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Hundreds join legal discourse on health care States, scholars, organizations submit 84 briefs to high court

BY ALEX DANIELS

WASHINGTON - The name of the case, Department of Health and Human Services v. Florida, suggests two organizations - a state and a federal agency - dueling it out in the U.S. Supreme Court in this week's oral arguments on the nation's healthcare mandate.

But hundreds of other voices, including several from Arkansas, are also trying to sway the tribunal and shape the outcome of this landmark case.

As they mull over the arguments, the justices will have access to at least 84 amici curiae, or "friend of the court" briefs, to help them determine whether the requirement in the 2010 health-care overhaul that most Americans obtain health insurance is constitutional.

Speaker of the House John Boehner, a Republican, has filed one. So has Senate Majority Leader Harry Reid, a Democrat.

States, including Maryland and Massachusetts, have chimed in, as have a group of tax-law professors, the latetelevangelist Jerry Falwell's Liberty University and a group called the "Young Invincibles," which says it represents the interests of 18 to 34 year olds on health-care issues.

The Arkansas Policy Foundation, a conservative research and advocacy group in Little Rock, has signed on to a brief filed by the **Cato Institute**, a libertarian research and advocacy group in Washington. Fifty-eight Republican Arkansas state legislators also affixed their names to the brief.

The Arkansas State Chamber of Commerce was one of 14 state chambers to file a brief. And University of Arkansas School of Law professor Robert Leflar joined 103 other law professors in a separate brief in support of the law.

The Arkansas State Chamber of Commerce members are "generally opposed" to the broader Affordable Care Act," Kenny Hall, the group's executive vice president said.

But both supporters and opponents in the group agree that the case should be decided quickly so businesses can make plans for the future.

"You don't know the costs" to a business until the case is decided, Hall said. "The game could change on you." The 14 chambers urged the court not to delay its ruling

by invoking the Anti-Injunction Act, a 19th-century law that bars a suit based on a tax until that tax or penalty has actually been levied.

"We chose a narrow issue that we didn't think would be overbriefed," Hall said.

He said the narrow focus was important for other reasons.

"None of us have big budgets," he said. "Cost was an issue." He said hiring an Atlanta-based attorney to write the brief cost between \$15,000 and \$25,000.

Up until the mid-1900s, friend of the court briefs were usually reserved for arcane matters where justices needed the expertise of a specialist, according to Linda Simard, a law professor at Suffolk University Law School in Boston.

In a 2008 University of Texas law journal article, she wrote that the growth of "public law," defined as the use of the courts to vindicate public policies or statutes, rather than solving private disputes, gave "fuel for the fire which ignited the amicus curiae blaze." By Simard's count, the filing of friend of the court briefs increased by 800 percent between 1950 and 2000.

Richard Fallon, a Harvard Law School professor, estimates that briefs written by legal scholars has risen dramatically in recent years.

In the 2010 Supreme Court term, the court received 56 briefs from legal scholars, on the 85 cases it decided. In 1985, the court decided on 159 cases, but only received three scholar's briefs.

Fallon has been critical of legal scholars signing onto briefs. Too often, he said, professors compromise their scholarship by serving as advocates.

But given the huge amount of lobbying and debate that occurred when the act was debated in Congress, Fallon said it's no surprise that there remains a large interest in influencing the court's deliberations.

"It would be sort of odd if people who were interested in presenting their point of view just sort of sat on their hands, rather than getting their lawyers to make a case," he said.

Fallon said it is unlikely the justices will "have their heads turned," by the voluminous filings.

According to The New York Times, Justice Antonin Scalia told a Chicago audience last year that he doesn't read all of the amicus briefs. That job, he said, was done by his clerks.

"If there's one that has a hidden truffle in there somewhere," he said, "they call it to my attention." Greg Kaza, president of the Arkansas Policy Foundation, said he first was motivated to participate in cases at the court as a state legislator in Michigan in the 1990s, when he and three other lawmakers worked to take two affirmative action cases to the Supreme Court related to the University of Michigan's admissions policy.

In joining the **Cato Institute's** brief, Kaza and the 58 Arkansas lawmakers argue

that the health-care law's defenders cannot define being uninsured as an active "economic decision" that can be regulated under the Commerce Clause of the Constitution.

"The definition of 'activity' leaves individuals with no way of avoiding federal regulation," Kaza argued. "At any moment, we are all not engaged in an infinite set of activities." Leflar, the University of Arkansas law professor, said he "jumped at the chance" to participate in the law professor's brief when he was contacted about it in December.

"The purpose of this brief is ... not to add to the many pagers of doctrinal argument before this court," states the brief. "Instead, it is to document facts about health care that should inform the Court's deliberation." The professors' argument is, essentially, that the mandate is a "necessary and proper" means of accomplishing the broader goal of healthcare access.

Their brief attempts to counter opponents of the mandate, who argue that the individual mandate attempts to regulate "inaction." The professors argue that as a "starting point" the justices should consider that sick people will necessarily participate in the market for health services. In other words, it is only a matter of time before someone, whether insured or not, goes to the doctor or emergency room.

Arkansas State Sen. Gilbert Baker, a Republican, is one of 58 state lawmakers to sign on to the **Cato Institute's** brief.

Baker said he's "not a constitutional scholar by any stretch." But as chairman of the Joint Budget Committee, he said, he worried that the law will result in an influx of Medicaid recipients that eventually have to be covered with state funds.

As the court heard arguments on Tuesday, Baker talked to 11 15- and 16-year-old students at Liberty Academy, a home-schooling cooperative in Conway.

He said he has no idea how the case will be decided.

But he told his students that either way, the case will have a big effect on how they live their lives.

"Keep an eye on it," he told them.