

**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
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN
OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

The Washington Legal Foundation (WLF) hereby moves for leave to file the accompanying *amicus curiae* brief in opposition to Secretary Kathleen Sebelius’s motion (Dkt. 21) to dismiss this action for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). In support of its motion, WLF states 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., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861 (U.S., dec. pending); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. King*, Crim. No. 09-30442 (9th Cir., dec. pending).

(3) 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. WLF is 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, WLF fears 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.

(4) WLF supports each of the arguments made by the Commonwealth of Virginia in its response (Dkt. 28) to the motion, but seeks to 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 Necessary and Proper Clause. Specifically, WLF argues that the Supreme Court's opinion last month in *United States v. Comstock*, ___ U.S. ___, No. 08-1224, 2010 WL 1946729 (U.S. May 17, 2010), demonstrates that only narrow, limited, and deeply historical claims of congressional power will be sustained under the Necessary and Proper Clause. As elaborated in the attached brief, Section 1501 of the

PPACA fails to satisfy the considerations established by *Comstock* to determine whether a statute is a “necessary and proper” means of exercising the federal authority.

(5) WLF is filing this brief because of its demonstrated interest in promoting a healthy balance of power between the state and federal governments; it has no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of its lack of direct interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

(6) Counsel for WLF 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, WLF respectfully requests that its motion for leave to file the attached *amicus curiae* brief be granted. A proposed order is attached.

Date: June 17, 2010

Respectfully submitted,

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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 17th day of June, 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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