No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

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QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C. § 5000A. The question presented is:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondents.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF's members include individuals who live and work in every State of the Nation. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved to the States and the

[1] Pursuant to Supreme Court Rule 37.6, counsel for MSLF affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of amicus briefs.

people. These limited powers include Congress's power to make rules regulating interstate commerce, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Legislation that reaches beyond Congress's constitutional authority, like the Individual Mandate component of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), ("Individual Mandate"), results in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Therefore, MSLF was actively involved in all relevant litigation challenging the Individual Mandate and filed amicus curiae briefs in the following cases: *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Liberty University v. Geithner*, 2011 WL 3962915 (4th Cir. 2011); *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011); *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011); and *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). Therefore, MSLF respectfully submits this amicus curiae brief in support of Respondents urging that this Court affirm the Eleventh Circuit's ruling that the Individual Mandate is unconstitutional.

SUMMARY OF THE ARGUMENT

The principle of enumerated powers is instrumental in maintaining the federal system of shared power established by the Constitution, because those powers not explicitly delegated to the federal government are reserved to the States and the people. That Congress is limited to its enumerated powers has been a foundational principle throughout the history of the United States. As demonstrated in Part I, the doctrine of enumerated powers can be traced to the colonial period, and is evident in the Declaration of Independence, the Articles of Confederation, the debate prior to ratification of the Constitution, and, as this Court has consistently held, in the text of the Constitution.

In contrast to the plenary authority of the British parliamentary system that many American colonists had left behind, colonial governments possessed limited authority. The colonists pointed to this notion of limited government in the Declaration of Independence, which explains that "Governments are instituted among Men, deriving their just powers from the consent of the governed" for the limited purpose of securing individual rights. The Articles of Confederation carried forward the notion that the federal government was to be one of limited powers. But the Articles of Confederation did not sufficiently limit the powers of State governments to enact protectionist legislation. To rectify this problem, the Articles were replaced with the Constitution, which granted Congress authority to regulate interstate commerce to

ensure free trade across state lines. U.S. Const. art. I, § 8, cl. 3.

The drafters of the Constitution adhered to the longstanding doctrine of enumerated powers; indeed, the ratification debates suggest that the Constitution might never have been ratified had the federal government not been limited to specifically enumerated powers. This Court has consistently acknowledged that the text of Article I and the Ninth and Tenth Amendments resolve definitively that the federal government is one of limited, enumerated powers. Yet, Congress often claims authority that exceeds constitutional limits, in an effort to justify legislation governing matters of purely intrastate concern, or matters outside commerce. The result of such overreaching is a federal government that cannot be regarded as limited and ethical, and further erosion of individual liberty, the right to own and use property, and the free enterprise system.

As demonstrated in Part II, the Individual Mandate compels all non-exempt Americans to affirmatively engage in interstate commerce by purchasing what Congress deems an acceptable level of health insurance coverage from private insurance firms. This mandate, passed purportedly pursuant to the Commerce Clause, "exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law." *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Services*, 780 F. Supp. 2d 1256, 1295 (N.D. Fla. 2011).

Nonetheless, the federal government has argued that the Individual Mandate is "eminently reasonable." Petitioners' Brief on the Merits at 19. The federal government's arguments in support of the Individual Mandate merely pay lip-service to the doctrine of enumerated powers, and thereby seek to undermine that foundational principle of American government. Petitioners' Brief on the Merits at 22 (citing *United States v. Comstock*, ___ U.S. ___, 130 S. Ct. 1949, 1956 (2010)). Indeed, the Individual Mandate threatens to eviscerate the doctrine of enumerated powers upon which the federal government was established.

The constitutionality of the Individual Mandate depends upon an unbounded interpretation of the Commerce Clause, which would render the other enumerated powers superfluous, and thereby render the doctrine of enumerated powers a nullity. As the Eleventh Circuit correctly decided, if the Commerce Clause gives Congress the power to compel individuals to engage in interstate commerce, it would consequently give Congress power to mandate any and all individual decisions. *Florida ex rel. Atty. Gen.*, 648 F.3d at 1295-98.

Such an unlimited interpretation of the Commerce Clause would be in direct conflict with the clear intent of the Founders, as expressed in the Declaration of Independence, the Articles of Confederation, in the debates surrounding the drafting and ratification of the Constitution, and in the text of the Constitution itself. Thus, by purporting to derive its power to enact the Individual Mandate from the

Commerce Clause, Congress engaged in an unprecedented power grab that threatens to extinguish the principle of enumerated powers upon which the federal government was established.

ARGUMENT

I. THE PRINCIPLE OF A LIMITED FEDERAL GOVERNMENT OF ENUMERATED POWERS IS DEEPLY ROOTED IN THE HISTORY OF THE UNITED STATES.

A. The Principle Of A Limited Government Of Enumerated Powers Arose In The Pre-Revolutionary Period.

In 18th-century Britain, power was concentrated entirely in the "King-in-Parliament" (i.e., the King, Lords, and Commons). Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1431 (1987). Britons understood this power as being absolute. *Id*.; *see also* William Blackstone, *Of the Nature of Laws in General*, *in Commentaries on the Laws of England* § 2 (1765-69) (In all governments, there is "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii* or the rights of sovereignty, reside.") *available at* http://www.lonang.com/exlibris/blackstone/bla-002.htm. Many American colonists, however, due in part to their experiences with the British Parliament, had developed a profoundly different view of government – one in which all power was derived from the people themselves. Kurt T. Lash, *Leaving*

the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction, 50 Wm. & Mary L. Rev. 1577, 1593-94 (2009).

The structure of the colonial governments reinforced the colonists' understanding that a just government is one of limited authority. Typically, each colony was governed by a corporate charter. Amar, *supra*, at 1432-33. These charters, such as the Massachusetts Bay Company Charter, established a governor and other governmental agents, much like corporate agents, with clearly defined authority:

> That from henceforth for ever, there shalbe one Governor, one Deputy Governor, and eighteene Assistants of the same Company, to be from tyme to tyme constituted, elected and chosen out of the Freemen of the saide Company . . . which said Officers shall applie themselves to take Care for the best disposeing and ordering of the generall buysines and Affaires of, for, and concerning the said Landes and Premisses hereby mencoed, to be graunted, and the Plantacion thereof, and the Government of the People there.

The Charter of Massachusetts Bay (1629), *available at* http://avalon.law.yale.edu/17th_century/mass03.asp. Like corporate agents, the colonial governmental officials possessed only those powers specifically enumerated; government actions beyond the scope of the charter had no legal authority. Amar, *supra*, at 1433-35 (citing A. McLaughlin, *The Foundations of American Constitutionalism* 38-65, 104-28 (1961)). For example,

the Massachusetts Bay government had the power "to make Lawes and Ordinnces for the Good and Welfare of the saide Company," of "nameing and setting of all sorts of Officers," of "disposing and ordering of the Eleccons of such of the said Officers as shalbe annuall," and "to incounter, expulse, repell, and resist by Force of Armes . . . all such Person and Persons, as shall at any Tyme hereafter, attempt or enterprise the Destruccon, Invasion, Detriment, or Annoyaunce to the said Plantation or Inhabitants." The Charter of Massachusetts Bay, *supra*.

The colonial charters were thus a precursor to the American notion of limited, constitutional government. Indeed, Rhode Island's colonial charter served as the basis for government there until Dorr's Rebellion in 1841. *See Luther v. Borden*, 48 U.S. (7 How.) 1, 1 (1849). Unlike Rhode Island, most of the colonies adopted constitutions following the Revolution, which carried forward the concept of constitutionally limited government. *See id.* Thus, even prior to the Revolution, colonial governments stood in stark contrast to the British system of government that many of the colonists had fled, wherein the government's authority was absolute and the actions of Parliament were unassailable. The British notion of sovereignty permitted none of the limitations that have come to define the American form of government:

> In sovereignty there are no gradations. There may be limited royalty, there may be limited consulship; but there can be no limited government. There must, in every

> society, be some power or other, from which there is no appeal, which admits no restrictions, which pervades the whole mass of the community, regulates and adjusts all subordination, enacts laws or repeals them, erects or annuls judicatures, extends or contracts privileges, exempt itself from question or control, and bounded only by physical necessity.

Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress* (1775), *reprinted in* 14 *The Works of Samuel Johnson* 93 (Pafraets & Company 1913), *available at* http://www.samueljohnson.com/tnt.html.

As a result, some colonists objected not only to Parliament's actual policies, but also to the principle that the power of Parliament was unlimited. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 876 (1978) ("The view that the Stamp Act was unconstitutional (in the full sense of "illegal") provided the organizing principle for a new and vigorous movement of popular protest against the tax."). The Boston Tea Party, for example, was a protest against both a tax on tea and the notion that Parliament had the power to tax tea. Amar, *supra*, at 1430 n.21 (citing J. Blum, E. Morgan, et al., *The National Experience* 94 (1973)). Indeed, the Tea Party took place after Parliament had *reduced* a tax on tea in an attempt to acclimate colonists to the

principle of plenary parliamentary taxation powers.[2] *Id*. The revolutionary idea that government power is limited by specific grants of authority was thus inherent in the structure of the colonies; it is an idea that would be integral to the new governments that were formed by the colonists in the wake of the American Revolution.

B. The Principle Of A Limited Government Of Enumerated Powers Is Evident In The Declaration Of Independence.

In 1776, the Founders' primary justification for independence from England was Parliament's abandonment of the principle of a limited government of enumerated powers in its governance of the colonies. The Declaration of Independence famously justifies the concept of limited government by observing that individuals are "endowed by their Creator with certain unalienable Rights." Declaration of Independence para. 2 (U.S. 1776). In other words, rights exist by virtue of an individual's nature as a human being. The Declaration explains this proposition by exposing the illogic of grounding rights in government:

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[2] In holding the Individual Mandate unconstitutional, the District Court for the Northern District of Florida recognized: "It is difficult to imagine that a nation which began, at least in part, as a result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place." *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1286.

> [The Declaration] speaks simply to the question of whether rights come from government by posing, in effect, the question of where government would get its rights if not from the people – it being clear that people create and hence come before government. In both logic and time, then, people come first, government second. That was the central point the Founders sought to pin down.

Roger Pilon, *The Purpose and Limits of Government, Cato's Letter #13* 6 (1999).

The unalienable rights possessed by the people are far too numerous to be listed specifically; the Founders acknowledged the broad nature of individual rights by providing that "among these [rights] are Life, Liberty and the pursuit of Happiness." Declaration of Independence para. 2 (U.S. 1776). They contrasted these individual rights with the unlimited authority claimed by King George III's Parliament, calling his reign a "History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States." *Id*.

Corollary to the unalienable rights identified by the Declaration, the Founders also acknowledged the Lockean idea that individuals possess the authority to empower a government to protect those rights.[3]

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[3] As has been documented frequently, John Locke was the primary philosophical influence for Thomas Jefferson, the principal author of the Declaration of Independence. *See*, *e.g.*, *American Civil Liberties Union of Kentucky v. McCreary County,*

(Continued on following page)

Locke described this authority to consent to governance as an "Executive Power," i.e., the right to secure an individual's unalienable rights. Pilon, *supra*, at 15 (citing John Locke, *Second Treatise of Civil Government* § 13 (1690)). Accordingly, the Declaration famously explains that governments are "instituted" for the limited purpose of "secur[ing] these rights" of the people, and the authority of the government to secure these rights is "derive[ed] . . . from the consent of the governed." Declaration of Independence para. 2 (U.S. 1776).

Consequently, the federal government's power exists solely because the people have conferred upon it their right to secure their unalienable rights. Naturally, then, for the federal government to have the power to secure a purported right, individuals must first have possessed that power, and then, through the consent of the governed, must have delegated that power to the federal government. *See* Frederic Bastiat, *The Law* 68-69 (Dean Russell, trans., Foundation for Economic Education 1998) (1850) ("It is not true that the legislator has absolute power over our persons and property. The existence of persons and property preceded the existence of the legislator, and his

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Kentucky, 354 F.3d 438, 453 n.7 (6th Cir. 2003) (noting that "with respect to 'the political philosophy of Nature and natural rights' referenced in the Declaration that the 'lineage is direct: Jefferson copied Locke' ") (quoting Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922)), *aff'd*, 545 U.S. 844 (2005).

function is only to guarantee their safety."). This provides the philosophical premise behind the principle of enumerated powers.

C. The Principle Of A Limited Government Of Enumerated Powers Is Explicitly Included In The Articles Of Confederation.

In the years following the Revolution, the principle of a limited government of enumerated powers continued to be foundational to the American form of government. The Articles of Confederation provided that, "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II. With that firm endorsement of the concept of enumerated powers as its guiding principle, the Articles proceed to list the enumerated powers delegated to the federal government. *See* Articles of Confederation, art. IX. Thus, the Founders, keenly aware of the dangers that resulted from a tyrannical English government, were careful to create a limited government possessing only a few enumerated powers.

The Articles of Confederation, however, were inadequate because, *inter alia*, they did not sufficiently limit the power of *state* governments. States had become engaged in the practice of enacting protectionist legislation to benefit local industries and businesses.

See, *e.g.*, *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 363-64 (2008) (Kennedy, J., dissenting). An attempt was made, unsuccessfully, in 1784 to amend the Articles to create a uniform rule of navigation among the States, in order to prevent the parochialism that had thus far pervaded interstate commerce. Melvin L. Urofsky & Paul Finkelman, *A March of Liberty* 85 (2d ed. 2002). Ultimately, commerce was made regular among the several States by the insertion of the Commerce Clause in the Constitution. *See*, *e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *The Federalist No. 22*, at 143-145 (Alexander Hamilton) (C. Rossiter ed., 1961)). The Commerce Clause fulfilled the Founders' desire to ensure free trade amongst the States, unrestrained by governmental biases, prejudices, or regulations. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison."). It is upon that clause that the federal government purports to rest the Individual Mandate, 42 U.S.C.A. § 18091(a), but even the mighty Commerce Clause cannot carry the burden that the federal government would have it shoulder.

D. The Principle Of A Limited Government Of Enumerated Powers Is Enshrined In The Constitution.

1. The Constitutional Convention proposed a federal government of enumerated powers.

"The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent . . . from the history of the proceedings of the convention, which framed it. . . ." Joseph Story, 2 *Commentaries on the Constitution of the United States* § 906 (1833) (hereinafter "*Commentaries*") *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_1s28.html. At the outset of the Constitutional Convention, James Madison expressed his desire for a national government of explicitly enumerated powers, though he was uncertain whether such an enumeration could be accomplished. 1 *The Records of the Federal Convention of 1787* 53 (Max Farrand ed., Yale University Press (1911)) (hereinafter "*Convention Records*"), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1785. Other delegates to the Convention, though not all, similarly expressed support for an enumeration of powers. *Id*.

After a month of debate on a wide range of issues, the delegates to the Convention appointed a committee "for the purpose of reporting a Constitution conformably to the Proceedings aforesaid" so that, going forward, the delegates would have one tangible

document on which to debate. 2 *Convention Records* 85. This Committee of Detail began its work with a broad, general sketch of the legislative branch provided to it by the Convention:

> Resolved[.] That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

1 *Convention Records* 53.

After nearly two weeks of work, the Committee of Detail presented its final document to the Convention as a whole. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901, 993 (2008). The document that emerged reflected the predominate desire, expressed by Madison, for a specific enumeration of powers. *Id*. at 986-93. Importantly, once the Committee of Detail's final draft was presented to the Convention, none of the delegates questioned the *principle* that the national government should be limited and comprised solely of defined, enumerated powers. *Id*. at 994. Eighteen specifically enumerated powers were proposed for the national legislature by the Committee of Detail, including the authority "To regulate commerce (both foreign & domestic)." 2 *Convention Records* 143. Ultimately, most of the proposed enumerated powers were accepted

and the commerce power was limited: "To regulate commerce with foreign nations, and among the several States; and with the Indian tribes." *Id*. at 569; U.S. Const. art. I, § 8, cl. 3.

2. The structure of the Constitution explicitly creates a federal government of enumerated powers.

This principle of a limited federal government comprised of defined, enumerated powers is express in the structure of the Constitution. Unlike Article II of the Constitution, which begins, "The executive Power shall be vested in a President of the United States of America," and unlike Article III of the Constitution, which begins, "The judicial Power of the United States, shall be vested in one supreme Court . . . ," Article I of the Constitution begins, "All legislative Powers *herein granted* shall be vested in a Congress." U.S. Const. art. I-III (emphasis added). In so doing, the Founders expressly limited Congress's power to only those powers "herein granted" and enumerated in the Constitution. *See United States v. Ho*, 311 F.3d 589, 596 (5th Cir. 2002) ("The Constitution creates a federal government of limited and enumerated powers, and in particular a Congress of limited and enumerated powers. The Article I Vesting Clause confirms this proposition, vesting in Congress '[a]ll legislative powers herein granted.'" (citations omitted)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (explaining that the Founders of the Constitution were keenly aware of the

doctrine of *expressio unius est exclusio alterius* (i.e., the enumeration of some excludes all others)).

The contrast between the plenary powers of the President to enforce the laws and the limited powers of Congress to enact the laws is perhaps most stark. The Constitution takes two diametrically opposite approaches for each branch: While the President has plenary executive authority that is limited by the Constitution, the Congress has only those specific powers granted by the Constitution. John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935, 1938 (2009) ("Article II, §1's Vesting Clause grants all of the federal executive power to the president alone, subject only to narrow, explicit exceptions in the text itself."). Indeed, the President's near-exclusive authority over foreign policy decisions is a stark example of the breadth of this inherent executive power. Even though the President's power to conduct foreign affairs is textually limited to submitting treaties to the Senate for its approval, "an implicit executive authority to set and conduct foreign policy on behalf of the nation" has been recognized since the founding. *Id*. at 1938 n.11 (citing Alexander Hamilton, *Pacificus No 1* (June 29, 1793), *in* Harold C. Syrett, ed., 15 *The Papers of Alexander Hamilton* 33, 39 (Columbia 1969)). Congress has no such "implicit" authority. Even the Judiciary is incapable of interceding in the President's foreign policy decisions. *See Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring). The only Congressional power that begins to approach the plenary executive authority of the

President is the Necessary and Proper Clause, but even this broad grant of power is constrained by the enumerated powers contained in Article I, section 8. *See*, *e.g.*, *Linder v. United States*, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the states is beyond the power of the federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure.").

3. The doctrine of enumerated powers was embraced during the ratification debates.

Following the Constitutional Convention, even federalists promoting the ratification of the Constitution, such as Alexander Hamilton, suggested that the Constitution should be rejected "if it would enable the Federal Government to ' . . . penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.'" *United States v. Lopez*, 514 U.S. 549, 592 (1995) (Thomas, J., concurring) (quoting 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 267-68 (J. Elliot ed. 1836) (A. Hamilton at New York Convention)). But Hamilton dismissed this concern because "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *The Federalist No. 32*, *supra*, at 166 (Alexander Hamilton) (emphasis in original). As James

Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined." *The Federalist No. 45*, *supra*, at 260 (James Madison). Madison further insisted that "the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." *The Federalist No. 39*, *supra*, at 213 (James Madison) (emphasis in original).

Echoing Hamilton and Madison, Oliver Ellsworth, at the Connecticut Convention, explained that, "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be void." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (Jonathan Elliot ed., 1836) (1787) (hereinafter "*Convention Debates*"), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html. Likewise, in the North Carolina Convention, Archibald Maclain explained that "'[t]he powers of Congress are limited and enumerated. . . . It is as plain a thing as possibly can be, that Congress can have no power but what we expressly give them.'" 4 *Convention Debates* 140-41. James Wilson succinctly expressed the principle of enumerated powers when, at the Pennsylvania ratifying convention, he explained that "the supreme power . . . resides in the PEOPLE, as the fountain of government. . . . They can delegate it in such proportions, to such bodies, on such terms, and under such

limitations, as they think proper." James Wilson, *Speech of Dec. 4, 1787*, *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch2s14.html. Likewise, a Virginia newspaper supporting ratification declared that "'should Congress attempt to exercise any powers which are not expressly delegated to them, their acts would be considered as void, and disregarded.'" Lash, *supra*, at 1595 (quoting Alexander White, *To the Citizens of Virginia*, Winchester Va. Gazette, Feb. 29, 1788, *reprinted in* 8 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States* 438 (John P. Kaminski & Gaspare J. Saladino eds., 1988)).

Even the anti-federalist "Federal Farmer," who was skeptical of a consolidation of power in a federal government, acknowledged in 1788 that one of the proposed Constitution's virtues was its creation of a federal government that would possess only specific, enumerated powers.

> The supreme power is undoubtedly in the people, and it is a principle well established in my mind, that they reserve all powers not expressly delegated by them to those who govern; this is as true in forming a state as in forming a federal government. . . . [W]e might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.

Letter from the Federal Farmer No. 16 (Jan. 20, 1788) *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s32.html.

After the ratification debate ended, Madison continued to champion the constitutional principle of enumerated powers. For example, in 1791, Madison clarified that "'[n]o power . . . not enumerated could be inferred from the general nature of Government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented or supplied by an amendment to the Constitution.'" 2 *Annals of Congress* 1950 (1791) (Joseph Gales ed., 1834), *available at* http://memory.loc.gov/ammem/amlaw/lwaclink.html) (hereinafter "*Annals of Congress*"). In 1792, during the Second Congress, Madison observed that the original meaning of the Constitution was uniformly understood to definitively limit the federal government's powers:

> I, sir, have always conceived – I believe those who proposed the Constitution conceived – it is still more fully known, and more material to observe, that those who ratified the Constitution conceived – that this is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers – but a limited government, tied down to the specified powers, which explain and define the general terms.

3 *Annals of Congress* 386 (1792). Likewise, in 1794, Madison reaffirmed the connection between personal

sovereignty and limited government: "When the people have formed a Constitution, they retain those rights which they have not expressly delegated." 4 *Annals of Congress* 934 (1794). Thus, the doctrine of enumerated powers was embraced before, during, and after ratification of the proposed Constitution.

4. The Bill of Rights demonstrates the scope and historical depth of the doctrine of enumerated powers.

So widely accepted was the principle of enumerated powers amongst the Founders that the idea of a Bill of Rights had "never struck the mind of any member of the late convention till . . . within three days of the dissolution of that body, and even then, of so little account was the idea, that it passed off in a short conversation, without introducing a formal debate, or assuming the shape of a motion." James Wilson and John Smilie, *James Wilson and John Smilie Debate the Need for a Bill of Rights* (Nov. 28, 1787) *in The Debate on the Constitution: Part One: September 1787 to February 1788* 807 (Bernard Bailyn ed., 1993). The initial rejection of a Bill of Rights was not a repudiation of individual rights in favor of a national government of plenary powers. Instead, many delegates opposed the Bill of Rights

because of its potentially negative implication for the enumerated powers doctrine.[4]

James Wilson, one of the five members of the Committee of Detail at the Constitutional Convention, captured this concern during the Pennsylvania ratifying convention by pointing out that inherent government authority could be implied from an enumeration of individual rights:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated

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[4] This was distinctly different from what existed in England:

> Bills of rights had possessed a relevance in England where there is a king and a House of Lords, quite distinct with respect to power and interest from the rest of the people. Since the English kings had claimed all power and jurisdiction, bills of rights like the Magna Carta had been considered by them as grants to the people. A bill of rights was used in England to limit the king's prerogative; he could trample on the liberties of the people in every case which was not within the restraint of the bill of rights.

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 539 (University of North Carolina Press 1969) (internal quotations omitted).

> is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.

2 *Convention Debates* 436. At the North Carolina ratifying convention, James Iredell, who would later become one of the original justices of this Court, echoed Wilson's concerns:

> [I]t would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

4 *Convention Debates* 167; *see also* Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. Cin. L. Rev. 49, 85-86 (1992) ("[S]ince the new central government was a government of limited and enumerated powers, any attempt to enumerate rights which were immune from the exercise of those powers carried with it an unwanted implication. . . ."). Hamilton took a similarly dim view of an enumeration of rights as unnecessary to a government of enumerated powers: "a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is

merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." *The Federalist No. 84*, *supra*, at 481 (Alexander Hamilton).

The anti-federalist Federal Farmer opposed both the Constitution and a bill of rights, on the basis that either would represent an affront to the authority of States and the rights of the people:

> When we particularly enumerate the powers given, we ought either carefully to enumerate the rights reserved, or be totally silent about them; we must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved, particularly to enumerate the former and not the latter, I think most advisable: however, as men appear generally to have their doubts about these silent reservations, we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.

Letter from the Federal Farmer No. 16, *supra*. The anti-federalists' wish for a general reservation of authority was ultimately embodied in the Ninth and Tenth Amendments. U.S. Const. amend. IX, X. These provisions were included in the Bill of Rights

specifically to address the concerns expressed by those quoted above, and others, that the doctrine of enumerated powers might be eroded by a Bill of Rights. *See Griswold v. Connecticut*, 381 U.S. 479, 488-92 (1965) (Goldberg, J., concurring). In presenting the proposed Bill of Rights, Madison called the Congress's attention to the salutary affect of the Ninth Amendment on the doctrine of enumerated powers:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].

1 *Annals of Congress* 456 (1789); *see also Griswold*, 381 U.S. at 488-90 (Goldberg, J., concurring). The documentary evidence therefore demonstrates that the change to the Constitution wrought by the Bill of Rights did nothing to diminish the doctrine of enumerated powers. Indeed, even the advocates of the Bill of Rights, such as Madison and the Federal Farmer, were careful to protect and defend the notion

that the federal government would continue to be one of only limited enumerated powers.

5. This Court has consistently recognized that the federal government possesses only limited, enumerated powers.

This Court's precedents have established conclusively that the Constitution creates a federal government of limited, enumerated powers. First, in the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), Chief Justice Marshall explained: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Later, in 1819, this Court again stated that "[t]his government is acknowledged by all, to be one of enumerated powers." *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819). Five years later, this Court again explained that the Constitution "contains an enumeration of powers expressly granted by the people to their government." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824). Indeed, "the constant declaration of this court from the beginning is that this government is one of enumerated powers." *Kansas v. Colorado*, 206 U.S. 46, 87 (1907).

More recent decisions reach the same conclusion. In *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), this Court acknowledged, "Under our Constitution, the Federal Government is one of enumerated powers."

Likewise, in *United States v. Lopez*, 514 U.S. 549, 552 (1995), this Court reaffirmed that:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed., 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

Again, in 2000, this Court explained that, "[w]ith its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000). Therefore, this Court held that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Id*. at 607.

Ultimately, the principle that the federal government is one of limited, enumerated powers is so well documented in the history of the Colonies, so thoroughly and painstakingly set forth in the Articles of Confederation, the Constitution, and the Bill of Rights, and so thoughtfully protected by this Court, that one cannot seriously argue that it is not a bedrock principle – perhaps the single most important principle – enshrined in the Constitution.

II. THE INDIVIDUAL MANDATE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT IS UNCONSTITUTIONAL; OTHERWISE, THE FEDERAL GOVERNMENT WOULD CEASE TO BE A GOVERNMENT OF ENUMERATED POWERS.

The plain language of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, even with help from the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, does not empower Congress to regulate any and all forms of human activity – *or inactivity*. *Morrison*, 529 U.S. at 607-08 ("[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."). The power "[t]o regulate commerce," is the power to direct how commercial exchanges take place, not the power to mandate that certain commercial exchanges happen. U.S. Const. art. I, § 8, cl. 3; *see* Samuel Johnson, 2 *A Dictionary of the English Language* (J.F. Rivington, et al., 6th ed. 1785) (Defining "to regulate" as "1. To adjust by rule or method. . . .

2. To direct."). Therefore, while Congress may regulate certain economic *activities* under the Commerce Clause, "a decision not to purchase a product, such as health insurance, is not an economic activity. It is a virtual state of repose – or idleness – the converse of activity." *Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 610. In fact, as the District Court in this case correctly explained, the Individual Mandate marks the first time in history that Congress has regulated economic *inactivity* under the Commerce Clause: "Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States." *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1284. "It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." *Id*. at 1286. The nonpartisan Congressional Budget Office ("CBO") has likewise opined that such federal action is unprecedented:

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An Individual Mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.

CBO, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance, 1 (1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf. Yet, Congress justified the Individual Mandate by reference to the Commerce Clause. 42 U.S.C.A. § 18091(a). Under this interpretation of the Commerce Clause, the federal government would no longer be limited to its enumerated powers; the centuries-old doctrine upon which the federal government is based would be eviscerated.

A. If The Individual Mandate Were A Valid Exercise Of The Commerce Power, The Commerce Clause Would Render The Other Enumerated Powers Superfluous.

Congress's interpretation of the Commerce Clause, as reflected in the Individual Mandate, effectively swallows up all the other enumerated powers in the Constitution, resulting in one comprehensive governmental power. Indeed, if the Commerce Clause empowers Congress to mandate that citizens enter into a specific commercial transaction, many of Congress's other enumerated powers under Article I, section 8, would be wholly superfluous:

> [T]here is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post

> offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. . . . An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.

Lopez, 514 U.S. at 588-89 (Thomas, J., concurring); *cf. United States v. Santos*, 553 U.S. 507, 519 n.6 (2008) (discussing the often-cited canon of statutory construction that statutory text should be interpreted such that no provision is rendered superfluous).

"In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. 540, 571 (1840). The power "to regulate commerce" in the Commerce Clause has a specific meaning, tailored to the limited role of the federal government envisioned by the Founders. It does not include the power to mandate that commerce occur.

When the Constitution was written, "to regulate" was defined by Samuel Johnson's authoritative *A Dictionary of the English Language* as "To adjust by rule or method" or, secondarily, "To direct." Johnson, *supra*, vol. 2. This was a common understanding of the

phrase, even years after the Constitution was written. Writing about the original meaning of the Commerce Clause in 1833, Justice Story commented that "[t]he power is to regulate; that is, to prescribe the rule, by which commerce is to be governed." Story, 3 *Commentaries* § 1057.

The Federal government argues that "there is no textual support in the Commerce Clause for [an] 'inactivity' limitation," emphasizing Johnson's secondary definition of "to regulate," i.e., "to direct." Petitioners' Brief on the Merits at 48; *but see* Respondents' Brief on the Merits at 20. The D.C. Circuit accepted this argument blindly. *Seven-Sky*, 661 F.3d at 16. Yet, that second definition, "To direct," is itself defined as "3. To regulate; to adjust. . . . 4. To prescribe certain measure; to mark out a certain course . . . 5. To order; to command." Johnson, *supra*, vol. 1. Although the last definition of "To direct" superficially supports the constitutional authority for the Individual Mandate, Johnson specifically notes that "to *direct* is a softer term than to *command*." *Id*. (emphasis in original). Thus, any link between the power encompassed in the grant of authority "to regulate commerce" in the Commerce Clause and the Individual Mandate to engage in economic activity is tenuous, at best. Any link between the Individual Mandate and the original meaning of the Constitution relies on stretching the definition of the term "to regulate" past its breaking point.

The purported link between the Individual Mandate and the Constitution disappears altogether when

the Commerce Clause is taken in context. *See* Respondents' Brief on the Merits at 19-20. The Constitution uses the phrase "regulate" or "regulation," two other times in Article I, section 8.

The Constitution gives Congress the power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures" and "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 5 & 14. The text of the Constitution draws a specific distinction between the power to regulate the value of money and the power to coin money. Similarly, the power to make rules for the regulation of the land and naval forces is different from the power "To raise and support Armies" and "To provide and maintain a Navy." U.S. Const. art. I, § 8, cl. 12-13. If the meaning of "to regulate commerce" actually supported the Individual Mandate to engage in commerce, the Constitution would not have drawn these distinctions. Instead, the power to regulate the value of money would necessarily include the power to coin money and the power to make rules for the regulation of the land and naval forces would inherently include the power to raise an army and navy.

Because the Constitution draws a distinction between Congress's authority to call something into existence and its authority to regulate those things already existing, the power to regulate only applies to something that is already in existence. The power to create or mandate something from nothing is an

entirely different power; e.g., the power to "coin," "raise," or "provide."

Indeed, James Madison highlighted the fact that Congress's regulatory authority over commerce would require knowledge of commerce already underway:

> How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated, without some knowledge of their relative situations in these and other respects? How can taxes be judiciously imposed and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided, without a similar knowledge of many internal circumstances by which the States are distinguished from each other?

The Federalist No. 53, *supra*, at 301 (James Madison). Throughout this passage, Madison referred consistently to regulating something that is already in existence, never about using regulation to mandate that citizens undertake a certain activity. This is consistent with the 18th-century dictionary definition of "to regulate," Justice Story's understanding of "to regulate," and the other uses of the term in Article I, section 8.

As a result, economic activity must already be underway before Congress can exercise its power under the Commerce Clause to regulate it. It is impossible to prescribe rules for or to regulate inactivity. Therefore, the Congress's reliance on the Commerce Clause for the authority to mandate the purchase of health insurance products is paradoxical and unconstitutional.

B. If The Individual Mandate Were A Valid Exercise Of The Commerce Power, The Principle Of A Limited Federal Government Of Enumerated Powers Would Be Eviscerated.

Neither the Commerce Clause standing alone, nor in conjunction with the Necessary and Proper Clause, can be interpreted to justify the Individual Mandate and still remain consistent with the doctrine of enumerated powers. As Justice Story noted, the Necessary and Proper Clause cannot make an unconstitutional law constitutional simply because it is convenient or expedient:

> What, then, is the true constitutional sense of the words "necessary and proper" in this clause? It has been insisted by the advocates of a rigid interpretation, that the word "necessary" is here used in its close and most intense meaning; so that it is equivalent to *absolutely and indispensably necessary*. It has been said, that the constitution allows only the means, which are *necessary*; not those,

> which are merely *convenient* for effecting the enumerated powers. If such a latitude of construction be given to this phrase, as to give any non-enumerated power, it will go far to give every one; for there is no one, which ingenuity might not torture into a convenience in some way or other to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase. Therefore it is, that the constitution has restrained them to the *necessary* means; that is to say, to those means, *without which the grant of the power would be nugatory*. A little difference in the degree of convenience cannot constitute the necessity, which the constitution refers to.

Story, 3 *Commentaries* § 1239.

As the Eleventh Circuit, the U.S. District Court for the Northern District of Florida, and the U.S. District Court for the Eastern District of Virginia have correctly held, if the individual mandate were to be upheld as a lawful exercise of the Commerce Clause and the Necessary and Proper Clause, the limited federal government of enumerated powers would be transformed into an omnipotent government of plenary powers: "If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be 'difficult to perceive any limitation on federal power' . . . and we would have a Constitution in name only." *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1286 (quoting *Lopez*, 514 U.S. at 564);

Florida ex rel. Atty. Gen., 648 F.3d at 1311-12; *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 782; *see also United States v. Patton*, 451 F.3d 615 622-23 (10th Cir. 2006) ("If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless."). Indeed, if Congress is empowered to regulate all spheres of activity – or inactivity – in an individual's life, except those explicitly protected in the Bill of Rights, the doctrine of enumerated powers, upon which the United States was founded, would cease to exist. Under such a scheme, the Founder's vision of a republic flourishing under the consent of the governed, constrained in its authority to those means specifically granted by those sovereign individuals, as the Declaration of Independence and the Constitution provide, would cease to exist. Instead, the doctrine of enumerated powers would be turned on its head, and the inalienable rights of life, liberty, and the pursuit of happiness would exist solely as revocable licenses from the federal government. *Gonzales v. Raich*, 545 U.S. 1, 47 (2005) (O'Connor, J., dissenting) ("[I]f the Court always defers to Congress . . . , little may be left to the notion of enumerated powers."). If the Individual Mandate were constitutional, the centuries old doctrine of enumerated powers, the very foundation of the Nation, would be destroyed.

CONCLUSION

For the foregoing reasons, this Court should affirm the Eleventh Circuit's ruling that the Individual Mandate is unconstitutional.

Respectfully submitted:

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