

Updated: February 18, 2011 - subject to additions

<http://www.ncsl.org/?tabid=18906>

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States have an extensive and complicated shared power relationship with the federal government in regulating various aspects of the health insurance market and in enacting health reforms.

In response to federal health reform legislation and enacted law, some members of at least 40 state legislatures proposed legislation to limit, alter or oppose selected state or federal actions, including single-payer provisions and mandates that would require purchase of insurance. In general most of the measures, in both 2009 and 2010:

- Focus on not permitting or not implementing or enforcing mandates (federal or state) that would require purchase of insurance by individuals or by employers and impose fines or penalties for those who fail to do so.
- Seek to keep in-state health insurance optional, and instead allow people to purchase any type of health services or coverage they may choose.
- Contradict, some would say challenge, some policy features contained in the new federal law.
- The language varies from state to state, often using provisions from Arizona, as cited below.

State-Based Actions: November 2010 - February 2011

Major court cases. These actions by executive branch officials and private parties are provided for information only. They are legally separate from state lawmaking but may affect state deliberations:

◆ Florida: Federal District Judge Roger Vinson ruled on January 31 to strike down the entire healthcare reform law, ruling that the requirement for individuals to purchase insurance is unconstitutional and is too central to making the law function. he said the whole law cannot stand because the law depends on the mandate to work. Twenty Six state Attorneys General had joined the case as January 18, 2011.

> February 18, 2011- Judge Vinson Replies to Administration's Request for Clarification on the Florida Decision Regarding the ACA - [Details below]

◆ Virginia's federal district court ruled December 13, 2010 that the individual mandate to purchase insurance is unconstitutional. In a 42-page opinion issued in Richmond, Va., Judge Henry Hudson wrote that the law's central requirement that most Americans obtain health insurance exceeds the regulatory authority granted to Congress under the Commerce Clause of the Constitution. The ruling does not by itself enjoin or halt any part of the federal law, pending rulings by higher courts. [Text of ruling | Case details, below]

◆ Michigan: In the first decision among more than 20 cases filed against the new law, a federal district judge in Detroit, Michigan dismissed one case and ruled in favor of the federal reform law; that decision

has been appealed and does not in itself alter the status of the law. [Read news summary of court action]

◆ Also in Virginia, a private party suit by Liberty University was rejected in another federal district court on November 30; the judge's 54 page ruling upheld the federal law. [read news article] Additional information and cases are in an appendix table at the back of this report.

2011 Proposed legislation: In the first weeks of new state sessions, so far, 9 states will consider constitutional amendments, 18 states have bills filed for proposed statutes and nine have advisory resolutions filed. (as of February 8, 2011) Details Coming soon in a new report.

November 2 ballot questions. With 45 state legislatures out of session, the focus of attention shifted to the three states with proposed constitutional ballot questions facing voters in Nov. 2, 2010, elections:

Arizona - passed by voters, 55.4% Yes to 44.7% No [results]

Colorado - rejected by voters, 53% No to 47% Yes. [article 11/3/10]

Oklahoma - passed by voters 64.73% Yes to 35.27% No [state results 11/3/10]

State constitutional amendments: In 30 of the states, the filed measures included a proposed constitutional amendment by ballot question. In a majority of these states, their constitution includes an additional hurdle for passage--requiring either a "supermajority" of 60 percent or 67 percent for passage, or requiring two affirmative votes in two separate years, such as 2010 and 2011.

Federal constitutional amendment: Idaho called for adding a U.S. 28th Amendment that Congress shall make no law requiring citizens of the United States to enroll in, participate in or secure health care insurance or to penalize any citizen who declines to purchase or participate in any health care insurance. This was adopted by both Senate and House on March 29, 2010. Florida adopted a non-binding resolution referencing a federal constitutional amendment process.

Changing state law: In at least 16 states, proposed bills aimed to amend state law, not the state constitution. These require a simple majority vote and action by the governor; they also can be re-amended or repealed by a future state law. So far in 2010, seven states have enacted such laws. Virginia became the first to enact a new statute section titled, " Health insurance coverage not required." It became law on March 10, 2010. Georgia, Idaho, Louisiana, Missouri, Utah and Arizona also each enacted similar statutes.

40 States with 2009-2010 Legislation Opposing Certain Health Reforms

NOTES: FLORIDA's proposed ballot question was removed from the ballot by the state court on August 31.

As of December 31, 2010 more than 115 formal resolutions or bills had been considered in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Additional states were reported in media or association articles to have discussed future action or intentions; examples are listed below.

New Laws: Seven states have signed or enacted statutes in 2010, based on final actions as of November, 2010:

- A Virginia law passed both Senate and House, was amended by the Governor and both branches of the legislature and became law as Chapter 106 on March 10, becoming the first such statute in the nation.\*
- Idaho enacted a similar statute, signed as Chapter 46 on March 17.
- A Utah statute, signed March 22, prohibits any state agency from implementing health reform unless state agencies recommend action or the legislature passes a provision.
- A Georgia statute addition was substituted during a conference committee and passed by Senate and House on the last day; it was signed into law by the governor on June 2.
- Louisiana enacted a statute, declaring that residents "shall be free from governmental intrusion in choosing or declining to choose" health coverage; signed July 2.
- Arizona enacted a separate statute, similar to their constitutional ballot question for November 2010. (Explained below)

Statute by Ballot Question approved in Missouri

- Missouri's Legislature passed a proposed statute, but required that it be put to voters for approval or disapproval on their primary election day, Tuesday August 3, 2010. It was approved by a 71.1 percent yes vote.

Constitutional Ballot Questions passed in two states:

- Arizona's resolution of June 2009 was the first constitutional ballot question measure to have passed the legislative process; it was approved by voters on November 2, 2010. (Also see statute, listed above).
- Oklahoma's constitutional amendment ballot question was approved by the Senate and House in May 2010; it was approved by voters on the November 2, 2010 ballot.

Question Rejected by Voters

Colorado: Although the legislature rejected a resolution on the topic, a citizen initiative proposed constitutional amendment was placed on the November 2, 2010 ballot; it was rejected .

#### Question Rejected by Court:

Florida's legislature was the second state to approve a constitutional amendment ballot question, on 4/22/10, for a decision by voters on Nov. 2, 2010. However, in late July a Florida District court ruled the question wording as inappropriate; on August 31 their State Supreme Court agreed that the question must be removed from the ballot.

#### Non-binding measures:

South Dakota passed a resolution opposing "government take-over" of health care. South Carolina adopted a resolution opposing health mandates and directing the attorney general to challenge such provisions in federal health reform. A Michigan Senate resolution urging removal of financial obligations passed in January 2010. Idaho called for adding a U.S. Constitutional Amendment to provide that Congress shall make no law requiring citizens of the United States to enroll in, participate in or secure health care insurance or to penalize any citizen who declines to purchase or participate in any health care insurance.

#### Measures That "Did Not Pass:"

For the 2009-2010 legislative sessions, 30 states have failed to pass or have rejected bills and resolutions (29 states in 2010, one in 2009)

For 2010 sessions, the states are: Alabama, Alaska, Arkansas, California, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, Wisconsin and Wyoming. A 2009 North Dakota constitutional proposal did not pass by the end of their session. If additional special sessions, reintroductions or reconsideration motions are filed, they will be added to this report.

An "interim study proposal" resolution was not acted on in Arkansas; in Indiana a resolution passed the Senate but did not pass the House. States with discussions but no known legislation are listed separately; information in the examples list below is based on media statements by individual legislators or legislative associations.[1]

Attorneys General in at least 21 individual states also have taken some actions related to constitutional challenges to health reform, listed below. In addition individual governors in 3-4 states have urged such legal challenges.

The issue has garnered state legislative interest in 2009-2010 in part due to the American Legislative Exchange Council's (ALEC) model "Freedom of Choice in Health Care Act," which the organization described as "How Your State Can Block Single-Payer and Protect Patients' Rights." The ALEC-endorsed language mirrors Arizona Proposition 101, which was narrowly defeated in 2008.

Legal experts have expressed widely varying pro and con opinions on the validity of this approach. [See Appendix 2 for commentary and quotes.]

Based on actions initially in Arizona in 2009, 29 other states considered proposed state constitutional amendments, using language such as:

"To preserve the freedom of all residents of the state to provide for their own health care... A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system ... A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services..."

B. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule"

[see full text in Appendix 1]

According to The New York Times, "Conservatives and libertarians, mostly, have been advancing the theory lately that the individual mandate, in which the government would compel everyone to buy insurance or pay a penalty, is unconstitutional." (NY Times, 9/26/09) Missouri votes: August 3, 2010

Photo: NY Times (c)

Table 1:

Filed Bills and Resolutions for 2009-2010

Table 1 indicates 1) Activity and status for measures filed;

2) the percentage of affirmative votes in the legislature required for approval;

3) the earliest date that a proposed constitutional amendment can appear on the statewide ballot.

Timing and parliamentary steps vary among states. The State Constitutional process:

In 35 states, the legislature can enact a proposed constitutional amendment during a single session.[Appendix 3] This would allow passed measures to appear on the state ballot in 2010 or later. In 12 states the legislature must enact a proposed constitutional amendment during two sessions, which would make 2012 the earliest date for voter decisions.

State Activity/Legislation Required for passage

Alabama HB 42 by Rep. Bentley; HB 47 by Rep. Gipson; HB 498 by Rep. Galliher; SB 233 by Sen. Beason.

Would propose a constitutional amendment to prohibit any person, employer, or health care provider from being compelled to participate in any health care system.

(HB 42 prefiled 11/5/09 for 2010 session; sent to Health Committee 1/12/10; did not pass by end of session 4/22/10

(SB 233 filed 1/13/10; Passed Senate, sent to House 4/1/10; did not pass by end of session 4/22/10  
60% both legislative chambers

+

2010 ballot vote

Alaska HJR 35 by Rep. Kelly filed for 2010 session

Would propose a state constitutional amendment prohibiting passage of laws that interfere with direct payments for health care services and the right to purchase health care insurance from a privately owned company, and that compel a person to participate in a health care system.

(Filed 1/19/10; favorable House committee reports 3/12/10; failed passage 22y-18n 4/15/10) 2/3rds  
both legislative chambers

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2010 ballot vote

HR 14 by Rep. Chenault

Would urge the United States Congress to oppose federal health care reform bills.

(Filed 2/17; re-referred to House Comm. 3/19/10; did not pass by end of session) Non-binding  
resolution; majority vote

Arizona

(2009)

Arizona

(2010) Resolution HCR 2014 of 2009 by Rep. Barto

Refers to the November 2010 ballot a proposed amendment to the State Constitution "which provides that no law or rule shall compel any person or employer to participate in any health care system, a person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for doing so, a health care provider may provide directly purchased lawful health care services; prohibits the terms or conditions of a health care system from imposing certain mandates or limitations." [full text in Appendix 1 below]

(Filed 1/16/09; passed House 6/11/09; passed Senate 6/22/09; passed by voters, 55.4% Yes to 44.7% No, on Nov. 2, 2010 ballot.) Also see 2008 ballot question history, below.

50% both legislative chambers

(Passed)

2010 ballot vote

SB 1001

Added by state statute the "public policy that every person in this state... may choose or decline to choose any mode of securing lawful health care services without penalty or threat of penalty." Also protects "any right of contract related to the provision of lawful health care services to any person or group". "A public official or an employee or agent of this state or any political subdivision of this state shall not act to impose, collect, enforce or effectuate any penalty in this state that violates the public policy prescribed in this section."

(Substituted by committee; Signed into law by governor as Chapter 1, 4/1/2010.)

HB 2443 by Rep. Burges

Would add by state statute the Health Care Freedom of Choice Act requiring Arizona to exercise its option to decline the public health care plan if authorized by the federal government.

(Filed and sent to committees 1/26/10; did not pass by end of session) Proposed statute:

majority both

legislative chambers

Arkansas      ISP 2009-204 by Rep. Glidewell (Interim Study Proposal for 2010 Fiscal Session)

Would add a state statute to "ensure freedom of choice in health care" for state residents; "to prevent involuntary enrollments in health care insurance programs" and providing that an "individual or an employer may make direct payment for lawful health care services and shall not be required to pay penalties or fines" for making direct payment for health services.

(Filed 12/17/09 for 2010 session; 2010 regular session ended without action on any language)

Proposed statute:

majority both

legislative chambers

California      SCA 29 by Sen. Strickland

Would propose a state constitutional amendment prohibiting the effectiveness or enforcement of a state or federal program that (1) requires individuals to obtain health care coverage, (2) requires health care service plans or health insurers to guarantee issue contracts and policies to all applicants, (3) requires employers to either provide health care coverage to their employees or pay a fee or tax to the state or the federal government in lieu thereof, (4) allows an entity created, operated, or subsidized by the government to compete with health care service plans and health insurers in the private sector, or (5) creates a single-payer health care system, unless the program is approved by the electorate by ballot measure.

(Filed 2/19/10; did not pass Senate Comm. 3y-6n, 5/5/10)      2/3rds both legislative chambers

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2010 ballot vote

Colorado      HJR 10-1009 by Rep Acree

Resolution stating the intent of the General Assembly, to "Reserve the opportunity and ability of the State of Colorado and its citizens, under the state's and the people's Tenth Amendment rights, to opt out of any obligations due or participation required in any new federal health care legislation.

(Filed 2/5/10; Judiciary Comm. did not pass -postponed indefinitely 3/11/10)      50% both legislative chambers

### Ballot Amendment 63

A separate citizen initiative petition was circulated in summer 2010 and certified by the Secretary of State to appear on the November 2, 2010 ballot.

It stated: "(1) All persons shall have the right to health care choice, no statute, regulation, resolution, or policy adopted or enforced by the state of Colorado, its departments and agencies, independently or at

the instance of the United States shall: (a) require any person directly or indirectly to participate in any public or private health insurance plan, health coverage plan, health benefit plan, or similar plan; or (b) deny, restrict, or penalize the right or ability of any person to make or receive direct payments for lawful health care services.”

(Requires a majority vote on the statewide ballot; rejected by voters November 2, 2010, by 53% No to 47% Yes) [article 11/3/10]

(News articles: Ballot amendment 63 "Two sides of the debate" > Vote "YES - Stand up to D.C." versus Vote "NO - It won't hold down health costs"

No legislative role; requires 2010 ballot vote

Delaware

(2010) HB 353 by Rep. Hudson

Would add a state statute providing the following:

"The people of Delaware have the right to enter into private contracts with health care providers for health care services and to purchase private health care coverage. The United States Congress may not require any person to participate in any health care system or plan, nor may it impose a penalty, fine, tax, surcharge, or fee of any type for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan. Only the State of Delaware has the legal authority to regulate private health care insurance, systems, plans, and services for the people of Delaware within its borders."

(Filed 3/30/10; held in House Administration Comm.; did not pass by end of regular session 6/30/10; may be considered in special session)

HCR 28 by Rep. Hudson

A non-binding resolution, stating opposition to the passed federal health reform; maintaining that the federal government does not have the authority to impose a federal healthcare program and urges the U.S. Congress to pursue less costly and more viable alternatives to reduce the cost of healthcare and increase its availability. Also states that "should the 111th Congress decide to enact a federal healthcare entitlement, it would urge Delaware's Congressional delegation to advocate for a provision that would require states to choose to "opt-in" to the program.

(Filed and sent to committee 3/18/10; no action; held in committee; did not pass by end of regular session 6/30/10; may be considered in special session) State statute; 50% majority vote

Non-binding resolution;

50% majority vote

Florida HJR 37 (Joint Resolutions filed for 2010) by Rep. Plakon; 39 co-sponsors;

SJR 72 by Sen Baker.

Joint resolutions propose a State Constitutional amendment to prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system; permits person or employer to purchase lawful health care services directly from health care provider, and permits health care providers to accept direct payment from a person or employer for lawful health care services.

(HJR 37 prefiled 7/27/2009 for 2010 session; substituted; passed House; passed Senate; enrolled; 4/22/10; was directed to appear on the November 2, 2010 state ballot for voter approval or disapproval) This ballot question, Amendment 9, was ordered removed from the ballot by the Florida District Court in late July; on August 31 the Florida State Supreme Court agreed and orderd that the question wording was inappropriate and must be removed from the ballot. [text of court ruling, No. SC10-1527] [Article by AP, 9/1/10]

(SJR 72 prefiled 10/5/09; favorable comm. report 3/4/10 substituted by HJR 37 above)

News update: "Fla. Const. amendment, round 2 in 2011?" - published 11/24/10)

NOTE: SB 10 separately calls for a United States Constitutional Convention to address various matters related to a balanced Federal Budget, including health care expenditure requirements.

(Passed Senate and House; enrolled and signed, 5/5/10) 60% both legislative chambers

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2010 ballot vote

Georgia

Georgia            2010 resolutions: HR 1086 by Rep. Calvin Hill; HR 1107 by Rep. Mills;

SR 794 by Sen. Hill; SR 795 by Sen. Harp.

Would propose an amendment to the Constitution so as to provide that no law or rule or regulation shall compel any person, employer, or health care provider to participate in any health care system and to authorize persons and employers to pay directly for lawful health care services without penalties or fines; would provide for submission of the amendment for ratification or rejection.

SR 795 would provide that residents would not be subject to penalties or fine for not having health insurance.

(Prefiled 11/23/09 for 2010 session; HR 1086 favorable report 3/11/10; did not pass House 3rd Reading 111y-61n-3nv, 3/18/10; motion to reconsider vote granted 110y-58n-6nv, 3/24/10) 2/3rd affirmative vote required; did not pass by end of session 4/29/10)

SR 795 favorable report by Senate Judiciary 2/2/10; did not pass by end of session 4/29/10)SR 794 did not pass Senate 3rd reading 31y-19n, 3/18/10) 2/3rds both legislative chambers

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2010 ballot vote

SB 317 by Sen. Hill

Would establish by statute that "no law or rule or regulation shall compel any person, employer, or health care provider to participate in any health care system;" to authorize persons and employers to pay directly for lawful health care services without penalties or fines.

(SB 317 filed 1/25/10; favorable Comm. report 2/10/10; passed Senate 31y-16n; did not pass by end of session 4/29/10))

SB 411 with amendment 37-1032S by Sen. Hill

Wellness discounts bill; amended, inserting similar language from SB 317 by Sen. Judson Hill.

Establishes by statute that "no law or rule or regulation shall compel any person, employer, or health care provider to participate in any health care system;" to authorize persons and employers to pay directly for lawful health care services without penalties or fines. The intent is that state residents would not be forced to comply with the mandates in the federal health care reform law.

(House amendment, added and passed 4/27/10; 4/29/10 (AM21-3736) passed Senate 4/29/10; signed into law by governor 6/2/10) [Bill history]

SR 829 and SR 830 by Sen. Hill. (Substituted and approved by conference committee;

Resolutions would direct the Attorney General to "initiate a formal investigation into the constitutionality of the special exemption set forth in the United States Senate's version of this national health care legislation and explore the availability of all other legal challenges.

(Filed 1/15/10; Senate 2nd reading 2/11/10; did not pass by end of session 4/29/10) Statute:

majority both

legislative chambers

Resolutions; majority vote

Idaho HB 391 by State Affairs Comm.

Amend and add to existing law to establish the Idaho Health Freedom Act, stating in part, "that every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty."

(Filed 1/19/10; passed House 52y-8n, 2/9/10; amended; passed Senate 24y-10n & enrolled, 3/12/10; signed into law by governor as Session Law Chapter 46, 3/17/10) Statute:

majority both

legislative chambers

SJM 106 by State Affairs Committee

Non-binding memorial stating findings of the Legislature urging Congress to take action to amend the United States Constitution to provide that "Congress shall make no law requiring citizens of the United States to enroll in, participate in or secure health care insurance or to penalize any citizen who declines to purchase or participate in any health care insurance program."

(Filed 3/26/10; passed Senate and House 3/29/10) Memorial to Congress

Illinois

(2010) H 6842 by Rep. Mitchell

Would provide by statute that no resident of the State, regardless of whether he has or is eligible for health insurance coverage shall be required to obtain or maintain individual insurance except as required by a court or a State agency

(Filed and sent to committee 3/26/10; pending; held in Rules Comm. as of 1/3/2011) Statute:

majority both

legislative chambers

HR 1074 by Rep. Bellock

Would request that the IL Commission on Government Forecasting and Accountability examine the provisions of the federal health care reform law to determine the fiscal impact of the provisions on the budget of the State.

(Filed and sent to Rules Committee, 3/26/10; placed on calendar 4/28; held in Rules Comm. as of 1/3/2011) Non-binding

resolutions

HR 1075 by Rep. Bellock

Would urge the IL Attorney General to take steps necessary to file a suit challenging the constitutionality of the federal Patient Protection Affordable Care Act.

(Filed and sent to Rules Committee, 3/26/10; pending; held in Rules Comm. as of 1/3/2011))

Indiana

(2009)

Indiana

(2010) SJR 65 by Sen. Waltz; SJR 91 by Sen. Waltz; SJR 111 by Sen. Waltz (Advisory resolutions for 2009)

SJR 91: Resolved, "That the Indiana General Assembly must ensure that all residents of Indiana may enter into private contracts with health care providers for health care services and may purchase private coverage for health care services. That the Indiana General Assembly should not require an individual to participate in a health care system or plan or impose on an individual a penalty or fine of any type for choosing to obtain or decline coverage for health care services or participating in a particular health care system or plan."

(SR 65 - filed 4/7/09 - did not pass by end of session; SR 91 - filed 4/27/09 - did not pass by end of session; SR 111 - filed 4/28/09 - did not pass by end of session; Indiana does not carry over bills or resolutions to 2010) Non-binding

resolutions

SJR 14 by Sen. Krause, HJR 6 by Rep. Noe; HJR 8 by Rep. Turner; also non binding resolution SCR 10

Would propose a state constitutional amendment stating, "A person, an employer, or a health care provider shall not be compelled, directly or indirectly, to participate in any health care system. A person or an employer may pay directly for lawful health care services and shall not be subject to penalties or fines for paying directly for lawful health care services. A health care provider may receive direct payment for health care services from a person or an employer and shall not be subject to penalties or fines for accepting direct payment from a person or an employer."

SCR10 - nonbinding resolution passed Senate 2/1/10; did not pass House Committee)

(Filed 1/11/10; did not pass by end of regular session deadline 3/3/10) 50% both legislative chambers

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2012 ballot vote

Iowa HJR 2007 by Rep. Upmeyer

Would propose a state constitutional amendment prohibiting passage of laws that interfere with direct payments for health care services and the right to purchase health care insurance from a privately owned company, and that compel a person to participate in a health care system.

(Filed 1/26/10; did not pass by end of session 4/12/10) 50% both legislative chambers

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2012 ballot vote

HF 2117 by Rep. Sorensen; HF 2214 by Rep. Upmeyer; S 2139 by Sen. Zaun

Would establish by statute that the people of Iowa have the right to enter into contracts with health care providers for health care services and to purchase private health care coverage. In addition, the general assembly cannot require any person to participate in any health care system or plan, or impose any type of penalty or fine on any person for choosing to obtain or declining to obtain health care coverage or for participating or declining to participate in any particular health care system or plan.

(Filed 1/26/10; HF 2214 motion to expedite failed 44y-53n, 2/12/10; did not pass by end of session 4/12/10) Proposed statute:

majority both

legislative chambers

Kansas HCR 5032 by Rep. Landwehr; SCR 1626 by Sen. Pilcher-Cook

Would propose a state constitutional amendment providing that 1) "A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system or purchase health insurance. "2) A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services."

(Filed & sent to committees 2/2/10, 2/17/10: HCR 5032 did not pass House 74y-47n by required 2/3rds vote, 3/24/10; SCR 1626 withdrawn from and returned to Judiciary committee, 2/17/10) [staff analysis]

2/3rds both legislative chambers

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2010 ballot vote

Kentucky HB 307 by Rep Moore

Would prohibit by statute any other law "from requiring any individual to participate in any health care system or plan, or to impose a penalty or fine regarding participation; permit an individual or an employer to pay directly for health care services and a health care provider to accept direct payment without penalties or fines. Also would prohibit the state executive branch from "participating in or complying with any federal law, regulation, or policy that would compromise the freedom of choice in the health care."

(Filed 1/21/10; sent to Banking & Insurance Comm. 1/26/10; discharge from committee petition filed 3/24/10; did not pass by end of session 4/15/10) Proposed statute:

majority both

legislative chambers

Louisiana

Louisiana HB 1474 by Rep. Talbot

Prohibits by state statute any state resident from being required to purchase health insurance coverage; provides that it is a declared public policy of the state that every person within the state is and shall be free from governmental intrusion in choosing or declining to choose any mode of security health insurance coverage without a penalty or threat of penalty.

(filed 5/6/10; signed into law by governor as Act 952, 7/2/10)

SB 26 by Sen. Crowe

Would prohibit by statute any other law requiring a "person, employer, health care provider to participate" in a health system or insurance system; also would prohibit compelling participation in any health care system or health insurance plan. Would establish a misdemeanor offense and penalty (\$500 or five day in prison) for any state or local official who "attempts to coerce any individual to purchase health insurance."

(Filed and sent to Sen. Health and Welfare 3/5/10; did not pass by end of session) 5A

Proposed statute:

majority both

legislative chambers

HB 94 by Rep. Talbot

Would propose a state constitutional amendment to prohibit laws or rules that would compel "any person, employer, or health care provider to participate in any health care system"; would allow the direct payment of health care services; also such persons, employers or providers would "not be required to pay penalties or fines" for buying or selling health services.

(Prefiled 3/4/10; House ordered to 3rd reading; did not pass by end of session) 2/3rds both legislative chambers

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2010 ballot vote

Maryland HB 603 by Rep. Shenk; SB 397 by Sen. Pipkin

Would propose a state constitutional amendment limiting the regulation of health care in the state; prohibiting a law from compelling residents to participate in any health care system; prohibiting residents from being required to pay penalties or fines for not participating in health insurance; specifying that the purchase or sale of specified health insurance may not be prohibited by law; authorizing residents to pay directly or accept direct payment for specified health care services.

(Filed 1/29/10; HB 603 unfavorable report, did not pass Health & Govt. Op. Committee, 3/26/10) (SB 397 did not pass Comm. 3/29/10) 60% both legislative chambers

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2010 ballot vote

HB 1563 by Rep. Dwyer

Would provide by statute any other law requiring a "person, employer, health care provider to participate" in a health system or insurance system;; a person has the right to choose to participate in a private health insurance system or plan; establishes that, notwithstanding specified provisions of law and subject to a specified exception, a person has the right to pay for lawful medical services without interference and a penalty, tax, fee, or fine may not be imposed on a person who declines to contract for health insurance coverage.

(Filed and sent to committee 3/21/10; did not pass by end of session 4/20/10) Proposed statute:

majority both

legislative chambers

Michigan SJR K of 2009 by Sen. Kuipers; HJR CC by Rep. Calley; HJR Z of 2009 by Rep. Amash

Would propose a state constitutional amendment "to affirm the right to independent health care."  
Includes a statement that "a person or employer shall not be required to pay penalties or fines for paying directly for lawful health care services.

(Filed 8/1/9/09, 8/29/09 and 9/9/09; pending in Committee on Health Policy; no floor vote in 2009; carried over to 2010) SJR K 2nd Reading and committee substituted; failed to pass 3rd Reading; reconsidered 3/16/10; no further actions as of 5/21/10) 2/3 both legislative chambers

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2010 ballot vote

Minnesota HF 171 by Rep. Emmer, S 325 by Sen. Koch, S 1282 by Sen. Hann

Would propose an amendment to the Minnesota Constitution stating that "no law shall be passed that restricts a person's freedom of choice of private health care systems or private health plans of any type. No law shall interfere with a person's or entity's right to pay directly for lawful medical services, nor shall any law impose a penalty or fine, of any type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or health plan."

(Filed 1/22/09, 3/9/09; did not pass committee by end of 2009 session; did not pass committees by end of 2010 session 5/17/10)

Executive Order 10-12: In an action unrelated to the legislature "Governor Pawlenty signed an Executive Order "Directing State Agencies to Decline All Discretionary Participation" in Federal health reform – 8/31/2010.

50% both legislative chambers

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2010 ballot vote

Mississippi HCR 17 by Rep. Monsour; SCR 562 by Sen. Nunnelee

Resolution, would propose a constitutional amendment to prohibit laws compelling any person, employer or health care provider to participate in any health care plan. Would provide that a "person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly."

(Filed; sent to Committee on Constitution 1/7/10; HCR 17 and SCR 562 died in committee 2/2/10)  
2/3 both legislative chambers

+

2010 ballot vote

Missouri HJR 48 by Rep. Davis; HJR 50 by Rep. Ervin; HJR 57 by Rep. Jones Ti;

SJR 25 by Sen. Cunningham;

Joint resolutions, would propose a constitutional amendment which would prohibit compelling a person to participate in any health care system. "Upon voter approval, this proposed constitutional amendment prohibits any person, employer, or health care provider from being compelled to participate in any health care system. Individuals and employers may pay directly for lawful health care services, and health care providers can accept payment for health care services from individuals or employers without being subject to fines or penalties. The purchase or sale of health insurance in private health care systems cannot be prohibited by law or rule. Committee substitute added definitions

(Prefiled 1/6/10 for 2010 session; HJR 48 House resolutions combined & passed House 109y-46n, 3/16/10; pending in Senate 5/12/10)

( SJR 25 substituted; favorable comm. report 3/16/10); session adjourned 5/25/10 without further action) 50% both legislative chambers

+

2010 ballot vote

HB 1764 by Sen. Cunningham [final full text]

Proposed state insurance statute amendment to prohibit "any person, employer, or health care provider from being compelled to participate in any health care system. Individuals and employers may pay directly for lawful health care services, and health care providers can accept payment for health care services from individuals or employers without being subject to fines or penalties.

The summary for voters reads, "Shall the Missouri Statutes be amended to: Deny the government authority to penalize citizens for refusing to purchase private health insurance or infringe upon the right to offer or accept direct payment for lawful healthcare services?"

(Senate substituted language prohibiting "compelling" participation in health insurance. Passed Senate 26y-8n, 5/4/10; passed House 5/11/10, 5/11/10; approved on August 3, 2010 primary election ballot by voters, 71.1% yes) [Vote Results Here](#)

> Legislative News release 5/11/10.

> With Prop C, Missouri voters will be first in nation to weigh in on health-care reform. Includes NCSL material. - St. Louis Beacon - July 28, 2010

State Statute placed on voter ballot for approval in August 2010.

Nebraska LR 289CA by Sen. McCoy

Proposed constitutional amendment stating "no law shall be passed that: (1) Restricts a person's freedom of choice of private health care systems or private health plans of any type; (2) Interferes with a person's or an entity's right to pay directly for lawful medical services; or (3) Imposes a penalty or fine of any type for choosing to obtain or decline health care coverage."

(Filed 1/13/10; postponed indefinitely; did not pass by end of session 4/14/10) 60% both legislative chambers

+

2010 ballot vote

New Hampshire CACR 30 of 2010 by Rep. Renzullo

Would propose a state constitutional amendment to establish a right stating, "People may enter into private contracts with health care providers for health care services and to purchase health care coverage." Also would prohibit the state legislature from requiring health insurance or imposing any fine or penalty for not having coverage.

(Filed 1/6/10; did not pass as "inexpedient to legislate" 2/3/10) 60% both legislative chambers

+

2010 ballot vote with 2/3rds popular vote

Also see Financing category below

--

New Jersey ACR 109 by Assemblymember Mchose; SCR 81 by Sen. Doherty

Would propose a state constitutional amendment to prohibit state or federal law or regulation from compelling a person to obtain, provide, or participate in health care coverage.

(New Jersey 's constitution requires a three-fifths vote in each chamber at one session [2010], or majority vote in each chamber for two successive sessions [for 2012])

(ACR 109: Filed 2/25/10; held in in commerce committee as of 1/3/2011)

(SCR 81: Filed 2/25/10; held in health and human services committee as of 1/3/2011) Both legislative chambers

+

ballot vote

(see note)

New Mexico

(2009)

New Mexico

(2010) SJR 1 of 2009 by Sen. Sharer/ HJR 10 of 2009 by Rep. Gardner

Proposed constitutional amendment stating, "No law shall be enacted that: A. restricts a person's freedom of choice of a private health care system or plan; B. interferes with a person's right to pay directly for lawful medical services; or C. imposes a penalty or fine of any type on a person for choosing to obtain or to decline health care coverage or for participation in a particular health care system or plan." | Fiscal Impact Report

(SJR 1 filed 1/21/09; HJR 10 filed 1/28/09; failed to pass by end of session; no carryover) 50% both legislative chambers

+

2010 ballot vote

HJR 5 by Rep. Gardner; SJR 2 by Sen. Sharer

Proposed constitutional amendment stating, "No law shall be enacted that: A. restricts a person's freedom of choice of a private health care system or plan; B. interferes with a person's right to pay directly for lawful medical services; or C. imposes a penalty or fine of any type on a person for choosing to obtain or to decline health care coverage or for participation in a particular health care system or plan."

(Filed 1/20/10; failed to pass by end of regular session 2/10)

North Carolina HJR 1674 by Rep. Stam; SJR 1134 by Sen. Clary

Proposed Joint Resolution Authorizing the 2009 General Assembly to Consider a Bill To Be Entitled An Act To Protect The Freedom to Choose Health Care And Health Insurance.

(Filed 5/17/10; Did not pass by end of 2010 session) Proposed bill, majority vote required

SB 1157 by Sen. Forrester

Proposed constitutional amendment stating, "A law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system. (b) A person or

employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services."

(Filed 5/17/10; Did not pass by end of 2010 session) 50% both legislative chambers

+

2010 ballot vote

North Dakota HCR 3010 by Rep. Kasper (Joint Resolution), a proposed 2010 constitutional amendment based on Arizona language.

Would propose an amendment to the State Constitution; relates to freedom of choice in health care; prohibits laws that restrict an individual's choice of private health care systems or private plans, interfere with a person's right to pay for lawful medical services, or impose a penalty or fine for choosing to obtain or decline health care coverage or for participation in any health care system or plan."

(Filed 1/14/09, failed to pass House 3/4/09 by end of 2009 session; no regular session in 2010) 50% both legislative chambers

+

future year ballot

vote

Ohio SJR 2 of 2009 by Sen. Coughlin; SJR 7 by Sen. Grendell; HJR 3 by Rep. Maag

Joint resolutions for a proposed constitutional amendment to state, " The people of Ohio have the right to enter into contracts with health care providers ... and to purchase private health care coverage" Would prohibit state laws requiring coverage or imposing fines. For "obtaining or declining" coverage.

(SJR 2 filed 2/24/09; held in Senate committee; did not pass by end of session1/4/11)

(SJR 7 filed 9/29/09; held in Senate Insurance & Commerce Comm. as of 1/3/2011)

(HJR 3 filed 8/26/09; sent to Insurance Comm. 9/15/09; carried over to 2010; held in comm. as of 1/3/2011) 60% both legislative chambers

+

2010 ballot vote

HB 489; SB 244

Would prohibit requiring an individual to obtain or maintain a policy of health insurance.

(Filed 4/14/10; pending;' held in original comm. as of 1/3/2011) Proposed statute:

majority both

legislative chambers

Oklahoma HJR 1054 by Rep. Ritze; SJR 56 ; SJR 59 by Sen. Newberry

Joint resolution for a proposed constitutional amendment stating, "A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system; and A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines" for lack of insurance.

HJR 1054 was amended by conference committee: it would enact a statute instead of a constitutional amendment. Also directs the state Attorney General to file a lawsuit against the federal government to prevent legislation regarding federal health insurance;

(HJR 1054 filed 12/22/09; passed House 77y-10n, 3/11/10; enacting clause stricken, which nullified effect of the resolution; passed Senate 36y-11n, 3/23/10 ; Statute version favorable conference committee report, 4/19/10; approved by House 4/28/10; approved by Senate 4/29/10; vetoed by governor; veto overridden by House 5/18/10; veto override did not pass in Senate, 5/21/10)

SCR 64 by Sen. President Pro Tempore Coffee and House Speaker Bengel

Non-binding resolution authorizing legislative leaders to "employ legal counsel to file a lawsuit against the United States Congress, the President of the United States of America, and the Secretary of the United States Department of Health and Human Services to prevent the provisions" of federal health care from taking effect.

(Adoped by Senate by 29y-17n; adopted by House by 63y-19n; certified as passed)

(SJR 59 Conference Comm. report for a separate 2010 constitutional amendment ballot question approved by Senate by 30y-13n, 5/5/10; approved by House by 88y-9n and sent to Secretary of State 5/26/10; will appear on the November 2, 2010 ballot as Question #756)

Oklahoma article: Question 756: Voters will have health care 'opt out' amendment in November - 9/8/2010

50% both legislative chambers

+

2010 ballot vote

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HJR 1054

majority both

legislative chambers

SJR 58 by Sen. Coffee

Petitions the federal government to opt-out of certain mandates; and for certain waivers and block grants.

(Filed 2/1/10; passed Senate 35y-11n, 2/22/10; did not pass by end of session 5/28/10)

SJR 64

Directs the Attorney General to file a lawsuit against the federal government to prevent legislation regarding federal health insurance; directs distribution.

(Filed 2/1/10; passed Senate 29y-16n, 2/24/10; did not pass by end of session 5/28/10) Non-binding resolutions

Pennsylvania HB 2053 by Rep. Baker

Proposed statute "providing for the rights of individuals to purchase private health care insurance and prohibiting certain governmental action." States, "The people shall have the right to enter into private contracts with health care providers for health care services and to purchase private health care coverage. The legislature may not require any individual to participate in any health care system or plan, nor may it impose a penalty or fine, of any type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan."

(Filed and sent to Insurance Committee, 10/21/09; no floor vote in 2009; carried over; did not pass by end of 2010 session) Proposed statute:

majority both

legislative chambers

Rhode Island S 2544 and S 2747 by Sen. Blais

Would provide that no law would restrict a person's ability to contract with, pay for, and/or otherwise select a private health care system or private plan of that person's choosing; would take effect upon passage.

(Filed and sent to committee 2/11/10; committee "held for further study"; did not pass by end of 2010 session 4/28/10) Proposed statute:

majority both

legislative chambers

South Carolina HJR 4181 by Rep. Scott; HJR 4240 by Rep. Duncan; HJR 4602 by Rep. Viers; SJR 980 by Sen. Bright; SJR 1010 by Sen. Rose.

Resolution for a proposed constitutional amendment, "prohibiting any law, regulation, or rule to compel an individual, employer, or health care provider to participate in a health care system, by allowing individuals and employers to pay directly for lawful health care services without penalties or fines for these direct payments, by providing that the purchase or sale of health insurance in private health care systems must not be prohibited by law, regulation, or rule."

The resolution title states, "... to preempt any federal law or rule that restricts a person's choice of private health care providers or the right to pay for medical services."

(HJR 4181 filed for 2010 session; sent to Committee on Labor, Commerce and Industry, 11/17/09; held/pending 5/31/10; session adjourned without further action 6/3/10; state wide session to be held 6/15/10)

(SJR 980 and SJR 1010 filed; sent to Senate Judiciary Committee 1/12/10; favorable report 3/30/10; session adjourned without further action 6/3/10; state wide session to be held 6/15/10)

SB 987 by Sen Rose.

By statute would provide that citizens "have right to enter into private contracts with health care providers for health care services and to purchase private health care coverage. The General Assembly may not require a person to participate in any health care system or plan and may not impose a penalty or fine, of any type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan."

(Favorable Senate Judiciary Committee report 3/31/10; held/pending 5/31/10; session adjourned without further action 6/3/10; state wide session to be held 6/15/10) 50% both legislative chambers

+

2012 ballot vote

Proposed statute:

majority both legislative chambers

SCR 424 by Sen. Bright

Senate concurrent resolution referencing state sovereignty under 9th and 10th Amendments. Resolves "that it is the policy of the State" that "no law shall interfere with the right of a person to be treated by or receive services from a health care provider of that person's choice; no law shall restrict a person's freedom of choice of private health care systems or private health care plans of any type; no law shall interfere with a person's or an entity's right to pay directly for lawful medical services; and no law shall impose a tax, penalty, or fine, of any type, for choosing a health care provider."

States that "the Attorney General will challenge constitutionality of any provision adopted by U.S. Congress" that violates these policies; also "no state agency, agent, department, instrumentality, or subdivision shall cooperate or participate in any way with any mandate passed by U.S. Congress" if a court challenge is filed.

(Adopted by Senate and House with amendments, 3/9/10) resolution; majority vote; no signature needed

South Dakota HJR 1001 by Rep. Jensen

Resolution for a proposed constitutional amendment, stating "The Legislature may not enact a law that restricts an individual's freedom of choice of private health care systems or private plans of any type; a law that interferes with a person's right to pay directly for lawful medical services; or a law that imposes a penalty or fine of any type for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan."

(Filed 1/28/10; sent to committees 2/10/10; did not pass committee "deferred " past end of session, 2/18/10) 50% both legislative chambers

+

2010 ballot vote

SCR 1 by Sen. Brown

Would oppose "the government takeover of health care as currently proposed by Congress" and encouraging preservation of states' rights regarding health care regulation, urging "not to adopt either measure or institute new federal review, oversight, or preemption of state health insurance laws."

(Filed 1/28/10; passed Senate 22y-10n, 2/1/10; passed House 44y-24n, 2/3/10) Non-binding resolution

Tennessee SB 2490 by Sen. Black; SB 2560 by Sen. Black; SB 3498 by Sen. Beavers; HB 2622 by Rep. Lynn; HB 2654; HB 3433 by Rep. Bell

Would amend state law by adding a "Tennessee Freedom of Choice in Health Care Act."

(SB 2560, HB 2622 assigned to committees, 2/22/10, 3/17/10; ; did not pass by end of session 6/10))

SB 3498 passed Senate engrossed, 29Y-1n, 2/22/10; did not pass House by end of session 6/10)

Proposed statute:

majority both legislative chambers

HJR 0745 by Rep. Lynn

Resolution for a proposed constitutional amendment, stating - Prohibits laws or rules that would compel any person, employer, or health care provider to participate in any health care system.

(Filed 1/21/10; sent to committees, 2/22/10; held; did not pass House by end of session 6/10) 50%  
both legislative chambers

+

2012 ballot vote

SJR 897 by Sen. Ramsey

Would request that the TN Attorney General join other States in contesting the implementation of the federal health care legislation that was signed into law on March 23, 2010.

(Filed 3/25; adopted in Senate 21y-8n, 4/12/10; ; did not pass House by end of session 6/10) Non-binding resolution

Utah H 67 for 2010 session by Rep. Wimmer

Amends statute provisions related to the state's strategic plan for health system reform to respond to federal reform efforts; prohibits a state agency or department from implementing any provision of the federal health care reform without first reporting to the Legislature: 1) whether the federal act compels the state to adopt the particular federal provision; 2) consequences to the state if the state refuses to adopt the particular federal provision; and 3) impact to the citizens of the state if reform efforts are implemented or not implemented; 4) would require any agency of the state not to implement any part of federal health care reform passed by the US Congress after March 1, 2010, unless the department or agency reports to the Legislature and the Legislature passes legislation "specifically authorizing the state's compliance or participation in, federal health care reform."

(Passed House amended , 53y-20n, 2/11/10; passed Senate 22y-7n; signed into law by governor 3/23/10) News articles 4, 7

Statute:

majority both legislative chambers

HCR 8 by Rep. Clark

Urges Congress to refuse to pass any health care legislation that contains certain provisions, urges Congress to pass health care legislation with specific provisions, and urges Congress, should it pass health reform legislation that further restricts states, to grandfather certain state laws, regulations, and practices.

(Filed 1/25/10; signed into law by governor, 3/22/10)

HJR 11 by Rep. Morley

Urges the United States Congress to refrain from passing certain federal health insurance reforms.

(Filed 1/25/10; Passed House 51y-21n, 2/8/10; passed Senate 18y-8n, 2/18/10) Non-binding resolution

Virginia

HJ 7 by Del. Marshall

Resolution for a proposed constitutional amendment, to protect "an individual's right and power to participate or to decline to participate in a health care system or plan; prohibiting any law that will infringe on an individual's right to pay for lawful medical services and prohibiting the adoption of any law that imposes a penalty, tax, or fine upon an individual who declines to enter into a contract for health care coverage or to participate in a health care system or plan.

(Filed for 2010 and sent to committee 12/9/09; did not pass) [Also see bills below] 50% both legislative chambers

+

2012 ballot vote

SB 283 by Sen. Quayle; SB 311 by Sen. Martin; SB 417 by Sen. Holtzman Vogel, HB 10 by Del. Marshall.

Amends state law by adding a section, "Health insurance coverage not required. No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or

the federal government, shall be required to obtain or maintain a policy of individual insurance coverage. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage." It does not apply to Medicaid and CHIP coverage.

(Filed for 2010 session 1/13/10; SB 283, SB 311 and SB 417 passed Senate 23y-17n, 2/1/10; passed House 67y-29n, 2/12/10; sent to governor; amended and repassed Senate 3/4/10; repassed House ; became law 3/10/10)

\* Under Virginia law, the Governor exercised his option to return the bill to the legislature with a formal recommended amendment. Both branches of the legislature voted to accept the Governor's recommendation, at which point the bills became law without requiring the Governor's signature.

[news articles: VA 2/10/2010; Boston Globe 3/8/2010]

Statute:

majority both legislative chambers

Washington HB 2669 by Rep. Hinkle; SB 6535 by Sen. Holmquist

Would amend state law by adding a provision that the state "shall not directly or indirectly compel any person, employer, or health care provider to participate in any health care system." and that " A person or employer may pay directly for lawful health care services and shall not be required to pay any penalty, fine, or other sanction for paying directly for lawful health care services.

(Filed & sent to Health & Wellness Comm. 1/12/2010; did not pass by end of regular session; reintroduced in 1st Special Session 3/15/10); final day 4/13/10) Proposed statute:

majority both legislative chambers

SJR 8220 by Sen. Stevens

A proposed 2010 Constitutional amendment to provide that no law or rule may compel any person, employer, or health care provider to participate in any health care system; defines health care system as any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment for, health care services or health care data or information for its participants.

(Filed & sent to Health & Wellness Comm. 1/12/2010; did not pass by end of regular session; reintroduced in 1st Special Session 3/15/10) 2/3rds both legislative chambers

+

2010 ballot vote

West Virginia

(2009)

West Virginia

(2010) H 3002 by Rep. J. Miller

The "Health Care Freedom Act" states, "The people have the right to enter into private contracts with health care providers for health care services and to purchase private health care coverage. The Legislature may not require any person to participate in any health care system or plan, nor may it impose a penalty or fine, of any type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan."

(Filed 3/9/09; failed to pass by end of session; cannot carry over to 2010) Proposed statute:  
majority both legislative chambers

(Did not pass)

HJR 103 by Rep. J. Miller

A proposed 2010 Constitutional amendment prohibiting compulsory purchases in healthcare and providing choice and in payment for health services.

(Filed 2/5/10; motion to discharge postponed 2/25/10; did not pass committee by deadline -end of session. 3/19/10) 2/3rds Vote in both legislative chambers

+

2010 ballot vote

Wisconsin SJR 62 by Sen. Leibham; AJR 138

A proposed 2012 Constitutional amendment; would establish the "right of the people to contract privately for health care services and health care coverage, and prohibiting requiring a person to obtain or maintain" health coverage.

(Filed 2/22/10; did not pass committee by 2010 session deadline 4/28/10) 50% both legislative chambers

+

2012 ballot vote

Wyoming

(2009)

Wyoming

(2010)

" SJR 3, by Sen. Pres. Hines

A proposed 2010 Constitutional amendment based on Arizona language, "that protects individuals, employers and health care providers from having to participate in any health care system." Provides for "freedom of choice in health care; prohibits laws interfering with freedom of choice in health care"

(Filed 1/20/09; died in Senate committee 3/3/09; no carryover) 2/3 both legislative chambers

+

2010 ballot vote

SJ 1 by Sen. Pres. Hines; HJ 12 by Rep. Lubnau

Resolution for a proposed 2010 constitutional amendment for "Health freedom of choice," stating, "the federal government shall not interfere with an individual's health care decisions." Also would call for "prohibiting any penalty, fine or tax imposed because of a decision to participate in or decline health insurance, or to pay directly or receive payment directly for health care services."

(Filed 1/26/10; did not pass introduction 18y-12n, 2/9/10; HJ 12 did not pass introduction 38y-19n, 2/10/2010) [news article]

SB 49 by Sen. Jennings

Resolution would direct the attorney general to investigate the state and federal constitutional effects of federal health care or health insurance reform legislation; requiring a report within 60 days of any future federal enactment; providing for the attorney general to seek legal remedies.

(Filed 2/3/10; did not pass introduction requirement, 18y-12n, 2/9/10) 2/3 both legislative chambers

+

2010 ballot vote

Proposed statute; 2/3 required for consideration in budget session

States Opposing Health Reform Financing and Unfunded Mandates

State Activity/Legislation Required for Passage

Arizona HCM 2002 ; SCM 1001

Relates to Medicaid; urges Congress to ensure that any federal health care reform legislation has a minimal fiscal impact on the states.

(Filed 1/15/10; favorable report 3/17/10; did not pass by end of session) Non-binding

resolutions

Florida S4b (Senate Memorial) Urges the Congress of the United States to amend Title XIX of the Social Security Act in order to reestablish a fair and prudent federal state partnership that respects that respects certain constitutional requirements and enables states to provide cost effective health care services to low income residents; urges Congress to restructure the Medicaid program.

(Passed Senate; passed House 11/16/10 Adopted)

Illinois HR 1074 by Rep. Bellock

Would request that the IL Commission on Government Forecasting and Accountability examine the provisions of the federal health care reform law to determine the fiscal impact of the provisions on the state budget, with a report due July 1, 2010 for use wit the FY1011 budget.

(Filed and sent to Rules Committee, 3/26/10; held in comm. as of 9/7/10) Non-binding

resolutions

Iowa SB 2097

Would affirm the intent of the General Assembly to exercise those powers reserved to the states; includes but not limited to providing state-based regulation of the health insurance market; provides aggressive oversight of this market; enforces consumer protection and a local, responsive presence for consumers.

(Filed; sent to Senate Committee on Judiciary 1/27/10; did not pass by end of session 4/10)

Michigan SR 106 by Sen. George

Memorializes the President, the Congress, and the Secretary of HHS to remove provisions from the final version of the federal health care reform legislation that would increase financial obligations for states, whether through expanded Medicaid requirements or other mandates.

(Filed; Adopted by Senate 1/16/10) Non-binding

resolutions

New Hampshire SB 417 by Sen. Bradley

Would amend state law to prohibit the expansion of the Medicaid program if Congress passes a national health insurance plan unless the expansion is approved by the NH Legislature or is paid for by the federal government.

(Filed and sent to Senate Finance Committee 1/6/10; did not pass; voted as "inexpedient to legislate" , 14y-10n, 3/3/10) Proposed statute:

majority both legislative chambers

Sources: NCSL research; State legislative web sites; StateNet for selected features.

## Table 2: State Attorneys General or Governors Seeking to Block Healthcare Law in Court

These actions are listed for information only. Unless otherwise noted above, they may have no connection to actions or decisions by the state legislatures.

Can Congress compel Americans to engage in specific commercial transactions?

In early April, 13 state attorneys general filed a lawsuit seeking to repeal health care reform in federal court in Florida; by June a total of at least 20 states had some role in support of this legal challenge. Virginia Attorney General Ken Cuccinelli is pursuing a similar suit in his home state. The cases center on health care reform's mandate that Americans, starting in 2014, purchase insurance. If they don't, they will stand to pay a fine of \$750, or 2 percent of their income, whichever is greater.

### Key ACA Provisions Challenged

Collectively the litigation raises constitutional challenges to four provisions of the ACA, as analyzed in a brief by the George Washington Law Center, updated 12/6/2010:

- Individual responsibility – The law's requirement that beginning January 1, 2014, non-exempt individuals either maintain health insurance coverage (termed "minimum essential coverage")<sup>[10]</sup> or pay a penalty in the form of a tax.<sup>[11]</sup>

- Medicaid expansion – The law’s requirement that states participating in Medicaid expand their programs, beginning January 1, 2014 to cover non-elderly persons with incomes below 133 percent of the federal poverty level (FPL), including individuals previously ineligible for federally assisted Medicaid benefits.[12]
- Insurance market reforms – Federal reforms aimed at curbing certain practices by health insurers, specifically: reforms that require insurers and self-insured group plans to issue and renew health insurance coverage without regard to the health status of individuals or groups, and to offer coverage that is not subject to annual or lifetime limits and that complies with certain other requirements.[13]
- Employer responsibility – The law’s minimum employer contribution responsibilities in the case of employers that either offer no plan or a plan with inadequate subsidies, with contribution responsibilities tied to the number of employees that qualify for a subsidy.[14]

On April 6th, the Thomas More Law Center asked the U.S. District Court for the Eastern District of Michigan (Case No. 2:10-cv-11156-GCS-RSW) for a preliminary injunction preventing the implementation of the health care reform provision that would require all Americans to purchase health insurance.

The Center, in its motion for preliminary injunction, claimed that health care reform, particularly the individual mandate, “represents an unprecedented encroachment on the liberty of all Americans, including plaintiffs, by imposing unprecedented governmental mandates that restrict their personal and economic freedoms in violation of the Constitution.” Read more:

<http://www.politico.com/news/stories/0510/37155.html#ixzz0pA3z7Of3>

As of January 2011 there are two distinct state-based federal court challenges and three other private party suits with judges' rulings:

1. State of Florida v. U.S. Dep't of Health & Human Services. (led by Florida A.G.; in Florida Northern District Court; Case No.3:2010-cv-0009 ) Filed March 23, 2010. On January 31, 2011 Federal District Judge Roger Vinson declared the federal health care overhaul unconstitutional, siding with 26 states that sued to block it, saying that people can't be required to buy health insurance by 2014 or face penalties. He went a step further than a previous ruling against the law, declaring the entire thing unconstitutional if the insurance requirement does not hold up.

Attorneys for the administration had argued that the states did not have standing to challenge the law and that the case should be dismissed. The final step will almost certainly be the U.S. Supreme Court. Two other federal judges have already upheld the law and a federal judge in Virginia ruled the insurance mandate unconstitutional but stopped short of voiding the entire thing. At issue was whether the government is reaching beyond its constitutional power to regulate interstate commerce by requiring citizens to purchase health insurance or face tax penalties.

> Judge Vinson held a hearing on the merits for December 16.

> "Fla. judge strikes down Obama health care overhaul" - Washington Post 1/31/2011

> Judge Vinson Replies on Feb. 18 to Administration's Request for Clarification on the Florida Decision Regarding the ACA,, with an Order Directing Expedited Filing. The order suggests that a clarification about the legal effect of the January 31 ruling will be expedited as well.

2. Commonwealth of Virginia v. Sebelius. (led by Virginia A.G.; in U.S. District Court for the Eastern District of Virginia; Civil Action No. 3:10-cv-188). Filed March 23, 2010. Judge Henry Hudson in early August declined to dismiss the suit and heard oral arguments on October 18. He issued a ruling declaring the individual mandate unconstitutional on December 13, 2010. The insurance mandate is central to the law's mission of covering more than 30 million uninsured because insurers argue that only by requiring healthy people to have policies can they afford to treat those with expensive chronic conditions.

> Health Care Law Ruled Unconstitutional (NY Times, 12/13/2010)

> Virginia: Reply\_Memo\_Summary\_Judgment-Oct. 4 |

[see "opinions" section below]

3. Thomas More Center v. Obama. (on behalf of 4 residents of S.W. Michigan; in U.S. District Court for the Eastern District of Michigan; Case No. 2:10-cv-11156-GCS-RSW) Filed March 23, 2010. On October 7, Judge George Steeh dismissed this case, stating that choosing not to obtain health insurance coverage qualified as an example of "activities that substantially affect interstate commerce." Plaintiff have indicated the case is being appealed.

4. Liberty University v. Geitner. Also in Virginia, a private party suit by Liberty University was rejected in the U.S. District Court for the Western District of Virginia on November 30; the judge issued a 54-page ruling that granted the government's request to dismiss the case. [read news article]

5. US Citizens Assoc. v. Sebelius. In another private party suit, the U.S. District Court for the Northern District of Ohio in a ruling Nov. 22 allowed part of a lawsuit challenging the constitutionality of the health reform law to move forward. Dismissing three claims brought by the U.S. Citizens Association, Judge David Dowd agreed to hear arguments that the law's individual mandate violates the Constitution's interstate commerce clause. The rejected claims asserted that the law violated plaintiffs' freedom of association guaranteed by the First and Fifth Amendments, the due-process clause of the Fifth Amendment and plaintiffs' right to privacy. "It is apparent to the undersigned that the controversy ignited by the passage of the legislation at issue in this case will eventually require a decision by the Supreme Court after the above-described litigation works its way through the various circuit courts," Dowd wrote.

6. Other -- There are a variety of other private-party filed lawsuits related to the 2010 federal health law. [litigation list]

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◆ <http://www.healthcarelawsuit.us/> - Website maintained by the Florida Attorney General on behalf of the 20 state plaintiffs.

Legal Challenges to the Affordable Care Act - Legal brief by Katherine Hayes and Sara Rosenbaum of the George Washington Law Center; updated December 6, 2010.

◆ HHS Letter to State Governors in Response to Legal Challenges to Individual Mandate -Letter from Secretary of the Department of Health and Human Services Katherine Sebelius to state governors - December 2010.

◆ Health Law Faces Threat of Undercut From Courts - New York Times, November 27, 2010

◆ Florida Attorney General Responds to Motion to Dismiss the Health Care Reform Act Lawsuit - Statement by FL A.G. Bill McCollum, June 17, 2010.

◆ Health Care Battle Heats Up - National Law Journal (Law.com) - Aug 9, 2010

◆ Overview of Litigation Filed to Stop Health Reform - National Health Law Program (NHeLP)- Jane Perkins, June 2010)

◆ Court Schedules for Pending Cases -challenging health reform- National Health Law Program (NHeLP) - Updated November 5, 2010

◆ Q & A: Update on Litigation Challenging the Affordable Care Act - National Health Law Program (NHeLP) - Updated November 9, 2010

◆ 4 Dem governors fighting Republican AGs' challenge to health care law- Denver Post, Oct. 17, 2010

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Constitutional Issues and the Patient Protection and Affordable Care Act - Meeting Session

NCSL's Legislative Summit 2010, July 27, 2010 — Louisville, Kentucky

Since passage of the federal health reform laws in March, questions have been raised about the constitutionality of some key provisions, including the requirement that most people have health insurance and the expansion of who is entitled to Medicaid. Explore and discuss these key constitutional questions and review pending challenges to the new laws.

- Speaker: James Blumstein, Vanderbilt University School of Law, Tennessee - State Challenges to Health Reform: A Look At The Constitutional Issues (18-page PDF File)

List of States Attorneys General (or Governors\*) acting to pursue lawsuits opposing health provisions.

-As of January 18, 2011

Note: Statements and actions by state executive officials are listed for background information only. This report does not evaluate the role or claims of such officials.

- Alabama
- Alaska
- Arizona (4/7/10) \*
- Colorado §
- Florida (news release 5/27/10)
- Georgia \*
- Idaho
- Indiana (4/7/10)
- Iowa (1/18/11)\*\*
- Kansas (1/18/11)
- Louisiana
- Maine (1/18/11)\*\*
- Michigan §
- Mississippi (4/7/10) \*
- Nebraska
- Nevada (4/7/10) \*
- North Dakota (4/7/10)
- Ohio (1/18/11)\*\*
- Pennsylvania §§
- South Carolina
- South Dakota
- Texas
- Utah
- Virginia (District Court ruling 8/2/10)

- Washington §
- Wisconsin (1/18/11)\*\*
- Wyoming (1/18/11)\*\*

\* = States where legal action was initiated by governors' offices.

\*\* New executive branch officials for 2011 announced support for lawsuit.

§ = States where Attorney General initiated action but Governor publicly supports law, opposes challenge.

§§ = The Republican AG of Penn. was elected Governor on 11/2/2010.

### Table 3

Examples of states with reported interest or pre-legislative steps toward a proposed constitutional amendment or statute.

No formally filed legislation was reported in these states - they do not meet in even numbered years.

NCSL provides links or references to third-party articles and information as a convenience. NCSL is not responsible for the accuracy or completeness of such material. Local news and opinion sources are listed as background only. Montana 5 (next regular session in 2011)

Texas, source (next regular session in 2011)

#### Recent News and Articles

- NCSL Podcast audio (11/20/09)
- "Can the States Nullify Health Care Reform?" - New England Journal of Medicine - 2/10/2010
- "Va. health bill could foil Obama proposal: State questions constitutionality." - Boston Globe, 3/8/2010
- MO: Missouri House sends to Senate plan for voiding federal requirement to buy health insurance - Kansas City Star
- The Missouri House on Tuesday gave final approval to a proposed state constitutional amendment that would attempt to nullify a possible federal mandate to purchase health insurance, 3/16/2010.

- "Lots of Bark, Little Bite in State Efforts to Block Health Reform" - includes NCSL citation. Health Beat Blog, 3/16/2010
- Legal Challenges to Health Reform - An Alliance for Health Reform Toolkit by Kevin Arts. March 29, 2010 - <http://www.allhealth.org/>
- "Many States Preparing Laws Rejecting Individual Mandate" - includes NCSL materials. Managed Care magazine March 2010.
- "States Mount Challenges to Health Reform Law." - includes NCSL materials. PBS NewsHour, April 1, 2010.
- Health Reform Challenges Continue from Many States- PBS VIDEO 4/1/10 (13 1/2 minutes)
- Efforts to Halt Health Reform: Playing Politics with Our Health "counters the misinformation that is being spread by opponents of reform, particularly regarding the individual responsibility requirement". Families USA, 4/10
- ObamaCare: Historic, but Is It Constitutional? Cato Institute Webinar, 5/4/10.
- Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis - Report by the Congressional Research Service (CRS), 5/7/10.
- Virginia Suit Against Health Care Law Moves Forward - New York Times - Aug. 3, 2010
- Missouri voters could rebel against health-care reform law - The Christian Science Monitor - Aug. 3, 2010
- Missouri: Proposition C landslide sends strong message, proponents say - St. Louis Beacon, August 3, 2010
- Health Care Battle Heats Up National Law Journal (Law.com) - August 9, 2010
- Health Insurance Politics in Federal Court - New England Journal of Medicine - August 25, 2010
- Florida: Suit on Health Care Bill Appears Likely to Advance - federal judge says he will rule on challenge to the new health care law within a month.-9/15/2010
- Florida: Justices Nix Legislature-backed health care amendment off ballot Article by AP/Bloomberg, 9/1/2010
- Colorado: Ballot amendment 63 "Two sides of the debate"
- > Vote "YES - Stand up to D.C." versus "Vote "NO - It won't hold down health costs"
- "Florida Court Swings Pendulum Toward Supreme Court" - Community Catalyst 10/15/10
- -----

## 2011 News and Articles

- N.C. House passes bill to exempt state from individual mandate in federal health reform - American Independent, North Carolina, 2/2/2011

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### APPENDIX 1 - The Arizona Approved Constitutional Amendment

Engrossed (Full Text)

State of Arizona, House of Representatives -- Forty-ninth Legislature, First Regular Session, 2009

HOUSE CONCURRENT RESOLUTION 2014

A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE XXVII, BY ADDING SECTION 2, CONSTITUTION OF ARIZONA; RELATING TO HEALTH CARE SERVICES.

Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:

1. Article XXVII, Constitution of Arizona, is proposed to be amended by adding section 2 as follows if approved by the voters and on proclamation of the Governor:

2. Health care; definitions

section 2. A. To preserve the freedom of Arizonans to provide for their health care:

1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system.

2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

B. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.

C. This section does not:

1. Affect which health care services a health care provider or hospital is required to perform or provide.
2. Affect which health care services are permitted by law.
3. Prohibit care provided pursuant to article xviii, section 8 of this constitution or any statutes enacted by the legislature relating to worker's compensation.
4. Affect laws or rules in effect as of January 1, 2009.
5. Affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or employer for paying directly for lawful health care services or a health care provider or hospital for accepting direct payment from a person or employer for lawful health care services.

D. For the purposes of this section:

1. "compel" includes penalties or fines.
  2. "direct payment or pay directly" means payment for lawful health care services without a public or private third party, not including an employer, paying for any portion of the service.
  3. "health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for or payment for, in full or in part, health care services or health care data or health care information for its participants.
  4. "lawful health care services" means any health-related service or treatment to the extent that the service or treatment is permitted or not prohibited by law or regulation that may be provided by persons or businesses otherwise permitted to offer such services .
  5. "penalties or fines" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge or any named fee with a similar effect established by law or rule by a government established, created or controlled agency that is used to punish or discourage the exercise of rights protected under this section.
2. The article heading of article XXVII, Constitution of Arizona, is proposed to be changed as follows if approved by the voters and on proclamation of the Governor:

The article heading of article XXVII, Constitution of Arizona, is changed from "REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE" to "REGULATION OF HEALTH, SAFETY AND WELFARE".

3. The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

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Arizona 2008 History/Action: In 2008, Arizona Proposition 101 appeared on the ballot, referred to by proponents as the "Freedom of Choice in Health Care Act." If it had passed, it would have added the following language to the Arizona Constitution: "Because all people should have the right to make decisions about their health care, no law shall be passed that restricts a person's freedom of choice of private health care systems or private plans of any type. No law shall interfere with a person's or entity's right to pay directly for lawful medical services, nor shall any law impose a penalty or fine, of any type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan." Proposition 101 failed to pass by a vote of 1,048,512 in favor and 1,057,199 opposed, a difference of 8,687 votes. Arizona's Proposition 101 language from 2008 has served as the basis for 2009 legislative language drafted by the American Legislative Exchange Council (ALEC).

Arizona Opinions: ALEC article: "Arizona Poised to Block Single-Payer Health Care"  
[http://www.alec.org/am/pdf/Inside\\_July09.pdf](http://www.alec.org/am/pdf/Inside_July09.pdf)

The 2009 legislative resolution was approved "along party lines." "I certainly would expect it would go to the courts as a states' rights issue," says Bert Coleman, manager of the Arizona campaign. Coleman adds that proponents of the efforts chose to go through the legislative route rather than a much slower citizen petition (as in 2008) process in order to be part of the ongoing discussion over health reform. "We wanted to be part of the debate now," Coleman stated to Inside Health Policy. "Will it influence the debate? I certainly hope so."

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## APPENDIX 2:

### Some Legal and Legislative Opinions on Anti-Reform State Actions

◆ Rep. Nancy Barto, chairwoman of the Arizona House's Health and Human Services Committee, sponsored the bill that led to the ballot referendum. Her basic argument is that "there is no place for government between someone and their doctor," said Becky Blackburn, communications director for the Republican Caucus of the Arizona House of Representatives.

◆ Rep. Linda Upmeyer, Iowa State Representative and the chair of ALEC's Health and Human Services Task Force stated, "Federal health care reform efforts may include a requirement that individuals

purchase health insurance, and a so-called 'public option' which will result in less choices for consumers and new government mandates."

◆ Thomas Miller, resident fellow at the American Enterprise Institute, stated that lawsuits are likely to challenge the mandate as an unprecedented violation of inherent individual rights under the U.S. Constitution in enforcing the purchase of a product "with no other reason other than the fact that you are just living in the country. "There's no clear Supreme Court precedent suggesting that this is going to be overturned constitutionally," he said. However, "give me the right five justices and anything's possible. Enforce it in a particularly onerous, all-encompassing, unfair manner and then it's more politically viable for judges to have problems with the way it comes out." [2]

The New York Times cited several legal experts who said "they saw little room for such a challenge:"

◆ Mark A. Hall, professor of law and public health at Wake Forest University, says states don't have the power to override or "opt out" of, or not participate in the mandate. The debate is "a flash in a pan" set off by libertarians who say "Washington, D.C. shouldn't be telling us what to do," he said. "There is no way this challenge will succeed in court," adding that the state measures seemed more "an act of defiance, a form of civil disobedience if you will." [2] Hall has studied the constitutionality of mandates that people buy health insurance, for the O'Neill Institute at Georgetown University.

◆ Timothy Stoltzfus Jost, a health law expert at Washington and Lee University School of Law, concludes that "States can no more nullify a federal law like this than they could nullify the civil rights laws by adopting constitutional amendments." [3, 8] In March 2010, he added, "State law cannot nullify federal law. This principle is simply beyond debate, and state legislators, many of them lawyers, know that," writes Jost in the New England Journal of Medicine. "The purpose of these laws, therefore, is not legal but rather political." Should health reform pass, the state bills "can thus be seen as invitations to civil disobedience that counsel state citizens to 'violate the federal law, wave this statute in their face, and dare them to come after you,'" says Jost

◆ Randy E. Barnett, a Georgetown law school professor who has written about what he views as legitimate constitutional questions about health insurance mandates, seemed doubtful. "While using federal power to force individuals to buy private insurance raises serious constitutional questions," Professor Barnett said, "I just don't see what these state resolutions add to the constitutional objections to this expansion of federal power." [8]

◆ Stuart Taylor Jr. wrote, in "Health Law Not A Sure Bet In Court," ... But A Decision In Its Favor Is Still The Best Bet. What chances of success await the lawsuits challenging the constitutionality of the new health insurance reform law filed by 14 state attorneys general this week, with more lawsuits by states, individuals, and companies in the pipeline?

Not much, according to most of the academic experts who have weighed in. They confidently predict that the Supreme Court will (if the case gets that far) uphold the new law's major provisions. These

include the much-debated mandate for individuals to buy comprehensive health insurance unless they're already covered by employer-based plans, and also the requirement that states spend billions of dollars expanding their Medicaid programs (unless they withdraw) and administering the complex new law. These experts cite the justices' very broad reading since the New Deal of Congress' powers to regulate interstate commerce and to tax and spend. -National Journal, 3/26/2010

◆ Virginia lawsuit oral arguments: [as reported by the New York Times, 10/19/10] Judge Henry Hudson said he would rule by the end of the year on the constitutionality of the new health care law, as lawyers for the Obama administration and the Commonwealth of Virginia debated whether the entire 2,700-page act should be invalidated if a key provision is struck down. In a nearly three-hour hearing, a lawyer for the commonwealth argued that if Judge Henry E. Hudson of Federal District Court finds unconstitutional the provision that requires Americans to have health insurance, he should declare the entire law void until the Supreme Court can review it. The lawyer noted that in writing the legislation, Congress failed to include "severability" language to specify that the rest of the law would survive.

But the federal government's lawyers argued on Monday that other provisions, like the vast expansion of Medicaid eligibility, could survive, and that the judge should keep the law in effect during the appeals process. That this stage in the legal assault on the health law has arrived so quickly is striking, given that many prominent law professors dismissed the challenges as baseless only seven months ago, when the first of more than 15 lawsuits were filed.

The Justice Department concedes that some of the most essential insurance changes, including requiring insurers to cover those with pre-existing conditions, will have to be scrapped if the coverage requirement loses in the courts. The administration maintains that the regulations can work only if everyone is required to have coverage, so people will not simply wait until they get sick to buy policies."

◆ Scott Steinke, The Pink Sheet, (October 25, 2010) reports on "If States Win Lawsuits Against Health Reform Law, How Might Pharma Fare? ...While it's likely to be 2012 before a final decision is handed down in lawsuits states have brought challenging the constitutionality of the Patient Protection and Affordable Care Act, questions are already arising about the possible impact on the law's pharmaceutical-related provisions if the states prevail...provisions such as PCORI or generic biologics have no connection to the individual mandate or Medicaid expansion, and thus stand a chance of being implemented regardless of the judicial outcome." Paid Subscription Required

◆ Wendy K. Mariner, J.D., M.P.H., and George J. Annas, J.D., M.P.H., Boston Univ. School of Public Health published the following, Health Insurance Politics in Federal Court in NEJM, August 25, 2010 (c) 2010 NEJM. Excerpts--

"Having been outmaneuvered in Congress with the passage of the Patient Protection and Affordable Care Act ("Affordable Care Act," or ACA), Republicans have taken their case to federal court, arguing that the law's key provision, the individual mandate to purchase health insurance, is unconstitutional. This argument has been made most prominently by attorneys general from 20 states in a Florida federal

court and by the Commonwealth of Virginia in a Virginia federal court. In early August, federal district court judge Henry Hudson decided that the Virginia challenge deserves a hearing,<sup>12</sup> thereby giving the constitutional argument an aura of respectability and ensuring that we'll hear more about the meaning of states' rights in the context of the Constitution's Commerce Clause (which grants Congress the authority to regulate interstate commerce), both in court and on the campaign trail.

The states have inherent (police) powers authorizing them to regulate residents' inactivity — to require residents, for example, to get vaccinations and even to purchase health insurance, as Massachusetts does. The federal government's powers are limited to those listed in the Constitution, but the reach of the Commerce Clause has necessarily expanded with the national economy. Virginia argues that if Congress can regulate inactivity that affects interstate commerce like insurance and health care, then there is no practical limit to federal regulation and Congress will usurp the state's police powers.

The fundamental legal problem is whether, if the federal government can penalize individuals for refusing to purchase health insurance, there is any principle that would limit the power of the federal government to penalize the failure to purchase other products, such as a daily newspaper to save the newspaper business from extinction. The federal government's answer is that people simply cannot choose “to avoid participation in the health care market.”<sup>1</sup> Rather, “it is inevitable . . . that every person — today or in the future — healthy or otherwise — will require medical care,” and the ACA provides a dependable, affordable mechanism to pay for such care.<sup>12</sup>

This answer may offer a limiting principle that distinguishes the ACA from a hypothetical penalty for not buying newspapers. There are few nondiscretionary national markets in which virtually all Americans inevitably participate. Congress could not require all Americans to buy cars from Detroit in order to shore up the automobile industry; not everyone needs a car. On the other hand, perhaps the federal government could justify penalizing individuals for not buying an apple a day or for not buying a gym membership or multivitamins, at least if these purchases are seen as integral parts of containing costs in a national health insurance market, because people who don't make these purchases increase health care costs for all of us.

We think that the federal government has the more realistic view of how the national economy functions and how the Constitution should function today. Nonetheless, the outcome in the federal courts is far from certain and will ultimately be decided by a Supreme Court that is just as ideologically fractured as the Congress that passed this law. Other clearly constitutional approaches were available, including Medicare for All, or simply raising the income or payroll tax to pay for health benefits, but these would have been even more objectionable to those who are raising Commerce Clause problems with the ACA.

Judge Hudson's next decision, this fall, will be on the merits of the case, and as he recognizes, his decision will be appealed no matter how he rules. But health care politics will not be put on hold while we await judicial resolution, which could take years. Without mentioning the Commerce Clause or health care, many politicians will campaign on the argument that the federal government is too big, is

too intrusive into our individual lives, and spends too much money. In this debate, the ACA will be exhibit number one." (10.1056/NEJMp1009054) was published on August 25, 2010, at NEJM.org.

◆ Ruth Marcus, a legal analyst writing for the Washington Post (November 26, 2009), "Constitution no bar to health reform," seeks to make a detailed case that the latest federal proposals are constitutional. She stated,

"Is Congress going through the ordeal of trying to enact health-care reform only to have one of the main pillars -- requiring individuals to obtain insurance -- declared unconstitutional? An interesting debate for a constitutional law seminar. In the real world, not a big worry. ... it's worth explaining where the Constitution grants Congress the authority to impose an individual mandate. There are two short answers: the power to regulate interstate commerce and the power to tax. The (Commerce) clause empowers Congress "to regulate commerce . . . among the several states," which may not sound terribly far-reaching. But since the New Deal, the Supreme Court has interpreted this authority to cover local activities with national implications.

... But the individual mandate is central to the larger effort to reform the insurance market. Congress may not be empowered to order everyone to go shopping to boost the economy. Yet health insurance is so central to health care, and the individual mandate so entwined with the effort to reform the system, that this seems like a different, perhaps unique, case. Congress clearly has authority to, in effect, require employees to purchase health insurance for their old age by imposing a payroll tax to fund Medicare.

The individual mandate is to be administered through the tax code: On their forms, taxpayers will have to submit evidence of adequate insurance or, unless they qualify for a hardship exemption, pay a penalty. See full text online.

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Sources: NCSL provides links or references to third-party articles and information as a convenience. NCSL is not responsible for the accuracy or completeness of such material.

[1] American Legislative Exchange Council (ALEC) as quoted in article of August 12, 2009 and NCSL interview with Christie Herrera, ALEC Health Director, August 17, 2009.

[2] Insurance NewsNet: Legal Analysts: "Suits May Challenge Constitutionality of Individual Mandate in U.S. Health Reform," October 8, 2009.

[3] New York Times "Health Care Overhaul and Mandatory Coverage Stir State' Rights Claims," September 29, 2009

[4] CNS News.com, a subsidiary of the Media Research Center. "Nineteen States Move to Defend Individual Health Care Choice," Tuesday, October 27, 2009

[5] Inside ALEC: "Arizona Poised to Block Single-Payer Health Care." Page 11, July 2009.

ALEC web site, accessed 1/31/2010.

[5A] Marsha Shuler, The Advocate, [Baton Rouge]. [Louisiana state] legislator pushing amendment addressing health-care changes." August 11, 2009

[6] Gov. Perry told Dallas talk radio WBAP's Mark Davis; as reported by the Fort Worth Star-Telegram, 7/23/2009

[7] Deseret News, "Pushing back against feds," August 13, 2009

[8] Politico.com. Professor Randy Barnett and Professor Timothy Jost: "Healthcare: Is 'mandatory insurance' unconstitutional?" Sept. 18 2009:

[9] Inside ARM. State Lawmakers Seek Legislative Solutions to Health Care Reform Mandates - September 28, 2009.

[10] News-Leader (Missouri) Lawmakers: Overhaul a threat to freedom. November 15, 2009

[11] Denver Post. Efforts already underway in Colorado to blunt federal health care reforms. December 30, 2009

[12] Virginia v. Sebelius, 2010 U.S. Dist. LEXIS 77678; Filed March 23, 2010 (Aug. 2, 2010).

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### APPENDIX 3:

#### Number of Sessions During Which Legislative Enactment Is Required

In the following 35 states, the legislature enacts a proposed constitutional amendment during only one session.

|            |             |              |
|------------|-------------|--------------|
| Alabama    | Louisiana   | North Dakota |
| Alaska     | Maine       | Ohio         |
| Arizona    | Maryland    | Oklahoma     |
| Arkansas   | Michigan    | Oregon       |
| California | Minnesota   | Rhode Island |
| Colorado   | Mississippi | South Dakota |

|          |                |               |
|----------|----------------|---------------|
| Florida  | Missouri       | Texas         |
| Georgia  | Montana        | Utah          |
| Idaho    | Nebraska       | Washington    |
| Illinois | New Hampshire  | West Virginia |
| Kansas   | New Mexico     | Wyoming       |
| Kentucky | North Carolina |               |

In the following 12 states, the legislature must enact a proposed constitutional amendment during two sessions.

|               |                |           |
|---------------|----------------|-----------|
| Delaware **   | Nevada         | Tennessee |
| Indiana       | New York       | Vermont   |
| Iowa          | Pennsylvania   | Virginia  |
| Massachusetts | South Carolina | Wisconsin |

\*\* Delaware does not require a public vote once a proposed amendment passes two consecutive sessions by a 2/3 vote.

In the following three states, the vote total determines the number of sessions during which a proposed constitutional amendment must be enacted.

|             |            |        |
|-------------|------------|--------|
| Connecticut | New Jersey | Hawaii |
|-------------|------------|--------|

Source for Appendix 3: Brenda Erickson, NCSL Legislative Management memorandum, 2009.

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