the harm that may befall the patient (unrelated to health care) because of the absence of that dollar to meet other needs at the earlier date.

As explained below, these harms burden young Americans' rights to marry and raise children.

## **B. Disproportionate Financial Burden on Young Americans.**

The Due Process Clause of the Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property, without due process of law. Its substantive component is implicated in this case. Substantive due process protects a small class of

fundamental rights. Among these are the rights to marry, have children, and direct the education and upbringing of one's children. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The ACA appears to violate these rights, by burdening their exercise with financial consequences not now extant.

The group most unfairly burdened by the individual mandate is the young. The young are as much as seven times healthier than the elderly. Unregulated insurance rates demonstrate this.<sup>3</sup> The mean personal income of the young (aged 15-34), however, is only half that of their elders (aged 35-64). Given unavoidable basic needs, this means the discretionary income of the young is much less than half that of their elders. This means the individual mandate they must pay under the ACA will fall on the young twice as heavily as on the old, on average. This cannot comport with fairness.

The ACA's disproportionate burden on the young is made clear by the premium age ratio limit of 3 to 1 (ACA, § 2701(a)(1)(A)(iii)). The young stand to pay a surcharge which will benefit not them but another, favored group:

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<sup>3</sup> Carla K. Johnson, "Health premiums could rise 17% for young adults" (March 29, 2010) <[http://news.yahoo.com/s/ap/20100330/ap\\_on\\_he\\_me/us\\_health\\_care\\_age\\_matters](http://news.yahoo.com/s/ap/20100330/ap_on_he_me/us_health_care_age_matters)>

Insurers typically charge six or seven times as much to older customers as to younger ones in states with no restrictions. The new law limits the ratio to 3-to-1, meaning a 50-year-old could be charged only three times as much as a 20-year-old.

See Johnson, *supra*.

Johnson predicts a 17% overcharge, and Chuck Bassett 35%.<sup>4</sup> These estimates underestimate the injustice, however. If the real costs of old are seven times those of young, and the new law limits premiums to three times those of the young, then a simple calculation, based on the idea that young and old generations are about the same size, yields this table:

	Young	Old	Total
Costs	1	7	8
Premiums	2	6	8

Therefore, under these assumptions, young people's premiums will be double what is fair, and 50% of what is forced out of relatively low-paid young people by compulsory insurance will go to subsidize the relatively wealthy older generation.

Even if we optimistically assume the younger generation is twice the size of the older generation (which is unrealistic in this age of falling birthrates),

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<sup>4</sup> Chuck Bassett, "Health Care Reform Overview" (May 6, 2010) <<http://afterthevote.com/wpcontent/uploads/2010/04/HC-Reform-Overview-BCBS-and-MSEC-May-2010.pdf>>

the assumption still yields higher costs for young than for old:

	Young	Young	Old	Total
Costs	1	1	7	9
Premiums	1.8	1.8	5.4	9

So, under the unrealistically optimistic assumption, young people are still subjected to a compulsory 80% overcharge, and 44% of their payments will go to subsidize the older generation.<sup>5</sup>

Backing the elder costs to six times those of the young (which is not consistent with the recent behavior of health costs, which always push the envelope especially for near-death care) yields a 60% to 75% overcharge according to the same two calculations. This is a heavy burden.

### **C. Likelihood Of Runaway Costs.**

United States health care costs are rising fast. They have gone from 16.2% of GDP in 2007<sup>6</sup> to 17.6%

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<sup>5</sup> The mathematical formula is: (number of young) x (cost per young) + (number of old) x (cost per old) = (number of young) x (young premium) + (number of old) x 3 x (young premium).

This remains valid if the intermediate age group pays equally to their cost.

<sup>6</sup> John C. Medaille, *Toward a Truly Free Market: A Distributist Perspective on the Role of Government, Taxes, Health Care, Deficits, and More 207* (ISI Books 2010).

of GDP in 2009 (well above projections of 17.3%).<sup>7</sup> This is about double the percent of a country that is comparable in technological advancement and age distribution (Britain, 8.4% in 2006).<sup>8</sup> The cause of this disparity is simple economics: two major instances of monopoly, drug patents and the AMA restriction on qualified medical practitioners. According to John Medaille:<sup>9</sup>

The market normally will provide the proper signals to producers telling them how much product to supply to the market and at what price. But monopoly destroys this mechanism; the monopolist may demand a share of whatever funds are supplied to a given market, and the more funds supplied, the higher the prices go without increasing the supply of the product. This is sufficient to explain why medical expenses consume an ever increasing share of the GDP without increasing the number of people covered. More funding means only higher prices, not more actual goods supplied.

The GDP percentage figures quoted above have actually been restrained by the increasing proportion of Americans going uninsured and avoiding medical

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<sup>7</sup> Department of Health and Human Services, “National Health Expenditure Data NHE Fact Sheet” (June 14, 2011), <[https://www.cms.gov.NationalHealthExpendData/25\\_NHE\\_Fact\\_sheet.asp](https://www.cms.gov.NationalHealthExpendData/25_NHE_Fact_sheet.asp)>

<sup>8</sup> Medaille at 207.

<sup>9</sup> *Id.* at 212.

care. The ACA does little to increase supply of medical goods, and nothing to alleviate the legal monopolies. It forces a large increase in the number of people covered. It forces the use of insurance, which adds agency costs, and introduces an indirect method of payment which reduces the effectiveness of the price mechanism. It is therefore predictable that the price surge, already visible as a percentage of GDP, will continue and grow worse. Though payment of a \$400 tax or fine is an alternative to the insurance requirement as the ACA is now written, the \$400 sum is akin to the “camel’s nose”; Congress could significantly boost this amount in future years, imposing an even heavier burden on taxpayers.

The result is a predictable and almost immediate funding shortfall, which cannot be leveraged away due to the well-known debt problems of the Federal Government. Thus it can be no defense of the individual mandate that the ACA offers rate limits and subsidies for the poorest, *e.g.*, ACA § 36B(b)(2). This is because, once the individual mandate is permitted, such details are subject to legislative change, and rates may rapidly be raised to or beyond the point of diminishing returns when Congress seeks money for deficit-cutting in the future – as it seemingly inevitably will.

#### **D. Irreparable Impact of These Costs on Marriage and Child-Rearing of Young Americans.**

The bad stewardship required by the ACA is compounded by the lack of a market mechanism to relieve the pressure. The move of people off medical insurance, and the lesser use of medical care, that have taken place since 2008 due to recession and high unemployment, were a market response that relieved the pressure. But this “safety valve” will become illegal in 2014, unless this Court acts to invalidate the individual mandate provision of the ACA.

Unemployment exacerbates the harm to the young threatened by the ACA. This is because unemployment is much higher among the young than among their elders.<sup>10</sup> A change that will worsen unemployment, especially unemployment in starting jobs, is therefore a disproportionate blow to the young. Most new employment is by small businesses. A heavy regulatory environment, such as is imposed by the two-thousand-page ACA, disproportionately affects small business. The surge in costs due to cutting off the “safety valve” will make accurate planning difficult, if not impossible.

Predictably, many small business owners will choose to work longer hours themselves rather than

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<sup>10</sup> Zachary Roth, “Reluctant slackers: economy leads young Americans to put adulthood on hold,” *The Lookout* (October 6, 2011) <<http://news.yahoo.com/blogs/lookout/reluctant-slackers-economy-leads-young-americans-put-adulthood-202742832.html>>

hire – thus worsening the ACA’s burden on young Americans.

Once youth unemployment has risen, there is no automatic tendency for an economic cycle to bring it down. As Egypt, Tunisia, Jamaica, Spain and many other countries have shown, it can remain at elevated rates, 20% to 40% or more, for years<sup>11</sup> and decades, reaching a neutrally stable state in which some actively participate in the economy while the rest are left behind.

The cumulative and foreseeable result of these economic probabilities is that the discrimination designed into the ACA will irreparably harm unfavored citizens. Those who do earn will suffer rapidly escalating compulsory insurance costs, just as they should be gaining the surplus that normally allows them to form families. How deeply this can cut is shown already by marriage rates, currently plummeting in the United States for economic reasons.<sup>12</sup> Forming families is the natural activity and joy of the young. It cannot be made good by a boon at age sixty. Missing it in youth means missing it forever.

The ACA places American young people in a vulnerable position. “Even three full-time minimum wage jobs doesn’t make enough to make ends meet

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<sup>11</sup> “Young, jobless, and looking for trouble,” *The Economist* (February 3, 2011) <[www.economist.com/blogs/schumpeter/2011/02/youth\\_unemployment](http://www.economist.com/blogs/schumpeter/2011/02/youth_unemployment)>

<sup>12</sup> Roth, *supra*.



[for a family of three] in San Diego County.” But “[i]n the last three years . . . health care costs went up 27 percent . . . according to the report.”<sup>13</sup> It is fair to conclude from the foregoing data that bypassing health care costs can bring normal family life within reach of many. But the ACA’s individual mandate will forbid that choice. Like buoyancy to a swimmer, the surplus destined for taking by the ACA’s individual mandate is critical to many young families.

The young couple, kept unemployed or prevented from accumulating a surplus by the heavy oppression of the individual mandate, who cannot found a family because of that – and hundreds of thousands or millions of young Americans will predictably be in this marginal class – is denied the chance to contribute to our country their children, our country’s future.

The ACA’s individual mandate will burden a disfavored class of United States citizens (the healthy but impecunious young) for no other purpose than to make a system work for favored classes – the elder generation, and the medical industries. The disfavored citizens are treated as unequals and instruments. The ACA, once effective, will force them to haul an unduly heavy burden. For many of them this will foreseeably damage their chances at one of the

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<sup>13</sup> City News Service, “Study: cost of self-sufficiency for family of three in San Diego up \$10K in 3 years” (October 4, 2011) <<http://www.cbs8.com/story/15615498/study-cost-of-self-sufficiency-for-family-of-three-in-san-diego-up-10K-in-3-years>>

fundamental rights protected by the Fifth Amendment – the right to marry and raise a family.

This Court should decide the important question of whether such damage runs afoul of the substantive due process guaranteed by the Fifth Amendment.



### **CONCLUSION**

Dr. Dickson asks that this Court grant him leave to file this brief and that it grant the petitions for *certiorari* now pending.

Respectfully submitted,

Dated: October 31, 2011

DAN LAWTON