

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

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|--|---|------------------------------------|
| COMMONWEALTH OF VIRGINIA,                          | ) |                                    |
| ex rel. Kenneth T. Cuccinelli, II, in his official | ) |                                    |
| capacity as Attorney General of Virginia,          | ) |                                    |
|  | ) |                                    |
| Plaintiff,   | ) |                                    |
|  | ) |                                    |
| v.   | ) | Civil Action No. 3:10-cv-00188-HEH |
|  | ) |                                    |
| KATHLEEN SEBELIUS, Secretary of the                | ) |                                    |
| Department of Health and Human Services,           | ) |                                    |
| in her official capacity,                          | ) |                                    |
|  | ) |                                    |
| Defendant.   | ) |                                    |
|  | ) |                                    |
|  | ) |                                    |

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE  
IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND IN  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Physician Hospitals of America (“PHA”) states as follows in support of its motion for leave to participate as amicus curiae in this action in opposition to Secretary Sebelius’s motion to dismiss the Commonwealth of Virginia’s Complaint.

Neither the Federal Rules of Civil Procedure nor the Local Rules of this Court specifically address the participation of amici curiae. Thus PHA has filed this memorandum consistent with the requirements of Local Rules 26.1 and 29(a) and (b) of the United States Court of Appeals for the Fourth Circuit.<sup>1</sup>

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<sup>1</sup> Counsel for the Commonwealth of Virginia has consented to the participation of PHA as amicus curiae. Counsel for Secretary Sebelius, when contacted, advised that Defendant takes no position on PHA’s motion.

## **I. CORPORATE AND 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 PHA in the above captioned action certifies that there are no parents, trusts, subsidiaries, and/or affiliates of PHA that have issued shares or debt securities to the public.

Pursuant to the United States Court of Appeals for the Fourth Circuit Local Rule 26.1, PHA declares it is a 26 U.S.C. § 501(c)(6) organization formed to educate members of the 265 physician-owned hospital community about regulatory and legislative issues and to encourage PHA members to advocate for the rights of physician-owned hospitals. PHA states that it has no parent corporation and issues no stock. No publicly-held corporation has a direct financial interest in the outcome of this litigation due to PHA's participation.

## **II. INTEREST OF MOVANT**

PHA is a 26 U.S.C. § 501(c)(6) organization formed to educate members of the physician-owned hospital community about regulatory and legislative issues and to encourage PHA members to advocate for the rights of physician-owned hospitals. PHA has approximately 166 member hospitals in 34 different states, comprising both existing facilities and physician-owned hospitals in various stages of development. PHA member hospitals are typically enrolled as providers under Medicare and Medicaid programs, with up to 70% of their case mix stemming from Medicare and Medicaid patients. The physician owners of PHA member hospitals are also providers under the Medicare and Medicaid programs.

PHA is committed to the sanctity of private property as guaranteed by the Constitution, especially in relation to the rights of physicians to own and operate hospitals and to provide

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patients with expert, cost-effective, and efficient health care. In *Physician Hospitals of America, et al. v. Sebelius*, Case No. 6:10-cv-00277-MHS, filed June 3, 2010, in the U.S. District Court for the Eastern District of Texas, Tyler Division, PHA, along with a member hospital, is challenging the constitutionality of § 6001 of the Patient Protection and Affordable Care Act of 2010 (“PPACA”), which singles out for negative treatment physician-owned hospitals from among all other hospitals owned by persons of any other profession. Section 6001 retroactively prohibits planned, approved, and commenced service facility expansion at approximately 58 Medicare-certified hospitals solely because they are owned by physicians, and further prevents the development of an additional 84 physician-owned hospitals that would be otherwise eligible for Medicare certification.

PHA has an interest in protecting its members directly, and the public indirectly, from any unconstitutional healthcare legislation, and thus it has an interest in supporting the Commonwealth of Virginia in this action.

In the proffered brief filed with this motion, PHA addresses the merits of the Commonwealth’s Motion for Summary Judgment and of the Secretary’s Motion for Summary Judgment and urges the Court to grant the Commonwealth’s Motion and to deny the Secretary’s.

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

PHA members are an integral part of the American health care system. PHA member hospitals are owned by physicians who have put their own personal capital at risk to ensure quality health care services for patients, and who dedicate their talent in management and medical skills to that end. Thus PHA members have a unique perspective on health care reform issues generally, and the PPACA specifically.

Speaking for its members, PHA agrees with the Commonwealth of the Virginia that the lynchpin of the PPACA, the individual insurance mandate, is unconstitutional. Specifically, PHA agrees with Plaintiff that neither the Commerce Clause nor the General Welfare Clause serve to empower Congress to coerce an individual to purchase health insurance.

#### **IV. CONCLUSION**

WHEREFORE, PHA respectfully requests that its motion be granted and that the Court accept for filing its memorandum in opposition to Secretary Sebelius's motion to dismiss the Commonwealth's Complaint.

Dated: October 4, 2010

Respectfully submitted,

/s/ Scott C. Oostdyk

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of October, 2010, I electronically filed the foregoing Memorandum of Law in Support of Motion for Leave To Participate as Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment and in Opposition To Defendant's Motion for Summary Judgment with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to Earle Duncan Getchell, Jr., Charles E. James, Jr., Stephen R. McCullough, Wesley Glenn Russell, Ian Gershengorn, Joel McElvain, Jonathan Holland Hambrick, Sheila M. Lieber, and all counsel for Amici. A copy has also been served via first class, postage prepaid, U.S. Mail to Ray Elbert Parker, Pro Se, P.O. Box 320636, Alexandria, Virginia 22320.

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