

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

RICHMOND DIVISION

COMMONWEALTH OF)
VIRGINIA EX REL. KENNETH)
T. CUCCINELLI, II,)
in his official capacity as Attorney)
General of Virginia,)
Plaintiff,)
v.)
KATHLEEN SEBELIUS,)
Secretary of the Department)
of Health and Human Services,)
in her official capacity,)
Defendant.)

No. 3:10-cv-00188-HEH

**MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* OF THE
CATO INSTITUTE, THE COMPETITIVE ENTERPRISE INSTITUTE
AND PROF. RANDY E. BARNETT SUPPORTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 29(a) and (b) of the Federal Rules of Appellate Procedure, movants, the Cato Institute, the Competitive Enterprise Institute and Professor Randy E. Barnett respectfully move this Court for leave to file the accompanying memorandum in support of the Plaintiff’s Motion for Summary Judgment and in Opposition to the Defendant’s Motion for Summary Judgment.¹

I. CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualifications or recusal, the undersigned counsel for

¹ The Plaintiff has consented to the participation of movants as *amici* in this case. The Defendant, when contacted, stated that it takes no position on movants’ motion for leave.

the Cato Institute and the Competitive Enterprise Institute in the above captioned action, certify that there are no parents, trusts, subsidiaries and/or affiliates of Cato or Competitive Enterprise Institute that have issued shares or debt securities to the public.

Pursuant to Fourth Circuit Local Rule 26.1, the Cato Institute and Competitive Enterprise Institute each declare that they are nonprofit public policy research foundations dedicated in part to the defense of constitutional liberties secured by law. Cato and Competitive Enterprise Institute each state that they have no parent corporation. Competitive Enterprise Institute issues no stock, while Cato has issued a handful of shares that are privately held by its directors. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of Cato or Competitive Enterprise Institute.

II. INTEREST OF MOVANTS

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*. It also files amicus briefs with the courts, including in cases focusing on the Commerce Clause and the Necessary and Proper Clause such as *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Comstock*, 560 U.S. __ (2010). The present case centrally concerns Cato because it represents, without exaggeration, the federal government's most egregious attempt to overstep its constitutional powers.

The Competitive Enterprise Institute is a public interest group founded in 1984 and dedicated to free enterprise, limited government, and civil liberties. It studies and publishes on a wide range of regulatory issues, including those involving health and safety, drugs, biotechnology, and medical innovation—as well as the regulation of insurance markets. Competitive Enterprise Institute attorneys have argued or participated as *amicus curiae* in numerous constitutional cases before the Supreme Court and other federal courts.

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center. Prof. Barnett has taught constitutional law, contracts, and criminal law, among other subjects, and has published more than 90 articles and reviews, as well as eight books. His book, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004), and other scholarship concerns the original meaning of the Commerce and Necessary and Proper Clauses and their relationship to the powers enumerated in the Constitution. His constitutional law casebook, *Constitutional Law: Cases in Context* (Aspen 2008), is widely used in law schools throughout the country. In 2004 he argued *Gonzales v. Raich* in the Supreme Court. In 2008, he was awarded a Guggenheim Fellowship in Constitutional Studies.

III. AN AMICI BRIEF IS DESIRABLE AND THE MATTERS ASSERTED ARE RELEVANT TO THE DISPOSITION OF THE CASE

Movants Cato, Competitive Enterprise Institute and Professor Barnett possess experience and expertise in constitutional and tax law and seek to analyze relevant case law to show that the Court should resolve the relevant issues in this case in Plaintiff's favor.

Movants maintain that the individual insurance mandate included in the recent health care legislation exceeds any power granted to the federal government. As interpreted by the Supreme

Court, neither the Commerce Clause, nor the Necessary and Proper Clause, nor Congress' taxing authority empowers the federal government to force individuals to purchase any good or service, including health insurance. The individual mandate represents a drastic expansion of the scope of federal power, well beyond limits previously recognized by the Supreme Court. Precedent upholding the individual mandate would permit the federal government virtually unlimited regulatory authority.

IV. CONCLUSION

WHEREFORE, we request this court to grant the present motion and allow the Movants to participate as *amici curiae*.

Respectfully submitted this 1st day of October, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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