



Written by [Joe Wolverton, II, J.D.](#) on April 13, 2011

## Missouri's Democratic AG Files Amicus Brief in States' Suit Against ObamaCare

This action by Chris Koster, a recent GOP defector, does not make the Show Me State a co-plaintiff in the complaint filed by several states (*State of Florida, et al. v. United States Department of Health and Human Services, et al.*) and currently under review by the U.S. Circuit Court of Appeals for the 11th Circuit, located in Atlanta, Georgia.



The brief submitted by Attorney General Koster urges the court to hold the individual mandate portion of the Patient Protection and Affordable Care Act (known as ObamaCare) unconstitutional.

The underlying suit argues that this particular provision, which mandates that all Americans, regardless of personal choice, purchase a qualifying healthcare insurance policy by 2014 or face tax penalties, is not a legitimate expression of the Constitution's Commerce Clause, as is averred by the Obama administration.

The brief supports its position on the individual mandate by stating:

It is the opinion of this office that the Congress reached beyond current Commerce Clause precedent when it regulated that individuals maintain "minimum essential [healthcare] coverage" or pay a penalty.

Koster invokes the *Federalist Papers* in his argument against the individual mandate's expansion of Congress' Commerce Clause power:

The Founding Fathers envisioned — and the people adopted — a federal government with limited, enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Alexander Hamilton wrote that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States." THE FEDERALIST NO. 32. [Emphasis in original.] James Madison also declared that federal authority extends "to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST NO. 39; see also THE FEDERALIST NO. 45 [James Madison] [reserving to the states power over "the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity"].

Later, Koster posits a question that is echoed by many opponents of the healthcare law:

If Congress can force activity under the Commerce Clause, then it could force individuals to receive vaccinations or annual check-ups, undergo mammogram or prostate exams, or maintain a specific body-mass.

And furthermore:



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Permitting Congress the power to force individual citizens to act under the Commerce Clause would allow a host of heretofore unauthorized incursions into areas of traditional state authority. In addition to immunizations or vaccinations, Congress could force compulsory education or require individual citizens to obtain long-term care insurance.

Despite the sound legal reasoning relied upon therein, Koster's "friend of the court" brief is unlikely to appease legislators in his state who have urged the state's top cop to enter the fray fully and join its sister states in one of the five lawsuits presently winding their way through the judicial process.

Evidence of the opposition of Missouri's people and their elected representatives to the year-old healthcare law is found in the [nullification](#) referendum that was voted for by nearly a three-to-one margin (71 percent).

Further proof is found in the non-binding resolutions passed by the state legislature recommending that Koster officially make himself a party to the suit.

In the text of the amicus brief, Attorney General Koster cited the legislature's vote, as well as the popular referendum as influential in his decision to file the document with the Court of Appeals.

On August 3, 2010, the people of the state of Missouri overwhelmingly passed, by referendum, "Proposition C." Mo.Rev.Stat. § 1.330. Proposition C was passed in response to the ACA and prohibits compelling "any person, employer, or health care provider to participate in any health care system." Id. § 1.330.1.

The ACA and Missouri state law are, therefore, in conflict.

On January 11, 2011, the Missouri House of Representatives adopted by a vote of 115 to 46 House Resolution No. 39, calling on the Office of the Missouri Attorney General to "[challenge] the constitutionality and validity of the Patient Protection and Affordable Care Act ... and to aggressively defend the validity of Proposition C...." On January 19, 2011, the Missouri Senate adopted by voice vote Senate Resolution No. 27, the language of which is nearly identical to House Resolution No. 39.

This office is sworn to uphold the Constitution and the laws of the state of Missouri, of which Proposition C is unquestionably a part. The resolutions passed by the General Assembly are non-binding on this office, but they are impactful, as they give voice to the political will of Missourians.

Many Missourians unqualifiedly opposed to the enactment and enforcement of the whole of the ObamaCare scheme may not be mollified by some of the language used by Koster in the brief. For example:

Our argument against the expansion of Congress' Commerce Clause authority is emphatically not based on any opposition to the expansion of health coverage for uninsured Americans. To the contrary, I favor the expansion of health coverage.

That caveat is not exactly illustrative of the bold refutation of the overreaching of the federal government that the concerned citizens of Missouri and many other sovereign states would make were they to hold the pen.

The floor leader of the Missouri House of Representatives, Tim Jones, described Koster's brief as "tepid." "He's waded into it the most gentle way he could and it would've been nice to see a more aggressive stance from him, but we're glad he's come to the party," the St. Louis Republican said.



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The *Kansas City Star* quotes Republican Lt. Governor Peter Kinder calling the filing “a day late and a dollar short” and not representative of the will of the citizens of Missouri.

Perhaps there is something to be learned about the diluted attack on ObamaCare in the Missouri amicus brief by a quick review of Chris Koster’s unusual political career.

Koster was elected to the state legislature as a Republican and switched to the Democratic Party just prior to announcing his candidacy for Attorney General. [The New York Times](#) reports that this change of allegiance earned the former Republican the nickname “Koster the Imposter.”

Rather than call for the outright invalidation of ObamaCare, Koster’s brief recommends that the court sever the offensive individual mandate provision from the rest of the legislation, presumably the sections Attorney General Koster considers to be acceptable and constitutional exercises of authority.

Despite Koster’s half-measures and personal political flexibility, the amicus brief will provide support for the plaintiffs, namely the Attorneys General of 26 states including those of Alabama, Alaska, Arizona, Colorado, Georgia, Indiana, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming — all of whom are Republican. (Buddy Caldwell of Louisiana left the Democratic Party and declared himself a Republican back in February.)

In spite of the brief’s languid attack on the healthcare behemoth, a section of the penultimate paragraph of the document succinctly sums of the issue, as far as it goes:

To now unleash the Commerce Clause, so as to grant Congress unlimited power over every aspect of our economic lives, from activities to inactivities, would be a substantial blow to federalism and personal freedom.

Photo of Chris Koster: AP Images



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