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WLF SUPPORTS VIRGINIA'S CHALLENGE TO FEDERAL HEALTHCARE MANDATE

(Commonwealth of Va. v. Sebelius)

The Washington Legal Foundation (WLF) yesterday filed a brief in the U.S. District Court for the Eastern District of Virginia urging it to deny a request by the federal government to dismiss the lawsuit. The case, *Commonwealth of Va. v. Sebelius*, involves the Commonwealth of Virginia's constitutional challenge to the recently enacted Patient Protections and Affordable Care Act (PPACA), a federal law containing an individual mandate that would require all uninsured Americans, under threat of civil penalty, to purchase health insurance for themselves and their dependents. In its brief opposing the federal government's motion, WLF relied on a recently announced test by the U.S. Supreme Court to argue that the PPACA's individual mandate is not a valid exercise of Congress's power under the Necessary and Proper Clause.

The PPACA directly conflicts with the Virginia Health Care Freedom Act (VHCFA), a recently enacted law by the Commonwealth of Virginia that precludes any resident of Virginia from being required to purchase an individual health insurance policy. Ordinarily, a federal law will trump a conflicting state law under the Constitution's Supremacy Clause, but only if that federal law is a constitutionally valid exercise of congressional power. In its brief, WLF argued that because only narrow, limited, and deeply historical claims of congressional power can be sustained under the Necessary and Proper Clause, the PPACA's individual mandate provision cannot survive judicial scrutiny.

"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," said WLF Senior Litigator Cory Andrews after WLF's brief was filed with the court. "The PPACA's individual mandate threatens to upset 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," Andrews said.

Relying on Supreme Court precedent, WLF argued that the Necessary and Proper Clause is not broad enough to sustain a federal statute that is not otherwise

tethered to a constitutionally enumerated power. In its brief invoking the Necessary and Proper Clause, the federal government purported to rely on Congress's enumerated authority under the Commerce Clause. In response, WLF argued that an individual's passive status as "uninsured" simply does not implicate the traditional Commerce Clause power because it does not constitute "activity" in interstate commerce. As a result, both the PPACA's individual mandate and its penalty provision exceed the outer limits of Congress's power under the Commerce Clause. Without a legitimate anchor to an enumerated congressional power under the Constitution, the Necessary and Proper Clause cannot be used to vindicate the individual mandate.

WLF also responded to the federal government's claim that there is a longstanding history of federal regulation of health insurance. Relying on the historical record, WLF demonstrated that federal involvement in private health insurance is an entirely modern phenomenon. Indeed, throughout much of this nation's history, the Supreme Court consistently held that regulation of the insurance industry was exclusively a state concern that did not constitute regulation of "interstate commerce" within the meaning of the Commerce Clause. As WLF's brief pointed out, even attorneys for the federal government conceded that the earliest congressional legislation affecting the "business of insurance" was passed within only the last thirty-six years. And, whatever the recent history of federal regulation of the health insurance industry, there is *no* history of the federal government's forcing uninsured Americans to purchase health insurance policies.

The federal government will now have an opportunity to reply to the arguments raised by both the Attorney General of Virginia and WLF. Following oral arguments on the pending motion to dismiss, a decision is anticipated sometime this fall.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. Among other things, WLF works to ensure a healthy balance of power between the state and federal governments.

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For further information, contact WLF Senior Litigator Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.