

No. 11-1057

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T.
CUCCINELLI, II,

Plaintiff-Appellee,

v.

KATHLEEN SEBELIUS,

Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of Virginia
Case No. 10cv188
The Honorable Henry E. Hudson

**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF
PLAINTIFF-APPELLEE URGING AFFIRMANCE**

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CORPORATE AND FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, I declare that Mountain States Legal Foundation (“MSLF”) is a non-profit, public-interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF is not a publicly owned corporation, has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to MSLF’s participation.

None of the parties’ counsel authored this brief in whole or in part; additionally, none of the parties’ counsel, nor any other person, other than amicus curiae, its members, or its counsel, contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

DATED this 4th day of April 2011.

Respectfully Submitted By

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CONSENT TO THE FILING OF AMICUS CURIAE BRIEF

All parties to this litigation have consented to the filing of this Amicus Curiae Brief. *See* Fed.R.App.P. 29(a).

IDENTITY AND INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation (“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 for the States and the people. These limited powers include Congress’s commerce power, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. MSLF submits that Congress often exceeds its commerce power to justify vastly increasing the scope of congressional legislation beyond what is constitutionally permissible. The result of such overreaching is a federal government that is no longer limited and ethical, and further erosion of individual liberty, the right to own and use property, and the free enterprise system. Therefore, MSLF has often participated as amicus curiae in cases involving

Commerce Clause issues. *E.g.*, *San Luis & Delta-Mendota Water Authority v. Salazar*, ___F.3d___, 2011 WL 1086598 (9th Cir. 2011), *Rapanos v. United States*, 547 U.S. 715 (2006), *GDF Realty Investments, LTD v. Norton*, 362 F.3d 286 (D.C. Cir. 2004), and *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003). More importantly, MSLF filed an amicus curiae brief in this case at the district court level, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 10-cv-188 (E.D. Virginia), in the case being argued *in seriatim* with this case, *Liberty University v. Geithner*, No. 10-2347 (4th Cir.), and in the legally analogous *Thomas More Law Center v. Obama*, No. 10-2388 (6th Cir.).

In the instant case, the District Court held that the Individual Mandate component of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (“PPACA”) “exceeds the constitutional boundaries of congressional power.” *Virginia ex rel. Cuccinelli*, 728 F.Supp. 2d 768, 788 (E.D. Va. 2010). On appeal, Secretary Sebelius pays lip-service to the doctrine of enumerated powers, and, in effect, seeks to undermine that founding doctrine. Appellant’s Opening Brief at 40 (Dkt. 20) (citing *United States v. Comstock*, ___U.S.____, 130 S. Ct. 1949, 1956 (2010)). If Secretary Sebelius’s argument prevails, it would eviscerate the doctrine of enumerated powers upon which the federal government was established.

Therefore, MSLF respectfully submits this amicus curiae brief in support of the Commonwealth of Virginia urging affirmance.

ARGUMENT

Sections 1501 and 1502 of the PPACA include an “Individual Mandate” that requires all non-exempt Americans to maintain what Congress deems to be an acceptable level of health insurance coverage. The Individual Mandate was passed purportedly pursuant to Congress’s enumerated power under the Commerce Clause of the U.S. Constitution, which provides: “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes[.]” U.S. Const. art. I, § 8. By purporting to derive its power to enact the Individual Mandate from the Commerce Clause, Congress engaged in an unprecedented power grab, wholly at odds with the principle of enumerated powers upon which the federal government was established.

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 Can Be Traced Back To The Pre-Revolutionary Period.

In the 18th century, British 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.R. 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 struggles 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.R. 1577, 1593 (2009).

The colonial governments themselves reinforced the colonists’ understanding that a government derives its power from the people. Typically, each colony was governed by a corporate charter. Amar at 1432–33. These charters, such as the Massachusetts Bay Company Charter, established a governor and other governmental agents, much like corporate agents. *Id.* at 1433. It was, therefore, understood that, like corporate agents, the colonial governmental officials possessed only specific, enumerated powers; purported government actions beyond the scope of the charter had no legal authority. *Id.* at 1433–35 (citing A. McLaughlin, *The Foundations of American Constitutionalism* 38–65, 104–28 (1961)). Thus, unlike in Britain, many colonists believed that

parliamentary acts that conflicted with principles in the Magna Carta (“Great Charter”) were null and void. Amar at 1432–34.

As a result, many colonists objected not only to Parliament’s actual policies, but also to the principle that the power of Parliament was unlimited. Amar at 1430. 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. *Id.* n.21 (citing J. Blum, E. Morgan, W. Rose, A. Schlesinger, K. Stamp, and C. Woodward, *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.¹ *Id.* Thus, the predominant colonial view was that Parliament’s power was not absolute but, instead, was limited. *Id.*

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

In 1776, the Founders used the principle of a limited government of enumerated powers as their primary justification for independence from England. The Declaration of Independence famously provides that individuals are “endowed

¹ In holding the Individual Mandate unconstitutional, U.S. District Court Judge Vinson, in the Northern District of Florida rationalized: “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 v. U.S. Department of Health and Human Services*, ___ F.Supp. 2d. ___, 2011 WL 285683, *22 (N.D. Fla. 2011).

by their Creator with certain unalienable Rights.” *Declaration of Independence* para. 2 (U.S. 1776). In other words, rights are not derived from Parliament or any other governmental body, but, instead, exist by virtue of an individual’s existence.

The Declaration, therefore:

[S]peaks 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—generally, the right to be free and independent—were far too numerous to be listed specifically, though the Founders sought generally to capture the essence of these rights by providing that “among these [rights] are Life, Liberty and the pursuit of Happiness.” *Declaration of Independence* para. 2 (U.S. 1776).

In addition to the unalienable rights, John Locke² explained that each individual possesses an “Executive Power,” *i.e.*, the right to secure an individual’s

² 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, Kentucky*, 354 F.3d 438, 453 n.7 (6th Cir. 2003) *aff’d*, 545 U.S. 844 (2005) (citing Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922) (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”)).

unalienable rights. Pilon at 15 (citing John Locke, *Second Treatise of Civil Government* § 13 (1690)). Accordingly, the Declaration of Independence provides a mechanism for securing the unalienable rights of the people. The Declaration 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 government’s power exists solely because the people have conferred upon the government their right to secure their unalienable rights. Naturally, then, for the 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 government. This provides the foundational premise behind the principle of enumerated powers.³

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

In the years following the Declaration of Independence, the principle of a limited government of enumerated powers was not abandoned. On the contrary,

³ In the specific context of this case, for the government to secure a purported “right” to affordable health care, individuals must first have possessed the right to force other individuals to acquire health insurance or pay a penalty. Because individuals have never possessed such a right, they could not possibly have delegated that right to the government.

the Articles of Confederation, the first constitutional document for the United States, began by providing, “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.”⁴

Articles of Confederation, art. II. Only after so providing does the document proceed to discuss which enumerated powers were 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.⁵

⁴ James Madison clarified that, in this context, “states” “means the people composing those political societies, in their highest sovereign capacity.” James Madison, *Report on the Virginia Resolutions* (Jan. 1800), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch8s42.html>.

⁵ 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 (2008) (Kennedy, J., dissenting). The Founders ultimately rectified this deficiency with 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); James Madison, *Vices of the Political System of the United States*, in 2 *Writings of James Madison* 362–363 (G. Hunt ed. 1901)). 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.”).

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, *Commentaries on the Constitution of the United States* 2 § 906 (1833) available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s28.html. At the very beginning 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. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901, 945 (2008). Other delegates of the Convention, though not all, similarly expressed support for an enumeration of powers. *Id.* at 986–87 (citing 1 *The Records of the Federal Convention of 1787* 53 (Max Farrand ed., rev. ed. 1966)).

After a month of debate on a wide range of issues, the delegates of 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. *Id.* at 982 (citing 2 *The*

Records of the Federal Convention of 1787 85 (Max Farrand ed., rev. ed. (1966)).

This Committee of Detail⁶ 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.

Id. at 986 (citing 1 *The Records of the Federal Convention of 1787* 53).

After nearly two weeks of work, the Committee of Detail presented its final document to the Convention as a whole. *Id.* at 993. The document that emerged introduced 18 specifically enumerated powers for the national legislature, rather than a general grant of legislative powers, as originally proposed. *Id.* at 986–93. Ultimately, most of the proposed enumerated powers were accepted and some were rejected. *Id.* Importantly, though, none of the delegates questioned the *principle* that the national government should be limited and comprised solely of defined, enumerated powers. *Id.* at 994.

⁶ The Committee of Detail was comprised of five delegates: Nathaniel Gorham, Massachusetts; Oliver Ellsworth, Connecticut; Edmund Randolph, Virginia; John Rutledge, South Carolina; and James Wilson, Pennsylvania. Ewald, *supra*, at 982 (citing 1 *The Records of the Federal Convention of 1787* 87).

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

This principle of a limited federal government comprised of defined, enumerated powers was written expressly into the text 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.’” (Internal 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)).

3. The doctrine of enumerated powers was embraced during discussion and ratification of the proposed Constitution.

In the weeks and months following the Constitutional Convention, federalists promoting the ratification of the Constitution extolled the principle of enumerated powers to such an extent that the Constitution may not have been ratified had such a principle not been explicitly included. Indeed:

The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. *See, e.g.*, 2 Debates 267–268 (A. Hamilton at New York Convention) (noting that there would be just cause for rejecting the Constitution 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); *see also The Federalist No. 32*, at 241 (Alexander Hamilton) (Wright ed. 1961).

Echoing Hamilton’s sentiments, 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, who, to secure their impartiality, are to be made independent, will declare it to be void.” Oliver Ellsworth, *Speech in the Connecticut Ratifying Convention (Jan. 7, 1788)*, reprinted in Jonathan Elliot, 2 *The Debates In The Several State Conventions On The Adoption Of The Federal*

Constitution 196 (Ayer Co. 1987) (1859). 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.” Lash, *supra*, at 1596 (quoting Archibald Maclain, *Remarks Before the Convention of the State of North Carolina* (July 28, 1788)). 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>.

Accordingly, 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).

Perhaps the most famous series of newspaper articles supporting ratification of the Constitution, *The Federalist*, expressed similar perspectives. James Madison provided 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*, at 285 (James Madison) (Wright ed. 1961); *see also The Federalist No. 45*, at 328 (James Madison) (Wright ed. 1961) (“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.”).

Indeed, Madison repeatedly explained the constitutional principle of enumerated powers even after ratification. 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.” Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 192–93 (2003) (quoting 1 *Annals of Congress* 1950 (Joseph Gales ed., (1791))). As Madison said in 1792, during the Second Congress, “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.” *On the Cod Fisheries Bill, granting Bounties* (1792), available at http://www.constitution.org/je/je4_cong_deb_12.htm. And, in 1794, Madison wrote that, “[w]hen the people have formed a Constitution, they retain those rights which they have not expressly delegated.” Lash, *supra*, at 1597 (quoting *4 Annals of Congress* 934 (1794)).

4. The Bill of Rights demonstrates the scope and 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). Importantly, 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, the Bill of Rights was opposed by many delegates because of its implication on the enumerated powers doctrine.⁷

⁷ 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

As James Wilson, one of the five members of the Committee of Detail at the Constitutional Convention, expounded at the Pennsylvania ratifying convention:

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 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.

James Wilson, *Remarks on the Pennsylvania Ratifying Convention* (Oct. 28, 1787), available at <http://teachingamericanhistory.org/library/index.asp?document=978>.

Likewise, at the North Carolina ratifying convention, James Iredell, who would later become one of the original justices on the Supreme Court, proclaimed:

[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.

Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U.

Cin. L. Rev. 49, 86 (1992) (quoting 3 *The Debates in the Several State*

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).

Conventions on the Adoption of the Federal Constitution 97 (Jonathan Elliot ed., 1836) (July 29, 1788)).

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 lack of a Bill of Rights, because the federal government would possess only specific, enumerated powers. As he explained:

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 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 (Jan. 20, 1788) available at

<http://press-pubs.uchicago.edu/founders/documents/v1ch14s32.html>.

Years later, Justice Goldberg, explained:

Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. *The Federalist*, No. 84

(Cooke ed., 1961), at 578–579. He also argued, “I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.” *Id.*, at 579.

Griswold v. Connecticut, 381 U.S. 479, 489 n.4 (1965) (Goldberg, J., concurring).

The Ninth Amendment, which provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” and the Tenth Amendment, which provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,” were included in the Bill of Rights specifically to preserve, unequivocally, the doctrine of enumerated powers. *Id.* at 488–92 (Goldberg, J. concurring). Indeed, as Justice Goldberg explained:

The [Ninth] Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

In presenting the proposed Amendment, Madison said:

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).

I Annals of Congress 439 (Gales and Seaton ed. 1834).

Griswold, 381 U.S. at 488–90 (Goldberg, J., concurring). It is, therefore, crystal clear that the debate over the addition of a bill of rights, and the inclusion therein of the Ninth and Tenth Amendments, demonstrate the scope and historical depth of the doctrine of enumerated powers.

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

A long line of cases has 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, the Supreme Court again proclaimed 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, the Supreme 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), the Supreme Court proclaimed, “Under our Constitution, the Federal Government is one of enumerated powers.” Likewise, in *Lopez*, 514 U.S. at 552, the Supreme 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.*

Id. Again, in 2000, the Supreme Court explained that, “With 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, the Supreme 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.

This Court sitting *en banc* has echoed a similar sentiment:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. “[T]hat these limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). These simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

Brzonkala v. Virginia Polytechnic Institute and State University, 169 F.3d 820, 825–26 (4th Cir. 1999).

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 documents that led up to the Constitution, as well as in the Constitution and Bill of Rights themselves, and so thoughtfully protected in the Supreme Court cases that interpreted the Constitution and Bill of

Rights, that one cannot seriously argue that it is not a bedrock principle—perhaps the single most important principle—enshrined in the Constitution.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT AND HOLD THE INDIVIDUAL MANDATE UNCONSTITUTIONAL; OTHERWISE, THE FEDERAL GOVERNMENT WOULD CEASE TO BE A GOVERNMENT OF ENUMERATED POWERS.

The plain language of the Commerce Clause, 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.”).

As explained by the District Court, though 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 v. Sebelius*, 702 F.Supp. 2d 598, 610 (E.D. Va. 2010). In fact, the Individual Mandate marks the first time in history that Congress has regulated economic *inactivity* under the Commerce Clause.⁸ See *Florida ex rel. Bondi*, 2011 WL

⁸ Even the nonpartisan Congressional Budget Office (“CBO”) has opined that such federal action is unprecedented:

285683, *20 (“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.”); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F.Supp. 2d at 609 (“The congressional enactment under review . . . literally forges new ground and extends Commerce Clause powers beyond its current high watermark.”); *Virginia ex rel. Cuccinelli*, 728 F.Supp. 2d at 781 (“Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity.”).

Yet, Secretary Sebelius apparently believes that the Commerce Clause empowers Congress to enact thought crimes by regulating and penalizing thoughts, even those not acted upon. Appellant’s Opening Brief at 32 (Dkt. 20) (attempting to characterize the inactivity of not purchasing health insurance as “the

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>.

consumption of health care services without payment”). This cannot possibly be the proper interpretation of the Commerce Clause, for if Secretary Sebelius’s arguments were adopted, the federal government would no longer be limited to its enumerated powers. This centuries-old doctrine upon which the federal government is based would be eviscerated.

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

If Secretary Sebelius’s interpretation of the Commerce Clause is adopted, the Commerce Clause will effectively swallow up all the other enumerated powers in the Constitution, resulting in one omnipotent governmental power. Indeed, if the Commerce Clause empowers Congress to regulate mere economic “decisions” without a corresponding economic “activity,” “many of Congress’ other enumerated powers under Art. I, § 8, are 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); *see* Appellee’s Brief at 40 (Dkt. 100); *see also United States v. Santos*, 553 U.S. 507, 520 n.6 (2008) (discussing the often-cited canon of construction providing that text should be interpreted such that no provision is rendered superfluous); *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) (“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.”).

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

Neither the Commerce Clause standing alone, nor in conjunction with the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, can be interpreted as broadly as Secretary Sebelius urges and still remain consistent with the doctrine of enumerated powers. As Supreme Court Justice Story remarked:

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.

Joseph Story, *Commentaries on the Constitution* 3, § 1239 (1833) available at http://press-pubs.uchicago.edu/founders/documents/a1_8_18s21.html.

Should the Individual Mandate 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. *Lopez*, 514 U.S. at 564 (“if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate”); *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 as to the federal government. Under such a scheme, unalienable rights would be derived not from individuals, as the Declaration of Independence and the Constitution provide, but, instead, would exist solely as a revocable license by the federal government. To be sure, “[i]f the Court always defers to Congress . . . ,

little may be left to the notion of enumerated powers.” *Gonzales v. Raich*, 545 U.S. 1, 47 (2005) (O’Connor, J., dissenting). No court that takes its duty to interpret and uphold the Constitution seriously may sanction such a radical metamorphosis of a centuries old doctrine at the very foundation of the Nation.

CONCLUSION

For the forgoing reasons, this Court should hold the Individual Mandate unconstitutional and affirm the District Court’s judgment.

DATED this 4th day of April 2011.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point font.

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I hereby certify that on the 4th day of April 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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