

**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. )  
) )  
\_\_\_\_\_ /

Civil Action No. 3:10-cv-188-HEH  
(Electronically Filed)

**MOTION OF WASHINGTON LEGAL FOUNDATION &  
CONSTITUTIONAL LAW SCHOLARS FOR LEAVE  
TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT  
OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

*Amici* the Washington Legal Foundation (WLF) and several constitutional law scholars hereby move for leave to file the accompanying *amicus curiae* brief in support of Plaintiff’s Motion for Summary Judgment (Dkt. 88). In support of their motion, *amici* state as follows:

(1) Founded in 1977, WLF is a public interest law and policy center with supporters in all 50 states, including Virginia. WLF devotes a substantial portion of its resources to advancing the interests of economic liberty, free enterprise, and a limited and accountable government. WLF also works actively to promote a healthy balance of power between federal and state governments.

(2) In particular, WLF regularly litigates in state and federal courts in support of efforts to ensure a strict separation of powers—both among the three branches of the federal

government and between federal and state governments—as a means of preventing too much power from being concentrated within a single governmental body. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *United States v. King*, Crim. No. 09-30442 (9th Cir., dec. pending).

(3) The remaining *amici* are all legal academics whose teaching, research, and published scholarship focus on constitutional law and related fields. Their substantial legal expertise bears directly on many of the core issues of this lawsuit. *Amici* include Jonathan Adler, Professor of Law and Director, Center of Business Law and Regulation, Case Western Reserve University School of Law; George Dent, Schott-van den Eynden Professor of Law, Case Western University School of Law; Michael Distelhorst, Professor of Law, Capital University Law School; James W. Ely, Jr., Milton R. Underwood Professor of Law Emeritus, Vanderbilt University Law School; Elizabeth Price Foley, Professor of Law, Florida International University College of Law; David Kopel, Research Director of the Independence Institute and Adjunct Professor of Law, University of Denver Sturm College of Law; Kurt Lash, Alumni Distinguished Professor of Law and Co-Director of the Program on Constitutional Theory, History and Law, University of Illinois College of Law; David N. Mayer, Professor of Law and History, Capital University Law School; Andrew Morriss, H. Ross and Helen Workman Professor of Law and Business, University of Illinois at Urbana-Champaign College of Law; Leonard J. Nelson III, Professor of Law, Samford University's Cumberland School of Law; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Ronald J. Rychlak, Associate Dean for Academic Affairs and Professor of Law, University of Mississippi School of Law; Steven J. Willis, Professor of Law, University of Florida Levin College of Law; and, Todd J. Zywicki, Foundation Professor of Law, George Mason University School of Law.

(4) The Framers of the Constitution sought to maintain a balance of power between federal and state governments as a means of reducing the risks of tyranny and abuse by governments at every level. *Amici* are concerned that the federal government is upsetting that balance by seeking to regulate Americans' economic *inactivity*—an individual's decision *not* to purchase health insurance—which is far afield from the enumerated powers assigned to the federal government under Article I of the Constitution. Further, *amici* fear that, if Congress's power under Article I is construed to include the authority to command Americans to purchase health insurance or pay a penalty, then the congressional power will become virtually indistinguishable from a national police power.

(5) *Amici* support each of the arguments made by the Commonwealth of Virginia in its memorandum in support of summary judgment (Dkt. 89), but write separately to address the Secretary's contention that the individual mandate contained in Section 1501 of the Patient Protection and Affordable Care Act is a valid exercise of Congress's power under the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause. As elaborated in the attached brief, even the broadest Supreme Court precedents interpreting these clauses do not give Congress the authority to force Americans to purchase a product they do not want.

(6) *Amici* seek to file this brief because of their demonstrated interest in promoting a healthy balance of power between the state and federal governments; *amici* have no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of their lack of direct interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of any party.

(7) Counsel for *amici* contacted each party in an effort to obtain consent for leave to file the attached *amicus curiae* brief. Counsel for Plaintiff consented to the filing of WLF's

brief. Counsel for Defendant stated that Defendant “took no position” on the filing of *amicus curiae* briefs in this case.

WHEREFORE, *amici* respectfully request that their motion for leave to file the attached *amicus curiae* brief be granted. A proposed order is attached.

Date: October 4, 2010

Respectfully submitted,

/s/ Richard A Samp

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. Civ. P. 7.1 and Local Rule 7.1 of the Eastern District of Virginia, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. WLF has no parents, trusts, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public. No publicly held corporation has an interest in the outcome of this litigation due to WLF's participation.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of October, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send a notification of such filing (NEF) to the following persons who are registered users of this Court's CM/ECF system:

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