No. 20-1735

In the Supreme Court of the United States

ÁNGEL MANUEL ORTIZ-DÍAZ, ET AL.,
PETITIONERS,

v.

UNITED STATES, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF FOR THE CATO INSTITUTE, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, AND PROF. RANDY BARNETT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under the "substantial effects" test, does the Commerce Clause, in conjunction with the Necessary and Proper Clause, allow Congress to reach wholly intrastate activity with no relation to any fungible commodity in an interstate market?

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INTEREST OF *AMICUS CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The **National Right to Work Legal Defense Foundation** has been the nation's leading litigation advocate for employee free choice since 1968. To advance this mission, Foundation attorneys have represented private-sector employees in several cases before this Court, and currently represent employees whose free choice to refrain from unionization and collective bargaining is regulated by federal statutes enacted under the Commerce and Necessary and Proper Clauses.

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This case concerns *amici* because it raises the question of the limits on the federal government's power under the doctrine of enumerated powers, which is foundational to our constitutional structure.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

Congress's attempt to ban cockfighting in Puerto Rico goes beyond the furthest limits of its power under the Commerce and Necessary and Proper Clauses. As a noneconomic, intrastate activity, it is neither necessary nor proper for Congress to reach cockfighting as a method of "carrying into execution" its power to regulate interstate commerce.[2]

Modern Commerce Clause analysis falters when it divorces itself from the original understanding of the clause. Historical sources help illuminate the scope of the commerce power, by which the federal government may govern actual interstate commerce and those things necessary and proper to regulating interstate commerce. Absent from this grant of power is the ability to control or prohibit purely intrastate activity that is not participating in interstate commerce.

Erroneous reliance on a "substantial effects" test that disregards any need for a commodity to be part of interstate trade has transformed the commerce power into a rubber stamp for all congressional legislation. For more than a century, Congress demonstrated an understanding that it could not pass legislation restricting purely local trade even if it affected interstate commerce in the aggregate. Yet, when this Court was presented with challenges to New Deal legislation, it determined that Congress possessed more power than was understood at ratification.

Often conceived as a Commerce Clause doctrine, the substantial effects test actually derives from the

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[2] This brief will use the term "intrastate," even though Puerto Rico is not a state.

Necessary and Proper Clause when it is applied to the power to regulate commerce. But that clause's grant of discretion to "carry into execution" an enumerated power does not imply a ratchet culminating in unlimited federal power—a "national problems" power. Instead, the Necessary and Proper Clause both augments and limits Congress's regulatory authority.

For this reason, the Court has adopted limits on the substantial effects test. In particular, it has said that Congress may only reach intrastate commerce that is "economic" in nature. The economic-noneconomic distinction limits the substantial effects doctrine, thereby providing a judicially administrable limit on the "necessary" requirement of the Necessary and Proper Clause. Federal laws regulating local economic activity are sometimes necessary to regulate interstate commerce. But laws regulating wholly intrastate non-economic activity are likely to be remote from regulating interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 35–36 (2005) (Scalia, J., concurring).

The Court has also sanctioned federal regulation of local activity that is part of a comprehensive regulatory scheme, even if that activity is not economic nor substantially affects interstate commerce. But under this doctrine, the law must be an essential part of a broader scheme to regulate interstate commerce. For example, the Court has held that neither gun possession within 1,000 feet of a school nor engaging in gender-motivated violence are economic in nature; nor is their regulation an essential part of a broader regulation of interstate commerce. Both laws thus exceeded congressional power under the "necessary" part of the Necessary and Proper Clause.

Amici believe that both doctrines have extended Congress's power beyond the Commerce and Necessary and Proper Clauses' original meaning and should be rejected by the Court. But despite these overly expansive doctrines, this Court has always insisted that Congress's regulatory power has limits. Here, the Court should act to preserve and enforce these limits. If the Court will not revisit the substantial effects test, it should grant certiorari to hold explicitly that this test does not allow Congress to reach intrastate activity with no relation to any fungible commodity in an interstate market.

ARGUMENT

I. THE COURT'S REVIEW IS WARRANTED TO RESTORE PROPER LIMITS TO THE COMMERCE CLAUSE THAT HAVE BEEN REMOVED BY THE SUBSTANTIAL EFFECTS TEST

It's difficult, but not impossible, to determine the meaning of a word or phrase as it was commonly understood over two hundred years ago. With careful analysis, however, the original public meaning of the Commerce Clause can be generally discerned. Evidence from the text, historical dictionaries, contemporaneous speeches and writings, and judicial interpretation confirm that Congress's jurisdiction under the Commerce Clause was meant to be far more limited than its current doctrine allows.

Clarifying the Commerce Clause's original meaning is a vital task that only this Court can undertake. Inferior courts are bound by vertical stare decisis in ways this Court is not. Properly viewed

through its original meaning, the Commerce Clause gives Congress the power to stipulate how the exchange or transportation of people and things between states may be conducted. But restoring the clause's original meaning must be done together with restoring the original meaning of the Necessary and Proper Clause because those clauses always work in tandem. Historical evidence shows that the Necessary and Proper Clause demands a narrower interpretation than current doctrine allows. To be both necessary and proper, a law should be evaluated to ensure that (1) there is a means-ends fit; "(2) the means chosen do not prohibit the rightful exercise of freedom (or violate principles of federalism or separation of powers); and (3) Congress's claim to be pursuing an enumerated end is not a pretext for pursuing other ends and not delegated to it." Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 221 (2003) [hereinafter Barnett, *Necessary and Proper*].

With those limitations in mind, the commerce-regulation power delegated to Congress through the Commerce and Necessary and Proper Clauses should be more restricted than the modern substantial effects test allows. Currently, the notion of commerce has expanded beyond its original understanding while the Necessary and Proper Clause has been distorted to act as a perpetual green light to congressional deference. The argument now is, essentially, "in order to have effective power over commerce, it is necessary and proper for Congress to have power over everything," and that cannot be what the Constitution allows.

A. The Original Meaning of the Commerce Clause Was Far Narrower Than Current Doctrine

1. "Commerce" was originally understood as confined to trade.

Modern interpretations of "commerce" mistake the desires of some Framers for a government powerful enough to control all aspects of the national economy as evidence that the term "commerce" reflects that aspiration. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1 (1999). Clashes of objectives among the ratifiers certainly existed, and opposing sides promoted their preferred meaning, but the records of the Constitution's drafting and ratification reveal no examples of an unambiguous use of "commerce" in a broad sense. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 112 (2001) [hereinafter Barnett, *Commerce*].

"Commerce" referred then to the activity of trading and transporting items, including goods and persons. It was not an umbrella term that encompassed the distinct activities of manufacturing and agriculture. These other activities produced items that could then be the subject of commerce. The term "commerce" was not broad enough to embrace all gainful activity—that is, activity entered into for gain. Neither was it broad enough to encompass all social "interaction." *See* Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. Ill. L. Rev. 623 (2012).

We first look to the text. Congress has power "[t]o

regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. At the time of the Founding, contemporaneous dictionaries illuminate that "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S, at 585 (Thomas, J., concurring). *See also* Samuel Johnson, 1 *A Dictionary of the English Language* 361 (W. Strahan 4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); Nathan Bailey, *An Universal Etymological English Dictionary* (Neill 26th ed. 1789) ("trade or traffic"); T. Sheridan, *A Complete Dictionary of the English Language* 585–86 (W. Young, Mills & Son 6th ed. 1796) ("Exchange of one thing for another; trade, traffick").

Given the broad agreement on the meaning of "commerce," it is no surprise that countless examples of "commerce" from the drafting and ratification process coincide with the narrower concept of trade:

> In Madison's notes for the Constitutional Convention, the term "commerce" appears thirty-four times in the speeches of the delegates. Eight of these are unambiguous references to commerce with foreign nations which can only consist of trade. In every other instance, the terms "trade" or "exchange" could be substituted for the term "commerce" with the apparent meaning of the statement preserved. In no instance is the term "commerce" clearly used to refer to "any gainful activity" or anything broader than trade.

Barnett, *Commerce*, at 114–15. This view was not espoused by Madison alone, but rather was seen across several state ratification conventions, suggesting that the general citizenry understood "commerce" to be restricted to trade or exchange.

At the Massachusetts convention, for example, Thomas Dawes distinguished agriculture, commerce, and manufacturing from each other as he expounded on the beneficial effect the Constitution would have on each. *See* Jonathan Elliot, ed., 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 57 (Taylor & Maury 2d ed. 1863) [hereinafter *Debates*]. During his discussion of "commerce" he referred to "our own domestic traffic that passes from state to state." *Id.* at 58.

In the North Carolina debates, William Davie defined the "general objects of the union" to be "1st, to protect us against foreign invasion; 2d, to defend us against internal commotions and insurrections; 3d, to promote the commerce, agriculture, and manufactures, of America." *Id.* at 17. Likewise, at the South Carolina convention, Charles Pinckney, who was also an influential participant in the Constitutional Convention, distinguished between those "people [who] are employed in cultivating their own lands" and "the rest [who are] in handicraft and commerce." *Id.* at 321. Similar examples showing the narrow use of "commerce" are seen in the Connecticut, New York, Pennsylvania, and Virginia conventions. *See* Barnett, *Commerce*, at 116–22. *See also* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) (surveying 1,594 uses of "commerce" in the *Pennsylvania Gazette* from 1728 to 1800).

In the Progressive Era, the Court routinely rejected attempts to expand "commerce" to cover any gainful activity by distinguishing between commerce and the productive activities of manufacturing and agriculture. In *United States v. E.C. Knight Co.*, Chief Justice Melville Fuller wrote: "Commerce succeeds to manufacture, and is not a part of it . . . . The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce." 156 U.S. 1, 13 (1895). Even four decades later the Court still made a point to emphasize the difference between "commerce" and other gainful activity. In *Carter v. Carter Coal Co.*, Justice George Sutherland explained that "[m]ining brings the subject matter of commerce into existence. Commerce disposes of it." 298 U.S. 238, 298 (1936) (ruling that Congress could not regulate the conditions under which coal is produced before it became an article of commerce).

While providing a check on Congress's power, the Court saw attacks on its credibility by those in the political and academic communities who wanted to expand national control of the economy and a living Constitution. *See* Walton H. Hamilton & Douglass Adair, *The Power to Govern: The Constitution—Then and Now* 184–94 (1937). But attacks on adhering to the text's original meaning, which continue today, are no reason to perpetuate overly broad definitions contrary to historical evidence.

2. "Among the several states" originally meant "between people of different states."

A textual analysis of the phrase "among the several States" provides convincing evidence that the original public meaning was "between people of different

states." If this phrase was intended to capture commerce that occurred wholly between people in the same state, the Commerce Clause would encompass all commerce and the phrase "among the several States" would be superfluous. As Chief Justice Marshall affirmed in *Gibbons v. Ogden*, the enumeration in the Commerce Clause of three distinct commerce powers "presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." 22 U.S. 1, 195 (1824). Ultimately, the only reason to include the phrase "among the several States" would be limit the type of commerce Congress controls.

Strong scholarly consensus also promotes this narrow interpretation. "Consistent with the scheme of federalism that motivated the granting of a power to regulate commerce among the states to Congress, trade that occurs wholly within a state was not commerce 'among the states' and, therefore, the regulation of such commerce was not among the powers of Congress." Barnett, *Commerce*, at 135. *See also*, Nelson & Pushaw, *supra*, at 42–49 (discussing deficiencies in William Crosskey's broad interpretation of "among the several States" and concluding: "Although Crosskey's interpretation is defensible, he did not marshal evidence strong enough to overcome the presumption that the regulation of commerce, like all federal power, does not extend purely to internal state affairs.").

Similarly, St. George Tucker, one of the earliest scholars on the Constitution, explained: "The constitution of the United States does not authorise congress to regulate, or in any manner to interfere

with, the domestic commerce of any state." "Appendix," in 1 William Blackstone, *Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 250 (William Young Birch & Abraham Small, eds., 1803) (1765).

Even though Congress currently enjoys a vast reach, it is still a body whose powers are enumerated. An expanded reading of "among the several States" would erode state sovereignty over its internal affairs. This Court serves as the check on that abuse of power. When it can identify judicially administrable limits on these powers, it has and should continue to do so.

B. The Necessary and Proper Clause Places Meaningful and Judicially Enforceable Limits on Congressional Power

To determine the constitutionality of legislation justified under the Commerce Clause, courts must also take into account the Necessary and Proper Clause. The latter clause was, after all, the power through which the Court "upheld various federal enactments as necessary and proper to achieve the legitimate objective of regulating interstate commerce." Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 808 (1996).

While the Commerce Clause gives Congress power over "commerce," the Necessary and Proper Clause gives Congress power over anything necessary and proper to regulate commerce. Without an appropriate understanding of what "necessary" and "proper" mean, the scope of power given by the clause threatens to undermine the entire scheme of enumerated powers.

1. *The original meaning of "necessary" falls between "convenient" and "indispensably necessary."*

Not long after the Constitution's ratification, Congress became engulfed in a fiercely contested constitutional conflict: was a national bank constitutional under the Necessary and Proper Clause? The conventional academic wisdom is that two competing theories about the meaning of "necessary" emerged. One side believed "necessary" *really* meant necessary while the opposing viewpoint claimed "necessary" was closer to "convenient." These positions created a false dichotomy when the actual meaning of "necessary" is most likely found between the two.

The Founder with the most capacious reading of this clause was Alexander Hamilton. In his opinion to President Washington on the national bank as Treasury Secretary, Hamilton insisted that "[t]he degree in which a measure is necessary, can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency." Alexander Hamilton, Opinion on the Constitutionality of a National Bank (1791), https://bit.ly/3xFUasi. He then offered the following test: "The *relation* between the measure and the end; between the nature of *the mean* employed toward the execution of a power, and *the object* of that power must be the criterion of constitutionality, not the more or less of necessity or utility." *Id.* (emphases added.) Today we would call this the requirement of means-end fit. An appropriate "end" or "object"—we would say "objective" or "purpose"—must be identified and the measure being adopted as "the means" must be closely enough related to that end.

Hamilton's "test of the legal right" of Congress to pass a law is not the clause's original meaning. It is what modern originalists call a "constitutional construction" by which that meaning is effected. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95 (2010).

Hamilton's was not the only such test proposed after the Constitution was adopted. In a speech to the House, Representative James Madison offered his: "Whatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end and *incident to the nature of the specified powers*." Madison contended that "[t]he essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed: If instead of *direct and incidental* means, any means could be used." 1 Annals of Congress 1947–48 (Joseph Gales, ed., 1791) (emphases added.)

Despite sharply disagreeing about the constitutionality of a national bank, there is not much daylight between Hamilton's and Madison's tests of whether a law is "necessary" and therefore within the power of Congress to enact. Their dispute largely turned on a factual disagreement about whether the bank was or was not closely enough *related* to (Hamilton) or *incident* to (Madison) an enumerated power. Both Hamilton explicitly, and Madison implicitly, rejected Secretary of State Thomas Jefferson's more stringent view that "the Constitution restrained [Congress] to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory." Thomas Jefferson, Opinion on the Constitutionality of

a National Bank (1791), https://bit.ly/3eiky3O. Hamilton's lengthy response to this test in his bank opinion, noted above, was telling.

Madison explained that the clause's words should be "understood so as to permit the adoption of measures the best calculated to attain the ends of government, and produce the greatest quantum of public utility." *Debates*, *supra*, at 417. He reasoned that, "[i]n the Constitution, the great ends of government were particularly enumerated; but all the means were not, nor could they all be, pointed out, without making the Constitution a complete code of laws: some discretionary power, and reasonable latitude, must be left to the judgment of the legislature." *Id.*

Parsing out where "necessary" falls in between indispensably necessary and convenience, is aided by the justiciability of the Necessary and Proper Clause as well as textual support. If "necessary" aligned with the broader interpretation of convenience, the term would be little more than a rubber stamp for Congress in the guise of a constitutional standard. Conversely, if "necessary" meant that a law must be "incidental and closely connected to an enumerated power, then this is a matter of constitutional principle and within the purview of the Courts to assess." Barnett, *Necessary and Proper*, at 206–07.

Like all limits on congressional power, the Necessary and Proper Clause must be judicially enforced by the adoption of judicially administrable doctrines. The text of the clause says that laws "*shall* be necessary and proper." (emphasis added). In the legal field, "shall" is almost always a mandatory

command. When a law intends to create discretion instead of a command, it uses the word "may."

> The authors of the Constitution were very careful to use "shall" and "may" properly. This strongly suggest that the injunction, "to make all laws which shall be necessary and proper," was not discretionary on the part of the law-making authority to whom it is directed—Congress. It is mandatory, and like all other mandatory provisions, is presumptively enforceable by the other branches of government, including the courts.

Barnett, *Necessary and Proper*, at 209.

Legislator George Nicholas commented at the Virginia ratification convention that the extent of the clause's power would be determined by "the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void." *Debates*, *supra*, at 443.

Madison likewise raised the justiciability issue in a speech to Congress on the National Bank: "[W]e are told, for our comfort, that the Judges will rectify our mistakes. How are the Judges to determine in the case; are they to be guided in their decisions by the rules of expediency?" Joseph Gales, *supra*, at 2010. According to both Hamilton and Madison, a means-ends fit must exist. The Court reflected that idea in its *McCulloch v. Maryland* formulation: "Let the end be legitimate, let it be within the scope of the constitution, and all means

which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. 316, 421 (1819).

2. "Proper" was originally a jurisdictional test.

While "necessary" highlights the intertwined relationship a law must have with an enumerated power for Congress to legislate on an issue, the term "proper" poses a jurisdictional limit on Congress's power. "The propriety of jurisdiction is determined in at least three ways: (1) according to principles of separation of powers, (2) according to principles of federalism, and (3) according to the background rights retained by the people." Barnett, *Necessary and Proper*, at 217. Thus, if a law is found "necessary," but violates separation of powers, federalism, or background rights retained by the people, it will still be "improper," and unconstitutional. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012) ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective.").

While explaining his proposed amendments to the Constitution that became the Bill of Rights, Madison offered an example of a necessary law that could still be improper. He posited that the federal government has the power to pass laws necessary to collect its revenue and, if the means for enforcing that collection were within the discretion of the legislature, one could imagine that serving general warrants on the public could be considered necessary to do so. *See* 1 Annals of Congress 456 (Joseph Gales, ed., 1789). General

warrants would still be considered improper and unconstitutional, however—even if necessary—because they would violate a person's right against unreasonable searches and seizures.

St. George Tucker offered another example of how Congress is constrained to using only necessary means that are also proper:

> If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means…. [I]f Congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity…because in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.

St. George Tucker, *supra*, at 289. Without being limited by propriety, Congress would have the power to use any means necessary to accomplish an enumerated end, even if it invaded rights retained by the people such as the right to keep and bear arms.

This potential abuse of power shows why "Congress cannot be the sole judge of whether it is acting within its powers… [which] would give it license to pursue objects or ends that are beyond its powers."

Barnett, *Necessary and Proper*, at 220. All acts of Congress must originate from one of its enumerated powers, but that is not where the analysis ends. The meaning attached to the Necessary and Proper Clause "not only determines the scope of congressional power—it determines the degree of deference that courts owe a congressional judgment that is acting within its powers." *Id.*

In his concurring opinion in *Gonzales v. Raich*, Justice Scalia correctly located in the Necessary and Proper Clause both the substantial effects and essential to a broader regulatory scheme doctrines (while adopting an overly deferential approach to the latter doctrine). *Raich*, 545 U.S. at 33–38 (Scalia, J., concurring). It is therefore imperative that this Court continue to clarify the importance of the Necessary and Proper Clause in reviewing all federal legislation and articulate the limits of the clause's meaning to preserve the original scheme of limited and enumerated congressional power.

II. PROHIBITING COCKFIGHTING, AN INTRASTATE ACTIVITY WITH NO RELATION TO ANY INTERSTATE MARKET, EXCEEDS THE SCOPE OF THE NECESSARY AND PROPER CLAUSE

A. The "Substantial Effects" Doctrine Applies the Necessary and Proper Clause to the Commerce Clause and Allows Congress to Use Its Regulatory Authority While Cabining that Authority

Since the New Deal, the Court has asked whether a particular "economic activity substantially affects interstate commerce" when considering whether

Congress can regulate it. *Raich*, 545 U.S. at 25. The New Deal cases that first developed the "substantial effects" doctrine, however, found the authority for that doctrine not in the Commerce Clause itself, but in its execution via the Necessary and Proper Clause.

Although often described as expanding the definition of the word "commerce," these cases show that the New Deal Court actually asked whether federal regulation of the activity was a *necessary and proper means* of exercising the regulatory power, because the activity substantially affects that commerce. "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id.* at 34 (Scalia, J., concurring) (citing *United States v. Coombs*, 37 U.S. 72, 78 (1838); *Katzenbach v. McClung*, 379 U.S. 294, 301–02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *E. C. Knight Co.*, 156 U.S. at 39–40 (Harlan, J., dissenting)). Congress has never been allowed to go further.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered Congress's power to "prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and hours." *Id.* at 108. Instead of stretching the definition of "commerce," the Court focused on how federal power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate." *Id.* at 118. The authorities cited for this proposition did not

come from *Gibbons v. Ogden*—the foundational Commerce Clause case cited elsewhere in *Darby*—but from *McCulloch*, the seminal Necessary and Proper Clause case.

A year later in *Wickard v. Filburn*, the Court used the same reasoning: not redefining "commerce," but ruling that the challenged measures were necessary and proper for regulating commerce. 317 U.S. 111 (1942). Like *Darby*, *Wickard* explicitly relied on the Necessary and Proper Clause, citing *McCulloch*. *Id.* at 130 n.29. *Wickard* did not expand the Commerce Clause itself to allow Congress power to regulate intrastate activity that, when aggregated, substantially affects interstate commerce. Instead, "like *Darby*, *Wickard* is both a Commerce Clause and a Necessary and Proper Clause case[,]" with the substantial effects doctrine reaching Roscoe Filburn's wheat growing via the Necessary and Proper Clause. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 594 (2011). Thus, the aggregation principle can only apply to economic activities the regulation of which is necessary and proper to effecting Congress's enumerated power to regulate commerce.

Accordingly, the Court in *United States v. Lopez* found that aggregation could apply only to economic activity: "Even *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not." 514 U.S. 549, 560 (1995). And in *United States v. Morrison*, the Court held that gender-motivated violence is not economic activity and thus that the substantial effects

doctrine was inapplicable. 529 U.S. 598, 613 (2000). The Court thus clarified the substantial effects doctrine by setting the regulation of intrastate economic activity (in certain contexts) as the absolute limit of federal power under the Commerce and Necessary and Proper Clauses. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560.

Conversely, non-economic activity cannot be regulated merely because it affects interstate commerce through a "casual chain," or has, in the aggregate, "substantial effects on employment, production, transit, or consumption." *Morrison*, 529 U.S. at 599.

Adopting a distinction between economic and noneconomic activity allowed the Court to determine whether legislation is "necessary" under the Necessary and Proper Clause without involving it in complex, potentially insoluble evaluations of the "more or less of necessity or utility" of the challenged law. Hamilton, Opinion on the Constitutionality of a National Bank, *supra*. By limiting the substantial effects doctrine to economic activities, *Lopez* and *Morrison* preserved the constitutional scheme of limited and enumerated powers, drawing a judicially administrable line beyond which Congress cannot go when choosing "necessary" means to execute its authority.

But if regulating intrastate economic activity can be a "necessary" means of regulating interstate commerce, as that term is understood in the Necessary and Proper Clause, the obvious corollary is that regulating non-economic activity cannot be

"necessary," regardless of its economic effects.

This Court's precedents are clear: Congress may reach non-commerce under its power to regulate interstate commerce only via the Necessary and Proper Clause, and this executory power is categorically limited—indeed must be categorically limited to be judicially administrable—to the qualitatively distinct class of economic activity (as well as activity that is essential to regulating interstate commerce as part of a comprehensive regulatory scheme). In other words, Congress's regulatory authority extends only to certain types of activity, rather than to any activity that passes some threshold degree of effect on interstate commerce. The latter fact-based line would not be judicially administrable, would undermine the principle of enumerated powers, and would involve courts in economic balancing and speculation beyond their ken.

B. As an Intrastate, Noneconomic Activity, Cockfighting Is Not Regulatable by the Commerce Clause through the Necessary and Proper Clause.

1. Cockfighting does not traditionally qualify for regulation under the Commerce Clause.

Based on its original meaning, the Commerce Clause grants Congress the power to stipulate in what way the exchange or movement of items between persons of one state and another may be conducted. In this instance, there has been no exchange or movement of goods between persons of one state and another. It was Congress itself that passed legislation restricting cockfighting to the boundaries of Puerto Rico assuring that there would be no interstate trade.

> Under the Animal Welfare Act, which was enacted pursuant to the Commerce Clause, Congress did not punish intrastate cockfighting in any "State" (which was defined to include Puerto Rico) where the practice was legal. In these jurisdictions, cockfighting violated federal law only "if the person knew that any bird in the fighting venture was knowingly bought, sold, delivered, transported, or received in interstate or foreign commerce for the purpose of participation in the fighting venture." 7 U.S.C. §2156(a)(2).

Pet. Br. at 3.

The Court should take this opportunity to repair the damage caused by a misreading of the Commerce Clause. Cockfighting that takes place wholly in Puerto Rico would not qualify as regulatable under the Commerce Clause because at no point in time does it involve interstate exchange.

2. Even under the substantial effects test, Congress cannot reach wholly intrastate, noneconomic activities with no relation to any fungible commodity in interstate trade.

Previous commerce power case law undeniably involves instances of economic policy in a way cockfighting does not. Primarily, cockfighting cannot be properly categorized as "economic" activity. As described in *Gonzales v. Raich*: "economics" in a Commerce Clause analysis may refer to "the production, distribution, and consumption of commodities" in an "interstate market." 545 U.S. at 26.

The necessity for an interstate market is repeatedly seen across multiple Commerce Clause cases. In *Wickard*, the Court observed an interplay between a purely local activity of growing wheat and a broader regulation of the national market price for wheat. In *Darby*, the Court associated a workforce in Georgia with the country-wide workforce. In *Raich*, the Court relied on Congress's attempt to regulate the national market for marijuana.

It would stand to reason that, to fall under the purview of the "substantial effects" test, the intrastate use of a commodity must substantially affect a national market of the same commodity that Congress seeks to regulate. In defiance of that commonsense meaning, however, the First Circuit tossed aside any meaningful restrictions to the Commerce Clause when it held that cockfighting with no national market may still be criminalized.

If the Necessary and Proper Clause allows the Commerce Clause to reach any wholly intrastate activity with no national market to disrupt or "affect," it is hard to comprehend what activity it could not reach. The Commerce Clause still grants an enumerated power, and it is imperative that this Court outline the limits of the Necessary and Proper Clause in regulating non-commerce. The unabashed expansion of an already overly broad interpretation of congressional power would strip states of any meaningful choice regulating their purely internal trade. Accordingly, correcting the First Circuit's error would not only start down the path of proper commerce-power jurisprudence but would preserve the delicate balance of federalism on which our Republic was founded.

CONCLUSION

The Court should grant certiorari to articulate a judicially administrable standard restricting Congress to regulating actual interstate commerce along with activities that are demonstrably necessary to carry out such regulation. That standard would allow states and Puerto Rico to adopt regulatory schemes reflecting a range of policies affecting the daily lives of their citizenry. One size does not fit all. The Court must act to deny the legitimacy of a "national problems power."

Respectfully submitted,

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