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Motion to Dismiss Denied in Virginia's Health Care Challenge
(*Commonwealth ex rel. Cuccinelli v. Sebelius*, No. 3:10-cv-188)

On August 2, 2010, U.S. District Court Judge Henry Hudson denied the federal government's motion to dismiss Virginia's lawsuit challenging the Patient Protection and Affordable Care Act, the federal law that requires most Americans to buy health insurance by 2014 or pay annual penalties to the government. In June, the American Center for Law and Justice (ACLJ) filed an *amici curiae* brief on behalf of 28 members of Congress and 70,000 Americans supporting Virginia's opposition to the motion, and ACLJ attorneys attended oral arguments on the motion in July. Judge Hudson's opinion also provides support for the ACLJ's lawsuit challenging the federal health care law, *Mead v. Holder*, No. 1:10-cv-950, filed in Washington D.C. in June.

Judge Hudson held that Virginia had legal standing to defend a state law that declares that Virginians shall not be required to purchase health insurance. He also stated that the case was not barred by the Anti-Injunction Act because it fell within an exception. With regard to the government's argument that the case was not ripe because the mandate to buy insurance will not take effect until 2014, the court explained:

> While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements.

Slip op. at 16.

Concerning the merits of the case, the court summarized its reasons for denying the motion to dismiss by stating,

> [w]hile this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate—and tax—a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some

> authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action.

Id. at 31. Although Judge Hudson had not been asked to decide the merits of the case, he observed that "[n]ever before has the Commerce Clause and associated Necessary and Proper Clause been extended this far. At this juncture, the Court is not persuaded that the Secretary has demonstrated that the Complaint fails to state a cause of action with respect to the Commerce Clause element." *Id.* at 25.