No. 21-7599

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

NEIL TIMOTHY AHO --PETITIONER

VS.

UNITED STATES OF AMERICA --RESPONDENT

Supreme Court, U.S.
FILED
APR - 7 2022
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

ELVENTH CIRCIUI

PETITION FOR WRIT OF CERTIORARI

NEIL TIMOTHY AHO

FED. REG. NO.: 20736-111

FEDERAL CORRECTIONAL INSTITUTION

PO BOX 2000

JOINT BASE /MDL, NJ 08640

QUESTIONS PRESENTED

(i) Whether Section 2252 of Title 18 of the United States Code ("Section 2252" or the "Statute") forming the gravamen of the charges in the Indictment lodged against Petitioner is void ab initio and no law at all on the ground Congress has no authority, direct or implied, to enact the Statute?

(ii) Whether the lower courts lacked subject-matter jurisdiction to adjudicate this criminal proceeding because the charging Statute is void ab initio?

(iii) Whether the lower courts failed to fulfill the independent and mandatory duty imposed on every Article III Court to confirm the existence of subject-matter jurisdiction prior to deciding any other aspect of this case?

(iv) Whether Congress lacks power outside of the Federal Enclave without ratification of an authorizing Amendment under Article V of the Constitution to promulgate, by expression or implication, new crimes beyond the ambit of the "Four Felonies" enumerated in Articles I and III of the Constitution?

(v) Whether the enactment of Section 2252, in the guise of regulating interstate commerce and in contravention of fundamental principles of federalism and dual sovereignty, impermissibly intrudes upon the broad residuum of sovereign power reserved to the States upon joining the Union and to the people pursuant to the Tenth Amendment to the Constitution?

(vi) Whether the Commerce Clause can be used to expand (with or without the Necessary and Proper Clause) the power to punish beyond the ambit of the Four Felonies enumerated in Articles I and III?

(vii) Whether the historical and structural context of the Commerce Clause, including the original intent and meaning as interpreted and applied in Dormant Commerce Clause jurisprudence, should be interpreted and applied consistently across the Commerce Power corpus juris and to this case to strike down laws like Section 2252 directly contravening the original intent and meaning of the Commerce Clause?

(viii) Whether the Eleventh Circuit misapprehended and/or ignored the Notice of Appeal raising these questions of public importance separate and distinct from the Request for Issuance of a Certificate of Appealability?

LIST OF PARTIES

The Caption set out above contains the names of the parties.

RELATED CASES

A. United States v. Aho, 15-CR-60225 (S.D. FL. June 1, 2018);

B. United States v. Aho, 20-CV-62517 (S.D. FL. Sept. 14, 2021);

C. United States v. Aho, 21-13328-C (11th Cir.), rehearing denied Mar. 16, 2022 (unpublished);

D. United States v. Aho, 779 Fed.Appx. 613 (11th Cir.) cert. denied, 2019 U.S. LEXIS 7284 (2019).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES
("TOA")

UNITED STATES SUPREME COURT CASES (CONT.)

UNITED STATES SUPREME COURT CASES (CONT.)

UNITED STATES SUPREME COURT CASES (CONT.)

UNITED STATES CIRCUIT COURT CASES

UNITED STATES CIRCUIT COURT CASES (CONT.)

UNITED STATES DISTRICT COURT CASES

STATE COURT CASES

I PRELIMINARY INFORMATION

A. Opinions Below: This case arises out of unpublished Federal Court opinions from (1) the U.S. Court of Appeals, Eleventh Circuit (the "Eleventh Circuit") appearing in Appendix A to this Petition and (b) the U.S. District Court, Southern District of Florida (the "District Court") appearing in Appendix C to this Petition.

B. Jurisdiction: The Eleventh Circuit decided this case in an order dated January 21, 2022 (the "Final January 21 Appellate Order"). A timely Petition for rehearing was denied by the Eleventh Circuit in an order dated March 16, 2022 appearing in Appendix B. This Court has jurisdiction under 28 U.S.C §1254 to both correct the lower courts' fundamental errors and address the emergent issues of public importance and constitutional dimension. Indeed, the gravamen of this Petition poses important and recurring constitutional Questions. See pp. i - ii, supra.

C. Constitutional Provisions & Statutes Involved: Art. I, §8, et seq.; Art. I, §9, cl. 3; Art. V; Amd't. IX; Amd't. X; Amd't. XVIII. Statutes Involved: 18 U.S.C. §2252; 18 U.S.C. §3231; 18 U.S.C. §4248; 29 U.S.C. §2(7).

II STATEMENT OF THE CASE

The record consisting of relevant lower court decisions compels the conclusion the lower courts acted contrary to the Rule of Law in derogation of the history, text and structure of the Constitution as well as controlling decisions of this Court including those related to subject-matter jurisdiction. In the single-sentence Final January 21 Appellate Order, the Eleventh Circuit affirmed sub silento without any substantive analysis a prior District Court Order entered on April 16, 2021 (the "District Court April 16 Order") (appearing in Appendix D) as well as the District Court Final Judgment (the "District Court Final September 14 Judgment") (See Appendix C). Although the Final January 21 Appellate Order denies a prior stand-alone request filed on September 27, 2021 to certify five distinct

issues (the "Request for a COA"), no mention is made in this Order of the timely Notice of Appeal filed (separate and distinct from the Request for a COA) in the District Court on September 23, 2021, and in the Eleventh Circuit on September 29, 2021 (the "Notice of Appeal") (copy included as Appendix E to this Petition).

In his Notice of Appeal, Petitioner expressly challenges: (1) the portion of the District Court April 16 Order denying the separation of his Motion to Dismiss for Lack of Subject-Matter Juridiction (filed on March 23, 2021) from his Section 2255 Motion; (2) the District Court direction (on pain of dismissal styled as "one final opportunity") to incorporate his subject-matter jurisdiction challenges (Appendix D at 2) into a significantly truncated Section 2255 collateral attack to set aside and vacate the Amended Sentence and Judgment of Conviction entered against Petitioner in this case (the "Conviction"); (3) the concomitant foreclosure of Petitioner's right to be heard "at a meaningful time and in a meaningful way"-- to present complete and comprehensive arguments addressing complex, interrelated issues in support of his challenge to the subject-matter jurisdiction of the District Court; (4) the failure of the District Court to recognize: (a) an Article III Court has no authority to act without subject-matter jurisdiction, (b) Petitioner's challenge to subject-matter jurisdiction (based on a Statute void ab initio) can not be waived or forfeited (and does not require Section 2255 as a procedural platform), and (c) a challenge to Article III jurisdiction takes precedence over any other type of challenge; and (5) the failure of the District Court to verify sua sponte verify the existence of subject-matter jurisdiction before entry of the Conviction against Petitioner.

Instead of considering the exhaustive arguments demonstrating the lack of subject-matter jurisdiction and fulfilling the immutable duty of every Article III Court to verify sua sponte subject-matter jurisdiction exists, the Eleventh Circuit in the summary Final January Appellate Order did not address in any way and/or

correct the abecedarian errors of the District Court and upheld sub silento the ultra vires actions of the Court. With anatomical specificity, Petitioner in his lower court filings demonstrated Congress has no authority (direct or implied) under any provision in the Constitution to enact Section 2252, thus depriving the District Court of original subject-matter jurisdiction under Section 3231 of Title 18 of the U.S. Code ("Section 3231"). No original Section 3231 jurisdiction can exist based on a void Statute because no offense against the laws of the United States can be committed when the charging Statute is a nullity. The failure of the Eleventh Circuit to address and rectify this constitutional error linked to the very power of the District Court to hear this case undermines the integrity of our System of Justice severely damaging public confidence in that System. Judicial review of the actions of the lower court is necessary to safeguard essential principles governing the power and propriety of our Judiciary to act.

On December 9, 2018 Petitioner appealed an Order of the District Court entered on August 14, 2017 denying his Motion to Withdraw his Plea Agreement and to vacate the imposition at sentencing of an obstruction of justice enhancement. The Eleventh Circuit affirmed the District Court Order. See United State v. Aho, 779 Fed. Appx. 613, 617 (11th Cir.) (per curiam) (unpublished opinion), cert. denied, 2019 U.S. LEXIS 7284 (2019). Neither the District Court nor the Eleventh Circuit addressed any of the questions of significant public importance set forth in this Petition. See pp. i - ii, supra. Following the denial of his Direct Appeal, Petitioner on March 23, 2021 filed a post-judgment collateral attack under Section 2255 to set aside and vacate his Conviction. On the same date, independent of his Section 2255 Application, Petitioner filed a Motion to Dismiss for Lack of Subject-Matter jurisdiction ("LSJM"). The LSJM challenged unconsitutional rulings of the lower courts originating with the District Court April 16 Order. In that Order, the District Court ruled Petitioner "may only challenge the constitutionality of his

confinement pursuant to a Section 2255 Motion. Therefore all possible grounds for relief must be raised within Movant's 2255..." (Appendix D at 1) "All grounds for relief must be specified within this motion" (Id. at 2). The District Court April 16 Order cleaved and excluded from consideration extensive arguments Petitioner had presented in support of his separate Motion to Dismiss for Lack of Subject-Matter Jurisdiction. The District Court was well-aware of the severity of truncation (almost 70%) by the imposition of the Section 2255 page-limitation.

The District Court Final September 14 Judgment compounded the flaws intrinsic to the prior District Court April 16 Order. In Section I of that Judgment addressing the subject-matter jurisdiction challenge, the District Court stated:

> [Petitioner] admits he did not raise the [jurisdiction] issue on direct appeal. Therefore he is barred from asserting it on motion for collateral relief unless he can show cause excusing his failure to raise the issue previously, and actual prejudice resulting from the alleged error [Appendix B at 2-3].

The misapprehension of law embedded in this assertion is addressed in Section V, infra). In his Section 2255 Motion filed in the District Court on May 3, 2021, Petitioner specifically reserved and preserved the right to challenge the truncation of his Motion to Dismiss for Lack of Subject-Matter Jurisdiction and the forced incorporation of the issue in the Section 2255 Motion. The Notice of Appeal raised this reservation and reiterated the challenge to the District Court determination arises out of the discrete section of the District Court Final September 14 Judgment relating to the subject-matter jurisdiction challenge (Appendix E at 1).

The District Court September 14 Final Judgment also stated:

> [Petitioner] simply cites 'ineffective assistance as the cause for why he did not raise the issue on direct appeal and does not assert resulting prejudice. Ineffective assistance of counsel may satisfy the cause exception to a procedural bar... In order to do so, however, the claim of ineffective assistance must have merit. To determine whether it does, the court must decide whether arguments the defendant alleges his counsel failed to raise were significant enough to have affected the outcome of his appeal... Appellate counsel is not ineffective to raise claims 'reasonably considered to be without merit...' [citations omitted]. The court finds no merit in [Petitioner's] present claim... [Appendix B at 3].

The District Court reached this conclusion with no analysis-- not even a mite of a mention-- of the propositions advanced in the LSJM: (i) Congress lacks authority, direct or implied, to promulgate Section 2252; (ii) as a result, the Statute is void ab initio depriving the District Court of any power to adjudicate the proceeding; (ii) the District Court seemed to pay no heed, as if on "cruise-control," passing right up on its duty to confirm sua sponte the existence of subject-matter jurisdiction in the case; and (iii) Petitioner's air-tight arguments based on "First Principles," demonstrating Section 2252 contravenes: (a) the original intent and meaning of the Commerce Clause (as understood in Dormant Commerce Clause jurisprudence); (b) the overwhelming weight of controlling authority prominently featuring this Court's precedents; (c) express structural and textual limitations in the Constitution on the creation of a new felony beyond the four felonies Congress is authorized to punish; and (d) the reservation of powers to the States and to the people under the Tenth and Ninth Amendments to the Constitution as well as principles of federalism and dual sovereignty forming the bedrock of our System of Government.

In lieu of coming to grips with the failure of the District Court entering the Conviction without confirming sua sponte the existence of subject-matter jurisdiction and without addressing the lack of such jurisdiction, the Eleventh Circuit appears to pretend the Notice of Appeal does not exist, and in turn, does not confirm sua sponte the existence of subject-matter jurisdiction to enter the Appellate Order affirming the Conviction. Indeed, no mention of the Notice of Appeal can be found in the Final January 21 Order (or the March 16 Order denying rehearing). The ensuing Sections demonstrate both lower courts acted without jurisdiction and, in essence, have upheld and placed the judicial imprimatur on a Statute void ab initio.

III SUMMARY OF ARGUMENT

The Petition seeking issuance of a Writ of Certiorari should be granted to review the lack of subject-matter jurisdiction in the lower courts; the failure of the lower courts to verify the existence of subject-matter jurisdiction to hear this case; and the Eleventh Circuit's utter disregard of the Notice of Appeal raising these issues (separate and distinct from Petitioner's Request for a COA). The following is a summary of the arguments for granting this Petition:

A. Congress has no authority under the Constitution, direct or indirect (via the Necessary and Proper Clause), to expand the carefully enumerated and limited power to punish beyond the four felonies specified in Article I, §8, cls. 6 and 10 (the "Offence Clauses" or "power to punish"). See Thomas Jefferson, Second Resolve Clause, Kentucky Resolutions (1798), infra at 18-19; Cohens v. Virginia, 6 Wheat. 264, 428 (1821) (Marshall, C.J.) (Congress has "no power to punish felonies generally");

B. The historical context of the Commerce Clause, including the original intent and meaning (as understood in Dormant Commerce Clause law), compels the conclusion the Founders, Framers, Drafters and Ratifiers of the Constitution (the "Architects of the Nation") wrote the Commerce Clause to eliminate or reduce barriers or restrictions to the free-flow of interstate trade. The Judiciary must: (1) prevent all attempts to strip constitutional provisions of context; (2) evenly interpret and apply the original intent and meaning of the Commerce Clause for all statutes and cases including here; (3) fulfill the primary role and essential purpose of "truing-up" coordinate branches to "the liberty-protecting line" (see Kansas v. Hendricks, 521 U.S. 346, 395 (1990) (Breyer, J., dissenting with Stevens, Souter, Ginsburg, JJ., joining with respect to the dissent, Part III); Federalist No. 78 at 466 (C. Rossiter ed.) (A. Hamilton) through strict adherence to the original meaning, intent and structure of the Constitution (see, e.g., Citizens United v. FEC, 528 U.S. 310,

353 (2010) (Kennedy, J.) (Court construed the First Amendment "as originally understood")); and (4) strike down statutes that violate the original intent and meaning of the Commerce Clause like Section 2252;

C. The "structural context" of the Commerce Clause in connection with the doctrine of enumerated powers[1] confines the ambit of the Commerce Power conferred without overlap or redundancy with respect to other Clauses in the Constitution. The Commerce Clause (i) is not an Offence Clause; (ii) embodies no power to punish; and (iii) provides no direct or indirect authority to create, define and punish new, unenumerated felonies like Section 2252;

D. The sovereign police power of the States was not surrendered to the National Government at the formation of the Union; nor is a general police power found among the enumerated powers to punish conferred on the National Government when the Colonies qua States conveyed to it few and limited powers (United States v. Lopez, 514 U.S. 549 L.Ed.2d 549, 506 (1995) (Rehnquist, C.J.) ("The Constitution" in short, "withhold[s] from Congress a plenary police power"); Taylor v. United States, 195 L.Ed.2d 450, 467 (2016) (Thomas, J., dissenting) citing Cohens, supra, and Lopez, supra) and no such power may be exercised in the guise of regulating interstate commerce. See Printz v. United States, 512 U.S. 89, 923-34 (1997) (Scalia, J.); Federalist No. 33[2] at 204 (A. Hamilton); and

E. The Amendment process set forth in Article V of the Constitution is the sole method of expanding the enumerated power to punish or authorizing the enactment of new nationwide criminal statutes (e.g., the 18th Amendment, circa 1919, authorizing Congress to prohibit intoxicating liquors nationwide). No amendment to the Constitution authorizes Congress to promulgate Section 2252, a Statute falling outside the scope of the enumerated powers to punish and impermissibly encroaching upon the sovereign police powers reserved to the States and to the people.

IV PETITIONER HAS ARTICLE III STANDING

In Bond v. United States, 180 L.Ed.2d 269 (2011) (Kennedy, J.) ("Bond I"), Justice Kennedy, writing for a unanimous Court (with Ginsburg and Breyer, JJ., concurring), resolved whether a person indicted for a violation of a federal criminal statute has standing to challenge the constitutionality of the statute on the ground enactment of the law violates fundamental principles of federalism. The Bond Court answered in the affirmative holding such a person has standing to challenge the authority of Congress to promulgate the statute on the ground the enactment violated principles of federalism. Standing exists to raise the challenge even though a State is not a party.

> The Framers concluded that the allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people from whom all governmental powers are derived... [180 L.Ed.2d at 279] [F]ederalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake... [Id. at 280]
>
> [I]t is appropriate for an individual, in a proper case... to challenge a law as enacted in contravention of constitutional principles of federalism... The claim need not depend on the vicarious assertions of a State's constitutional interests, even if a State's constitutional interests are also implicated... [Id. at 281] [brackets and volume and page citations added].

In this context, the Court explicitly recognized:

> The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with State sovereignty is not within the enumerated powers of the National Government... and action that exceeds the National Government's enumerated powers undermines the sovereign interests of the States [Id. at 282].

The Bond Court also held the person challenging the power of Congress to enact a statute must satisfy the Article III requirements "applicable to all litigants and claims" (Bond I, supra at 282). Article III standing requirements consist of: (i) Injury-in-fact, (ii) traceable to the conduct complained of and (iii) capable of redress (Bond I, supra, at 281-82); Monsanto Corp. v. Geertson Seed Farms, 177 L.Ed.2d 461, 471-72 (2010) (Alito, J.).

Petitioner fully satisfies these requirements. The continued incarceration of

Petitioner is concrete, particular injury-in-fact. The concrete and particular harm suffered "results from disregard of [the] federal structure of government" (Bond I, supra, at 282) and impermissible intrusion upon powers reserved to the "several States and to the people" pursuant to the Tenth Amendment. That injury is fairly traceable to the Conviction. Setting aside, vacating and dismissing with prejudice the distribution count in the Indictment (the other two counts lodged against Petitioner were previously dismissed) provides requisite redress. Standing to challenge the constitutionality of Section 2252 is undeniable and the lack of subject-matter jurisdiction of the District Court to enter the Conviction based upon a void Statute is manifest.

V THE CHALLENGE TO SUBJECT-MATTER JURISDICTION BASED ON A STATUTE VOID AB INITIO CAN NOT BE WAIVED

There is absolutely no question, "[f]ederal courts are courts of limited jurisdiction" Gunn v. Minton, 568 U.S. 251, 256 (2013) (Roberts, C.J.) quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (Scalia, J.) (same) ("[Courts] possess only that power authorized by the Constitution and statute"). As a direct consequence, subject-matter functions as an immutable restriction upon the power of the courts to hear a case and "can never be forfeited or waived... and defects in subject-matter jurisdiction require correction regardless of whether the error was raised in the district court" United States v. Cotton, 535 U.S. 625, 630 (2002) (Rehnquist, C.J.) citing Louisville & Nashville R. Co. Mottley, 211 U.S. 149, 152 (1908) (Moody, J.); Gonzales v. Thaler, 181 L.Ed.2d 619, 630 (2012) (Sotomayor, J.) ("Subject-matter jurisdiction can never be waived or forfeited. The objection may be resurrected at any point in the litigation... Challenges to a court's power to adjudicate a criminal proceeding survive a guilty plea because the intrinsic nature of the challenge is too important to forfeit due to a relationship to a court's very authority to hear a case."); Class v. United States, 138 S.Ct. 789, 803 (2017) (Breyer, J.) (Petitioner "did not relinquish his

right to appeal the district court's determination simply by pleading guilty"); Arbaugh v. Y&H Corp., 546 U.S. 500, 514 ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived"). The pertinent corpus juris demonstrates, "[c]ases are legion holding a party may not waive subject-matter jurisdiction" Pennsylvania v. Union Gas Co., 491 U.S. 1, 26 (1989) (Stevens, J., concurring) (citations omitted)). The constitutional challenge to the power of the District Court to adjudicate this case and to enter the conviction arises out of the utter lack of authority of Congress to enact the Statute upon which the Indictment and Conviction are based.

Citing United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000), Mills v. United States, 36 F.2d 1052, 1055 (11th Cir. 1994) and Cross v. United States, 893 F.2d 1287, 1289 (11th Cir. 1991), the District Court September 14 Final Judgment erroneously concludes Petitioner is barred from raising the subject-matter jurisdiction challenge because "[he] admits he did not raise the issue on appeal"; "simply cites 'ineffective assistance' as the cause for why he did not raise the issue" and "does not assert resulting prejudice" (District Court September 14 Final Judgment at 3). That assertion is flatly contrary to United States Supreme Court jurisprudence cited in the preceding paragraphs. See, e.g., Gonzales v. Thaler, supra; Arbaugh, supra. Remarkably, the three cases cited in the District Court September 14 Final Judgment, Nyhuis, supra (prosecutorial misconduct); Mills, supra (improper delegation of congressional authority) and Cross, supra (Grand Jury due process violation and recusal issue) have absolutely nothing to do with the lack of subject-matter jurisdiction challenge presented for review in tandem with the failure of the lower court to independently confirm the existence of subject-matter jurisdiction to adjudicate the case. Nor is there any doubt regarding the ineffectiveness of counsel in failing to raise these issues. Equally undeniable is the prejudice arising out of the District Court entering a Conviction with no authority to decide the case.

VI CONSTRUCTION AND INTERPRETATION OF THE CONSTITUTION[3]

Teachings of the Founding Fathers and Supreme Court jurisprudence establish there is no compromise concerning the methodology for the construction and interpretation of the Constitution. Founding Father and President Thomas Jefferson stated we should "carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifest in the debates" and conform to the probable meaning at the time the Constitution "was passed" (T. Jefferson, "Letter to William Johnson" June 12, 1823 in 15 "Writings of Thomas Jefferson" 439, 449 (A. Lipscomb ed. 1919)). Highlighting the original intent behind "limiting by enumeration" fixed power, Founding Father and President James Madison instructs:

> Nor can it ever be granted that a power to act on a case when it actually occurs, includes a power over all the means that may tend to prevent the occurrence of the case. Such a latitude of construction would render unavailing every practical definition of particular and limited powers [6 "Writings of James Madison" 367 (1900)].

Madison is warning against using the pretense of an appropriate means to expand the limits of a carefully fixed and finite (and permanent) power into a general, unlimited power. See Lambert v. Yellowley, 272 U.S. 581, 603 (1926) (Sutherland, J., dissenting) ("A grant of power to prohibit for specified purposes does not include the power to prohibit for other and different purposes"). Section 2252 does not arise out of a specified power to prohibit, and in fact, Congress is denied any right to exercise the nationwide police power embodied in the Statute.

Justice Thomas described the structural checks against an "aggrandizement of federal power" (Bond II, infra, 189 L.Ed.2d 1 at 28 (Thomas, J., with whom Alito and Scalia, JJ., joined concurring)) impermissibly intruding upon the sovereignty of the States. Justice Scalia, in a subsequent case, also points to "220 years" of Supreme Court "cases" confirming these fixed limitations:

> What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by the innumerable cases of ours in 200 years since, is that there are structural limits upon federal power... and upon what it can impose on the sovereign States [National Federation of Indep. Bus. v. Sebelius, 567 U.S. 519, 647 (2012) (Scalia, J., joint dissent with Justices Kennedy, Thomas and Alito)].

Objectives falling within the scope of delegated powers must be attained within prescribed constitutional limitations and not by an invasion of the sovereign police powers reserved to the States. Founding Fathers Jefferson and Madison both emphasized the intractable structural limits on federal power set forth in the Constitution. (See McCulloch v. Maryland, 4 Wheat. 316, 421 (1819) (Marshall, C.J.). Chief Justice Roberts affirmed adherence to the original meaning and intent when interpreting specific provisions of the Constitution:

> The Framers of the Constitution were practical men, dealing with the facts of political life as they understood them, putting into the form the government they were creating and prescribing in language clear and intelligible the power the government was to take. We ought to give effect to the words they used [Arizona State Legislature v. Ariz. Indep. Redistricting Comm., 576 U.S. 704, 750 (2015) (Roberts, C.J.) (Separate opinion with Scalia, Thomas and Alito, JJ.) quoting with approval South Carolina v. United States, 199 U.S. 437, 449 (1905) (Brewer, J.). See National Federation of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Roberts, C.J. announced the judgment of the Court) ("NFIB") at 555 (same) (There is "no reason to depart" from the original meaning and understanding of the Framers of the Constitution) citing South Carolina, supra, at 449). See 567 U.S. at 524 for summary of the separate concurrences and dissents in NFIB].

The Supreme Court has reaffirmed again and again the methodology for construing and interpreting the Constitution and the Amendments to the Constitution: "In the construction of the Constitution, we must look at the times and examine the state of things when it was framed and adopted to ascertain the old law, the mischief and the remedy." (Rhode Island v. Massachusetts, 12 Pet. 657, 713, 738 (1838) (Baldwin, J.) (Mr. Daniel Webster, recognized as the "Expounder of the Constitution" (See Myers v. United States, 272 U.S. 52, 151 (1926) (Taft, C.J.)), argued the cause for the Commonwealth of Massachusetts). See Mattox v. United States, 156 U.S. 237, 243 (1895) (Brown, J.) ("We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted"); Myers v. United States, supra, 272 U.S. 52, 182-83 ("[T]his Government is one of carefully enumerated powers under an intelligible charter. The only sound principle is to declare, ita lex scripta [so the law is written] to follow and obey") (emphasis supplied). Early in the

Twentieth Century, this Honorable Court reaffirmed the quintessential principles governing construction and interpretation of the Constitution:

> The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now... it is not only the same words, but the same in meaning, and delegates the same power to government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in the present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passions of the day... To determine the extent of the grants of power, we must therefore place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants. [South Carolina v. United States, supra, at 48-50, quoting with approval Rhode Island v. Massachusetts, supra, 12 Pet. at 721; see Mattox, supra, at 243 and Myers, infra, at 182-83].

Extolling the lucidity and clarity of the whole Constitution, renowned legal scholar and Chief Justice Evan Hughes in Wright v. United States, 302 U.S. 583, 586 (1936) admonished against departing from the careful and "deliberate choice of words" the Framers and Drafters selected:

> To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation... [e]very 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. The many discussions which had taken place upon the correctness of this proposition and shown high talent, the caution, and foresight of the illustrious men who framed it. Every word apears to have been weighted with the utmost deliberation and its force and effect to have been fairly understood.

The writings and pronouncements of the Founders and others involved in the framing, drafting and adoption of the Constitution provide a roadmap to: (i) The limits of federal power; (ii) The scope and operative effect of the Tenth and Ninth Amendments upon the exercise of that power and (iii) Structural barriers against the usurpation of State police powers inherent in our federalist system. James Madison explicitly recognized the powers of the proposed Federal Government extend only "to certain enumerated objects" leaving to "the several States a residuary and inviolable" (Murphy v. NCAA, 138 S.Ct. 1461, 1475 (2018) (Alito, J.), quoting in haec verba Federalist No. 39 at 245 (J. Madison)).

The Architects of the Nation envisioned an allocation of powers between the Federal Government, "few" and "defined" (Federalist No. 45 at 293) (J. Madison),

while the powers reserved to the several States "remain numerous and indefinite" (Id. at 328 (B. Wright ed. 1981)). The limitation upon federal power reflected in the original meaning and intent of the Architects coupled with the Judiciary acting as an ever-present "check" restraining the Legislature from intruding upon powers reserved to the States and to the people, resoundingly reflects the outright rejection of the old world doctrine: "People were made for kings, not kings for people" (Federalist No. 45 at 142) (J. Madison).

VII RATIFICATION-ERA AUTHORITY DEMONSTRATES SECITON 2252 IS VOID AB INITIO

A. The State Conventions and State Legislatures

Ratification-era debates, speeches and remarks in the States Conventions and State Legislatures of those with authority to ratify the proposed Constitution as fundamental law support the conclusion Congress can only punish the offenses set forth without ambiguity in Articles I and III. James Madison warned, "[An] excess of law-making was in their words one of the diseases to which are governments are most liable." (Federalist No. 62 at 378) (J. Madison). See also Federalist No. 73 at 441-42 (A. Hamilton); John Locke, "The Second Treatise on Civil Government and a Letter Concerning Toleration" ("The Second Treatise") §143. During the Virginia Ratification, Madison unequivocally states: "[E]verything not granted is reserved to the States" (J. Madison, Remarks at the Virginia Convention, June 24, 1788, reprinted in Documentary History of the Constitution of the States of America (Wash. D.C. Dept. of State (1897)) ("Documentary History"), Vol. 4 at 1473, 1501-21)). The idea Congress could enact nationwide criminal legislation beyond the four felonies would have been repugnant (an anathema tantamount to the infamous "lettre de cachet") to the delegates considering and then ratifying the Constitution. "The delegates would have rushed to the exits" (Arizona v. United States, 567 U.S. 387, 436 (2012) (Scalia, J., concurring in part, dissenting in part)) if they heard such a proposal. The "Framers... believed the new federal government's most dangerous power was the power to enact laws restricting people's liberty." (Gundy v. United States, 204

L.Ed.2d 522, 540-41 (2019) (Gorsuch, J., dissenting with Chief Justice Roberts and Justice Thomas joining in dissent) citing and quoting with approval Federalist No. 48 at 309-12 (J. Madison)). Acting as surrogates for the people, the Architects of the Nation placed clear-cut limits upon powers delegated to the Federal Government to safeguard against future abuse of the ambit of the consent to govern expressed in the Constitution (Id.).

The New York Ratification Convention included language in its Official Declaration foreshadowing what would become the limitation upon national legislative power expressed in the Tenth Amendment:

> [E]very Power, Jurisdiction, and Right, which is not by the said Constitution clearly delegated to Congress... remarks to the People of the several States, or to their respective state governments.

In his remarks to the New York Ratification Convention, Hamilton assured the assemblage the sovereign people of the several States retained all aspects not expressly delegated to the Federal Government:

> In the first information of government, by the association of individuals, every power of the community is delegated, because the government is to extend to every possible object; nothing is reserved, but the inalienable rights of mankind; but, when a number of these societies unite for certain purposes, the rule is different, and from the plainest reason -- they have already delegated their sovereignty and their power to their several governments; and these cannot be recalled, and given to another, without an express act. I submit to the committee whether this reasoning is not conclusive [2 Elliot's Debates, Note 9 at 362-63, Reporting Remarks of Alexander Hamilton to the New York Ratifying Convention on June 28, 1788].

Based upon a cavalcade of similar assurances and promises (see Elliot's Debates, passim), the Rhode Island Convention approved amendments limiting Congress to powers delegated and officially declared:

> The United States shall guarantee to each State its sovereignty, freedom and independence and every power, jurisdiction and right, which is not by this Constituition expressly delegated to the United States [See Ratification of the Constitution by the State of Rhode Island, in Documentary History at 310, 316; See also 1 Elliot's Debates at 334, Reporting the Ratification Convention of Rhode Island on May 29, 1790].

B. Judicial Decisions and Proceedings During the Ratification-Era

Judicial decisions rendered during the Ratification-era confirm the States retained expansive inviolable sovereign powers following the Ratification. See Calder

v. Bull, 3 U.S. (Dall.) 386-87 (1789) (Chase, C.J.).

> The several State legislatures retain all the power delegated to them by the State Constitutions, which are not expressly taken away by the Constitution of the United States.

In 1790, a year before Ratification of the Bill of Rights, the Maryland Court of Appeals ruled, "Congress has no power but what is expressly delegated to them by the new government. The States retain all powers not delegated and from the exercise of which they are not restricted by the new government" (Donaldson v. Harvey, 3H & McH 12, 19 Md. 1790).

Speaking on the floor of the House of Representatives during the 1803 House Impeachment proceedings lodged against Samuel Chase, arch-Federalist Robert Goodloe confirmed prior assurances regarding the limited grant of power to the Federal Government:

> [T]he Constitution is a limited grant of power... [and] it is of the essence of such a grant to be construed strictly, and to leave in the granters al the powers not expressly, or by necessary implication granted away... (2 Samuel Chase 257, CDA Capo Press 1970) (1805).

See Mayor of N.Y. v. Miln., 36 11 Pet. U.S. 102, 139 (1837) (narrowly construing the Commerce Clause) (Barbour, J.); see generally United States v. Worrall, 2 U.S. (Dall.) 384 (1789) (Before Chase, Circuit Judge and Peters, District Judge) (Distinguishing between the power of the national government to punish felonies and misdemeanors).

In his landmark decision in McCulloch v. Maryland, 4 Wheat. 316, 411 (1819), Chief Justice Marshall declared: "No great substantive and independent power" can be "implied as incidental to other powers, or used as a means of executing them." As Justice Scalia stated in Bond v. United States, 572 U.S. 844, 879 (2014) (Scalia, Thomas, Alito, JJ., concurring), "No law encroaching the principle of state sovereignty, whether or not 'necessary' can be said to be 'proper'." The concurrence in Bond II recognized Congress does not have "a general legislative authority over a subject which has not been given it by the Constitution." (572 U.S. at 579), quoting "an old well-known treatise" 1 Willoghby, "The constitutional law of the United States" §210 at 504 (1910). These bedrock principles impose fixed limits upon powers conferred upon Congress under the Constitution.

VIII THE ENUMERATED AND LIMITED DELEGATED POWER TO PUNISH

Writing for a unanimous Court in United States v. Butler, 297 U.S. 1, 69 (1932) (Roberts, J.), Justice Roberts excoriated any resort to legislative pretense to circumvent limits restricting enumerated and delegated power:

> Congress can not, under the pretext of executing delegated power, pass laws... not entrusted to the Federal Government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the power reserved to the States, is invalid and can not be enforced. [Butler is cited in National Federation of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Roberts, C.J.) ("NFIB") at 489.] [See Linder v. United States, 268 U.S. 5, 17 (1925) (MacReynolds, J.) quoted in haec verba in Butler, supra; Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) ("[A] law is not proper for carrying into execution the Commerce Clause when it violates... State sovereignty") (internal quotation marks and brackets omitted)].

Butler is an example of "aggressively" policing limits placed on the exercise of delegated powers. (Butler is also quoted in United States v. Comstock, 176 L.Ed.2d 878, 909 (2010 (Kennedy, J., dissenting opinion) ("The question is not what power the federal government ought to have but what powers in fact have been given by the people" quoting Butler, supra, 297 U.S. at 63). Conspicuously absent from the list of powers conferred upon Congress under the Constitution is anything approaching a plenary police power to enact nationwide punishments such as Section 2252. "Congress cannot punish felonies generally" (United States v. Morrison, 529 U.S. 598, 618 (2000) (Rehnquist, C.J.) quoting Chief Justice Marshall in both Cohens v. Virginia, 6 Wheat. 264, 428 (1821) (Marshall, C.J.) (same) and Gibbons v. Ogden, 9 Wheat. at 189-90 (1824) (Marshall, C.J.) (The power of "punishment for... a misdemeanor or felony is limited by the Constitution"). See McCulloch v. Maryland, supra, at 405 (The Constitution "creates a federal government of enumerated powers"); Lopez, supra, at 532 (same) citing Federalist No. 45 (J. Madison); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Sutherland, J.):

> The ruling and firmly established principle is that the power which the general government may exercise are only those specifically enumerated in the Constitution and such implied powers as necessary and proper to carry out the exact enumerated powers [emphasis supplied] [298 U.S. at 291].

See Kansas v. Colorado, 206 U.S. 46, 81, 87 (1907) (Brewer, J.) citing and quoting with approval (1) the opinions of Chief Justice Marshall in McCulloch v. Maryland, supra, and Gibbons v. Ogden, supra; (2) the opinion of Justice Story in Martin v. Hunter's Lessee, 1 Wheat. 304, 326 (1816) (Story, J.); and (3) expressly relying on the original meaning and intent of the Framers. In Kansas v. Colorado, supra, Justice brewer elucidated (with special emphasis on the Tenth Amendment) the strict limitation imposed on the scope of power delegated to the Federal Government:

> The government of the United States is one of delegated, limited and enumerated powers... no independent and unmentioned power passes to the national government or can be rightfully exercised by Congress... [206 U.S. at 87-88]
>
> [T]he proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independent of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to enact other and distinct things. This natural construction of the Constitution is made absolutely certain by the 10th Amendment... [which] disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare attempt to exercise powers which had not been granted... [Id at 89-90]
>
> With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending the act... [The Tenth Amendment] is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning... [Id. at 90-91]
>
> If powers granted [to Congress] are to be taken as broadly and as carrying with them authority to pass the acts which may be reasonably necessary to carry them into full execution... it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed... The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity and purpose to the spirit and purpose... if no such power has been granted, none can be exercised [Id. at 91-92].

There are exactly two Clauses in the Constitution's Article I expressly delegating to Congress the power to punish three enumerated felonies and one provision in Article III expressly authorizing Congress to define and punish Treason. At the Kentucky Resolutions, Thomas Jefferson proclaimed:

> The Constitution of the United States, having delegated to Congress the power

to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas and offenses against the law of nations, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that 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," therefore... all their other acts which assume to create, define, or punish crimes, other than those so enumerated in the Constitution, are altogether void, and of no force; and that power to create, define, and punish such other crimes is reserved, and, of right appertains solely and exclusively to the respective States, each within its own territory. [emphasis supplied] [T. Jefferson, Second Resolve Clause, the Kentucky Resolutions, 1798. See Knox v. Lee and Parker v. Davis, 79 U.S. 457, 535-36 (1871) (Strong, J.); St. George Tucker, 1 Blackstone Commentaries, Appendix at 186-87 (Birch and Small 1803)].

Alexander Hamilton accorded an essential role to the Judiciary to strike a balance between the limited, enumerated powers delegated to the Federal Government and those reserved under the Tenth Amendment to the States and to the people:

[T]he courts were designed to be an intermediate body between the people and the legislature... to keep the latter within the limits assigned to their authority... [T]he courts of justice are to be considered... the bulwarks of a limited Constitution against legislative encroachments... judges... do their duty as faithful guardians of the Constitution [against] legislative invasions [in] mitigating the severity and confining the operation of such laws... [A. Hamilton] [Federalist No. 78 at 242-252].

In matters of interpretation of law, "[n]o court ought... to give a construction to [a staute] which should involve a violation, however unintentional, of the Constitution." Parsons v. Bedford, 3 Pet. 433, 448-49 (1830) (Story, J.). And there can be no question whatsoever the Judiciary has the responsibility "to enforce the limits of federal power by striking down acts of Congress that transgress those limits." Marbury v. Madison, 1 Cranch at 175-76. See United State v. Coombs, 12 Pet. 72, 76 (1838) (Story, J.) ("If... Congress exceeded their constitutional authority it will become [this Court's] duty to say so..."). The power to regulate interstate or intrastate economic activity in a national market (be the market wheat, livestock, potatoes or marijuana) turns upon the essential nature of the activity and the attenuation criteria in Lopez, supra, and Raich, supra. Pursuant to these cases, Congress has authority to regulate three categories of commerce and those defined limits must be strictly enforced (Id.). Congress must also stay within the

confines established in the original intent of the Commerce Clause (see Section X(A), infra) as well as the original meaning and boundaries delineated in the structural context in its Framework (see Section X(B), infra) in keeping with the doctrine of enumerated powers. Properly understood, the Commerce Clause confers no general police power upon the Federal Government. This Court has "always rejected readings that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power" (Bond, supra, at 25 citing United States v. Lopez, supra, at 584 (Thomas, J., concurring); See, e.g., New York v. United States, supra, at 155); United States v. Kebodeaux, 180 L.Ed.2d 540, 553 (2013) (Roberts, C.J., concurring) citing Morrison, supra, at 618-19). In this respect, United States v. Lopez, supra, echoes Butler, supra, in admonishing against circumventing limits upon finite, delegated power:

> [Legislation pursuant to the power to regulate commerce] may not extend so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government [514 U.S. at 556-57].

The 'limitation by enumeration' of powers to punish in Articles I and III must, as a moral, ethical and legal imperative of historic dimension, be enforced to quash any attempt to misuse the Commerce Clause or Necessary and Proper Clause.

While the Commerce Power is broad, "[t]he Supreme Court has cautioned against such expansions of federal law into areas, like police powers that are the historical prerogative of the States" (United States v. Cannon, 750 F.3d 492, 512 (5th Cir. 2014) (Circuit Judge Elrod, also authoring the Opinion of the Court of Appeals) citing Shelby Cty. v. Holder, 133 S.Ct. 2611, 2623 (2013) (Roberts, C.J.)). See United States v. McLean, 802 F.3d 1228, 1230 (11th Cir. 2015); United States v. Cannon, supra, at 513); Murphy, supra, at 1476:

> [While] [t]he legislative powers granted to Congress are sizeable... they are not unlimited... The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore all other legislative power is reserved to the States, as the Tenth Amendment confirms.

United States District Judge Brantley Starr cogently observed:

> Article I, Section 8 enumerates the powers the People gave to the federal government at our nation's founding: the tax power, the borrowing power, the commerce power, the naturalization power, the bankruptcy power, the power to coin money, the postal power, the maritime power and the war power. None of these is the police power. [Lane v. United States, 2020 U.S. Dist. LEXIS 54545 at 11 (N.D. TX. Mar. 30, 2020) (Starr, D.J.)].

In promulgating the Statute embodying a generalized, nationwide police power, Congress "forgot the Tenth Amendment and the structure of the Constitution itself (Lane, supra, at 1). District Judge Starr warned in Lane: "It is concerning [indeed, alarming and apocalyptic] that the federal government believes it swallowed the states whole" (Id.). Inserting the word "interstate" into a statute as an essential element of an offense does not transform an illegal, overtly expansive Statute into a law consistent with the Constitution (as if "interstate" is some kind of constitutional "abracadabra" or incantation (of last resort)). The Gorgonian cascade of federal legislation has transformed the bedrock principles of federalism and dual sovereignty into a "Serbonian Bog" of illegal legislation where the whole Constitution "has sunk" (Milton, Paradise Lost, bk ii, line 502 (1667) reprinted in 4 Harvard Classics, "The Complete Poems of Milton" 125 (1969)).

In his concurrence in United States v. Lopez, supra, Justice Thomas provides brilliant perspect on laws exceeding the Commerce Power:

> Congress only enacted nationwide criminal laws "pursuant to direct grants of authority found in the Constitution. To be sure, Congress outlawed murder, manslaughter, maiming, and larceny, but only when those acts were either committed on United States Territory not part of a State or on the high seas." [citations omitted] [United States v. Lopez, supra, at 597 n.6].

This Court has held firm the enumerated power to punish specific crimes are not enlarged to any degree under other constitutional powers:

> We have frequently decided that police power of the States was not surrendered when the people of the United States conferred upon Congress the general power to regulate commerce... [Patterson v. Kentucky, 97 U.S. 501, 505 (1879) (Harland, J.); See United States v. Hall, 98 U.S. 343-46 (1879) (Clifford, J.); Knox v. Lee and Parker v. Davis, supra, at 535-36].

This express, iron-clad structural constraint can not be ignored, undercut or diluted through Commerce Clause abracadabra with or without the Necessary and

Proper Clause:

> We have always rejected a reading of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power. The First Congress did not enact nationwide punishment. Nor may these powers be exercised in a way that violates other other specific provisions in the Constitution [Morrison, supra, at 618-19].

Justice Thomas further castigates the use of the pretext of regulating commerce:

> By continuing to apply [a] rootless and maleable standard... the Court has encouraged to persist the view the Commerce Clause has virtually no limit. Until this Court [adheres] to the original [Commerce Power] understanding, we will continue to see Congress appropriate state police powers under the guise of "regulating commerce" [Id. at 627].

The limitation upon the power to punish conferred upon Congress is further reinforced under long-standing cannons of construction: (1) expressio unius est exclusio alterius ("The mention of one is the exclusion of the other") and (2) expressum facit cesare tacitum ("What is expressed makes what is silent cease"). See the famous and enduring essay, "Some reflections on the Reading of Statutes" 47 Colum. L. Rev. 527; 537 (1947) (Frankfurter, J.).

Unlike the lower court Orders in this case upholding the Conviction predicated on Section 2252 (unanchored, directly or indirectly, to any enumerated power to punish), examples of strict construction of the power to punish under the Offence Clauses are found providing validity to corresponding statutes. See United States v. Estupian, 453 F.3d 1336, 1338-39 (11th Cir. 2006); United States v. Bellaizac-Hurtado, supra, at 1258; United States v. Cifuentes-Cuero, 2020 U.S. App. 9949 at 8 (11th Cir. Mar. 31, 2020); Riley v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1346 (11th Cir. 2002); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995). The overarching, determinative point is the charge, conviction or dismissal in each case turns upon the fulcrum of "intimate" attachment to a constitutionally-enumerated power and the power was strictly construed, unlike, as in this case, Section 2252's lack of connection to an enumerated power to punish.

The scope of the expansive sovereign power reserved to the States can not be overstated. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.2 (1985) (Powell, J.):

> The Framers believed the States played a vital role in our system and that strong State governments were essential to serve as a 'counterpoise' to the power of the federal government [Atascadero State Hospital, supra, at 238 citing and quoting Federalist No. 17 at 107 (A. Hamilton) (J. Cooke ed. 1961)].

Even the prohibition against States impairing the obligations of contracts (Art. I, §10, cl. 1) is subject to state sovereign power to protect the health, safety and welfare of its citizens in time of urgent public need demanding relief (See Allied Structural Steel v. Spannus, 438 U.S. 234, 240-41 (1978) (Stewart, J.) citing W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934) (Hughes, C.J.)). The principle enunciated in Cohens v. Virginia, supra, has retained its vitality throughout our history. Indeed, in a 2-page opinion handed down in 1870, the Supreme Court invalidated a nationwide law prohibiting all sales of naptha and illuminating oils on the ground:

> [The] law in question was plainly a regulation of police power which could have Constitutional application only where Congress had exclusive authority, such as the Territories [United State v. DeWitt, 9 Wall. 41, 44-45 (1870) (Chase, C.J.)]. [See License Cases 5 Wall. 462, 470-71 (1867) (Chase, C.J.)].

Each State possesses:

> '[C]ertain exclusive and very important portions of sovereign power' (Federalist No. 9 at 55 (A. Hamilton)). Foremost among the prerogatives of sovereign power is the power to create a criminal code [Heath v. Alabama, 474 82, 93 (1985) (O'Connor, J.) citing and quoting Alfred L. Snapp & Sons v. Puerto Rico ex Rel. Berez, 458 U.S. 592, 601 (1982) (White, J.)].

The opinions in Heath, supra; Lopez, supra; and Patterson, supra extend an unbroken chain of this Court's holdings completely at odds with with the unjustified federal usurpation of State criminal law in the modern period exemplified in Section 2252. The Statute ventures deep into the land of Ultima Thule, far beyond the Constitutional horizon. Section 2252 does not "effectuate any recognized federal power on the core State power..." Artis v. District of Colmubia, 199 L.Ed.2d 473 (2018) (Gorsuch, J., with whom Kennedy, Thomas and Alito, JJ., join dissenting) and is nothing "other than an unconstitutional intrusion on the core State power..." (Id.).

IX THE NECESSARY AND PROPER CLAUSE DOES NOT SAVE THE STATUTE

In accordance with the original intent and meaning of the Necessary and Proper Clause (Art. I., §8, cl. 18), this Court has imposed definite boundaries on the ambit of power to be implied pursuant to the Clause:

> The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or any department or office thereof, is not the delegation of a new and independent power, but simply for making effective powers theretofore mentioned [emphasis supplied] [Kansas v. Colorado, 206 U.S. 46, 88 (1907) (Brewer, J.)].

Chief Justice Roberts in Kebodeaux, supra, affirmed:

> "[T]he powers of government are limited..." Chief Justice Marshall was emphatic that "no great and substantive and independent power can be implied as incidental to other powers, or used as a means of executing them..." It is difficult to imagine a clearer example a of a great substantive and independent power than the power to protect the public... and alleviate public safety concerns..." I find it implausible to suppose.. the Framers intended to confer such authority by implication rather than expression. A power of that magnitude vested in the federal government is not consistent with the letter and spirit of the Constitution... and thus not a proper grant for carrying into execution the enumerated powers of the federal government... it is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause [internal quotation marks and citations omitted unless otherwise indicated] [Kebodeaux, supra, 186 L.Ed.2d at 553]. [See Kinsella v. United States ex rel. Singleton, 361 234, 247 (1960) (Clark, J.) ("The Necessary and Proper Clause is merely a declaration... the means of carrying into those [powers] otherwise granted are included in the grant" quoting 282 VI "Writings of James Madison (Gaillard Hunt ed. 1906) (alterations in original); Mayor of New Orleans v. United States, 35 U.S. (10 Pet. 662, 736-37 (1836) (McLean, J.) (Mr. Daniel Webster argued the case for New Orleans); Florida v. HHS, supra, at 1279 ("The Necessary and Proper Clause is intimately tied to the enumerated power it effectuates..." citing Kansas v. Colorado, supra, at 88)].

There is no question the Necessary and Proper Clause "is subject to other constraints by the Constitution." United States v. Edgar, 304 F.3d 1320, 1326 (11th Cir. 2002); See United States v. McLean, supra, at 1230 citing Sabri v. United States, 541 U.S. 600 (2004) (Souter, J.). In his concurrence in Sabri, supra, at 614, Justice Thomas warns against "greatly and improperly expanding the reach of Congress' power under the Necessary and Proper Clause." The Clause does not give Congress power to subvert basic principles of federalism and dual sovereignty (Murphy, supra, at 882 citing Gonzales v. Raich, supra, at 32).

The ratification of the Tenth and Ninth Amendments merely confirmed the preexisting principle of expressly delegated power. The most vociferous advocates of this view were Federalist supporters of the Constitution. Indeed, during the debate regarding ratification of the Bill of Rights, Hamilton argued:

> I go further and affirm the bill of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They could contain various exceptions in power not granted, and on this very account would afford a colorable pretext to claim more than granted. For why declare that things shall not be done that there is no power to do... [T]he Constitution ought not be charged with the absurdity of providing against the abuse of an authority which was not given... [Federalist No. 84 at 512 (A. Hamilton)].

The Framers and Drafters of the Tenth Amendment added the phrase "reserved to the States, respectively or to the People"-- a declaration of reserved, non-delegated sovereign power. At the time the conception of popular sovereignty encompassed the following precepts: (1) All power delegated away by the people would be strictly construed and (2) Sovereign power could not be diminished by implication, only through express delegation. Alexander Hamilton confirmed:

> [The people] have already delegated their sovereignty and their powers to their several [State] governments, and these can not be recalled and given to another without express act [2 Elliot's Debates, at 306, Reporting Remarks of Alexander Hamilton to the New York Ratifying Convention on June 28, 1788].

During the debates regarding the Bill of Rights, John Page, a member of the First Congress, acknowledged the aggregate effect of the Tenth and Ninth Amendments is the inclusion of the term, "expressly":

> [H]ow could it be possible to suppose these two Amendments taken together, were not sufficient to justify every citizen in saying, that 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 as fully and completely, as if the word expressly had been inserted [John Page, to the Freeholders of Gloucester County 28 (Richard, John Dixon 1799)].

In Trump v. Mazars USA, LLP., 207 L.Ed.2d 951, 971, Justice Thomas in his dissent stated, "The scope of these implied powers is very limited. The Constitution does not sweep in power 'of inferior importance, merely because they are inferior'" quoting McCulloch v. Maryland, supra, 4 Wheat. at 408. The Necessary and Proper Clause does not expand the "metes and bounds" (Tennesee v. Lane, 541 U.S. 509, 541 (Rehnquist, Scalia, JJ., dissenting)) of powers enumerated and delegated in the Constitution, including the powers to puish. See the comments of Hamilton (and

others) during the New York Convention:

> There could be just cause for rejecting the Constitution if it would enable the federal government to 'alter or abrogate... [a State's] civil and criminal institutions... and control... the private conduct of individuals' [2 Elliot's Debates, at 267-68].

In Printz v. United States, 521 U.S. 898 (1997) (Scalia, J.), this Court addressd a challenge to the constitutionality of 18 U.S.C. §922 et seq. (the "Brady Act"), a statute establishing a national system for instant background checks for prospective handgun purchases. Justice Scalia, striking the law as "incompatible with our constitutional system of dual sovereignty" (id. at 935) declared:

> [W]hen a La[w]...for carrying into Execution the Commerce Clause violates... State sovereignty... it is not a Law... and thus, in the words of the Federalist, 'merely an act of usurpation which deserves to be treated as such.' (Federalist No. 33 at 204 (A. Hamilton) [citation omitted] [Id. at 923-24].

Justice Scalia further affirms:

> Residual State sovereignty was also implicit, of course, in the Constitution's conferral on Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8, which implication was rendered express by the Tenth Amendment [Printz, supra, at 19].

This Honorable Court considered the operative scope of the Necesary and Proper Clause in United States v. Comstock, 176 L.Ed.2d 878 (2010) (Breyer, J.) scrutinizing a federal civil-commitment statute (18 U.S.C. §4248). The statute directing the Dept. of Justice to detain a federal prisoner beyond his release date (176 L.Ed.2d at 887) was upheld under the Necessary and Proper Clause (Id.). This Court reached the conclusion based "on five considerations taken together" (id.), four of which are germane to the questions and statute in this Petition. First, the Court acknowledged, "a federal statute in addition to being authorized by Article I, §8, must not be prohibited by the Constitution" (Id., citing Chief Justice Marshall in McCulloch, supra, at 412). Second, 18 U.S.C. §4248 is very narrow in scope and definition (Comstock, supra, at 891-894). Third,

> The statute properly accounts for State interests... the statute does not "invade" State sovereignty or otherwise improperly limit the scope of powers that remain with the States. To the contrary, it required accomodation of state intersts [Id. at 886].

Fourth, this Court found: "Our holding today" does not confer "on Congress a general police power which the founders denied the national government and reposed in the States" (Id., citing Morrison, supra, at 618). Justice Breyer stated:

> Section 4248... applied to only a small fraction of federal prisoners, and its reach is limited to individuals 'already in custody...' Thus, far from a general police power, §4248 is a reasonably adopted and narrowly tailored means of pursuing the government's legitimate interest as a federal custodian in the responsible administration of its prison system [Comstock, supra, at 886].

With sweeping application, Section 2252, unlike §4248 upheld in Comstock, supra, is a broad, nationwide exercise of a "general police power." No attempt whatsoever is made to accomodate State interests and the Statute intrudes into the very core residuum of State sovereignty. Section 2252 infringes on State power to protect the welfare, safety, wellbeing and/or morals of their citizens. The two statutes could not be more dissimilar: §4248 was crafted to avoid intruding upon State sovereign power and the other, Section 2252, usurps that power, "swallowing the States whole" (See Lane, cited supra, at 21). The Constitution imposes fixed limits on the powers conferred on the Federal Government; the Document was purpose-built with a federalist structure. Section 2252 as a constitutional deformity contravenes this purpose and structure. Forming the basis of an incipient circuit clash specifically on whether Section 2252 violates the Tenth Amendment, District Judge Haikala found no law of the circuit: "On this the Eleventh Circuit has not spoken" (Nelson v. United States, 2021 U.S. Dist. LEXIS 7764 at 32 (N.D. ALA. 2021)).

The conclusion Section 2252 vastly exceeds any direct or implied power to punish conferred upon Congress is manifest. The Necessary and Proper Clause can not be the well-spring for the creation of offenses outside of the ambit of enumerated offenses in Articles I and III. Under the pretense of regulating commerce and without any regard for principles regarding intrusion on reserved State sovereign police powers including dual sovereignty and federalism. Section 2252 violates all of the cardinal foundation blocks of our System of Government and must be stricken. As a consequence, there is no subject-matter jurisdiction to hear an action based on a void Statute. None of the lower court decisions consider the misapplication of the Necessary and Proper Clause nor the manifest constitutional errors embodied in the enactment of Section 2252.

X THE COMMERCE CLAUSE CAN NOT BE PROPERLY INTERPRETED IN ISOLATION

The Framers, Drafters and Ratifiers of the Constitution were lucid wordsmiths masterfully constructing an elegant, nonpareil federal model with carefully selected and ordered terms and phrases. Affirming an enlightened moral code, our "Constitution is born of the proposition that all legitimate governments must secure the equal rights of every person to 'Life, Liberty, and the pursuit of Happiness'." (Cruzan v. Director, Mo. Health Dept., 497 U.S. 261, 330 (Stevens, J., dissenting) (1990)). The Foundation of our System of Government is under assault through a corrosive "rewriting" of the Commerce Clause (see Gonzales v. Raich, supra, at 70) to illegitimately enlarge the federal criminal code.

In terms of the significance of contextual analysis to understanding and applying law, "Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of the text (the Textualist's Touchstone) does not limit one to the hyperliteral meaning of each word in the text." (Bostock v. Clayton, 140 S.Ct. 1731, 1827 (2020) (Alito, Kavanaugh, JJ., dissenting)). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." (emphasis supplied) (Antonin Scalia & Bryan Garner, "Reading Law, The Interpretation of Legal Texts" 56 (2012)).

A. The Historical Context of the Commerce Clause

The original meaning, intent and purpose of the Commerce Clause is critical to properly construe and/or interpret the Clause. Justice William Johnson, in the original Commerce Clause case, Gibbons v. Ogden, supra, unambiguously affirms the intent and purpose of the Commerce Power as follows:

> If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from invidious and partial restraints. [(emphasis supplied) (Id. at 231). See United States v. Darby, 312 U.S. 100, n.1-n.3 (1941) (Stone, J.); NLRB v. Jones & Laughlin Steel Corp., 371 U.S. 416, 37 (1937) (Hughes, C.J.); Wickard v. Filburn, 317 U.S. 111, 115 (1942) (Jackson, J.); Atlanta Hotel v. United States, 379 U.S. 241, 271-75 (1964) (Clark, J.)].

In many of these Commerce Clause cases, this Court noted the underlying restrictive

"prongs" grafted onto the specific statutes under scrutiny. In each case, Congress determined to "eliminate or reduce" "obstructions," "barriers" or "restrictions" in protection of- or to facilitate- the free-flow of interstate commerce in line with the intent behind the Commerce Clause. These purpose clauses run 180-degree directly contrary to any "broader regulatory scheme designed to eliminate [a] national market in its entirety." United States v. Maxwell, 448 F.3d 1210, 1218 (11th Cir. 2006) ("Maxwell II"). See Gonzales v. Raich, supra, at 19. Hence, this Statute contravenes the Constition as written, is illegal, dead-on-arrival and must be permanently severed from the United States Code.

Senior District Judge Vinson in Florida v. United States HHS, 780 F.Supp.2d 1256 (N.D. FL. 2011), analyzing Commerce Clause case history including this Court's:

> It was not until one hundred years after ratification [of the Constitution], that Congress first exercised its power to affirmatively and positively regulate commerce among the states. And when it did, the Supreme Court at the time rejected the broad conception of commerce and the power of Congress to regulate the economy was sharply restricted [quoting Kidd v. Pearson, 128 U.S. 1, 21 (1881)]... There was no desire to authorize federal interference with social conditions or legal institutions of the states. (citations and quotations omitted) [brackets in original] [United States v. HHS, at 1276]....
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> In the Supreme Court's 1885 decision Kidd v. Pearson, Justice Lamar noted that "it is a matter of public history that the object of vesting in congress the power to regulate commerce... among the several states was to insure uniformity for regulation against conflicting and discriminatory state legislation." See Kidd, supra, 128 U.S. 1 at 21. More recently, Justice Stevens has advised that when "construing the scope of the power granted to Congress by the Commerce Clause ... [i]t is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself, that is, the Founders had " 'set out only to find a way to reduce trade restrictions.'" See EEOC v. Wyoming, 460 U.S. 226, 244-45, 103 S. Ct. 75 L.Ed.2d 18 (1893) (Stevens, J., concurring). The foregoing history is so 'widely shared'... that Constitutional scholars with opposing views on the Commerce Clause readily agree on this point. Compare [Robert L. Stern, "That Commerce Which Concerns More States Than One" 47 Harv. L. Rev. 1335, 1344 (1934)] ("There can be no question, of course, that in 1787 [when] the framers and ratifiers of the Constitution ... considered the need for regulating 'commerce with foreign nations and among the several states,' they were thinking only in terms of ... the removal of barriers obstructing the physical movements of goods across state lines.") with Robert H. Bork & Daniel E. Troy, "Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce," 25 Harv. J.L. & Pub. Pol'y 849, 858, 865 (2002) ("One thing is certain: the Founders turned to a federal commerce power to carve stability out of this commercial anarchy" and "keep states from treating one another as hostile foreign powers"; in short, "the Clause was drafted to grant Congress the power to craft a coherent national trade policy, to restore and maintain viable trade among the States, and to prevent interstate war"). Hamilton and Madison both

shared this concern that conflicting and discriminatory state trade legislation "would lead to outrages, and these to reprisals and wars." The Federalist No. 7 at 37 (A. Hamilton); see also The Federalist No. 42 at 282 (J. Madison) [Florida v. HHS, supra, at 1277]....

In one of his letters, [Madison] wrote that the Commerce Clause "'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'" [citations omitted] [Id. at n.12].

In the same letter, Madison emphasized:

There is thus not a single occasion in the proceedings of the convention itself where a grant of power of commerce between the states was advanced as the basis for independent affirmative regulation by the federal government. Instead it was uniformly mentioned as a device for preventing obstructive or partial regulations by the states. [Albert S. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 471 (1941) ("Abel")].

In the landmark decision in NLRB v. Laughlin & Jones Steel Corp., 301 U.S. 1, 37, Chief Justice Hughes ruled Congress may regulate interstate commerce "to protect that commerce from burdens and obstructions [Id. cited and quoted in United States v. Lopez, supra, at 555]. The opinion in NLRB, supra, points to the National Labor Relations Act (29 U.S.C. §2(7)) to clarify "the term 'affecting commerce'":

[The] definition is one of exclusion as well as of inclusion [and] is purported to reach only what may be deemed to burden or obstruct commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate... commerce, or its free flow, are within the reach of the congressional power.

Though with a selective, rabbit-in-a-hat quality, the original intent and historical context of the Commerce Clause as clarified above survives- even thrives- in terms of the interpretation and application of law. Cursory research has revealed usage of the prefix 'dormant' began and grew to be commonplace in the mid-20th Century and continues into the current day. See Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct 2449 (2019) (Alito, J.):

States notoriously obstructed the interstate shipments of goods. Interference... was cutting off lifeblood of the Nation [citations and quotation marks omitted]... [At the] Philadelphia Convention... discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state barriers, see Abel... fostering free trade among the States was prominently cited as a reason for ratification [139 S.Ct. at 2460].

See also Just Puppies, Inc. v. Frosh, 2021 U.S. Dist. LEXIS 177475 at 79 (D. MD.

2021) citing Tenn. Wine & Spirits, supra; Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) (Souter, J.) quoting Hughes v. Oklahoma, 441 U.S. 322, 325-36 (1979) (Brennan, J.); Hood v. Du Mond, 330 U.S. 525, 533-34 (1949) (Jackson, J.). The original intent and meaning as interpreted in Dormant Commerce Clause jurisprudence can not be selectively cleaved or ignored elsewhere in Commerce Clause law. And assuming arguendo the validity of any loosely interpreted expansion of the Commerce Power ambit beyond the original intent, such expansion in law can not conflict in any way with any part of the original grant of power. Section 2252 does just this as an invalid legislative act obstructing commerce (to "eliminate a national market" (see Maxwell II, supra, at 1218)) and contravening the original intent and meaning of the Commerce Clause. Section 2252 is an outgrowth of a rewritten, internally-inconsistent Commerce Clause bifurcated mutant that must be put out of its misery.

Section 2252 proscribes both commercial and non-commercial activity, but the legerdemain goes deeper, reaching to the anti-commercial activity in this case (online peer-to-peer trading). This activity is ironically conducive to the ends of eliminating "in its entirety" (Maxwell II, supra, at 1218) the "multi-million dollar industry" (United States v. Smith, 402 F.3d 1303, 1320 (11th Cir. Mar. 18, 2005)), market-specific language used to justify the adoption of the Statute that persists today. Online trading via peer-to-peer software (ala Napster) is both destructive to profit motives and commercial industries. Engrafting Wickard, supra, and Raich, supra, onto Maxwell, supra, drops any distinction between such anticommercial activity in "a nonrival good" from commercial activity of "rival goods in [a] marketplace" (United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004) ("Maxwell I") at 1057) like wheat or marijuana, stretching all credulity (past the breaking point). "Support [for] Federal jurisdiction in this case is the equivalent of saying Congress can for example regulate backyard cookouts simply because a multimillion dollar interstate restaurant industry exists" (Smith, supra, at 1320).

Section 2252, unmasked: (1) was not promulgated to regulate interstate commerce in any way, shape or form (see Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389, 1399 (2002) (Kennedy, J.) ("[Proscription] of child pornography was based on how it was made, not what it communicated"); (2) "has no clear economic purpose..." (Maxwell I, supra, at 1057); and (3) "[i]nstead, attempts to... [punish] primary conduct directly" (Id.). The Judiciary must not "permit Congress to achieve power beyond its constitutional reach simply by uttering pretextual incantation evoking the phantasm of commerce" (id. at 1062). By embodying an illicit nationwide police power, Section 2252 transgresses: (a) the limitation on the specific grant of congressional powers to punish; (b) the doctrine of enumerated powers as applied to Art. I, §8 (See Subsection B, infra); and (c) the intended dual sovereign, federalist structure of the Republic made express by the Tenth Amendment.

With the origins of the Commerce Clause as a backdrop, the next Section examines the "structural context" of the Clause. (To comprehend how "consitutional provisions work together, we look[] to [the] history" of the provisions "for guidance" Tenn. Wine & Spirits, supra, at 816). The Articles and Amendments comprising the Constitution must be viewed as "part of a unified constitutional scheme" (id.) and "[l]ike other provisions of the Constitution [the Commerce Clause] must be considered in light of the other[s]" (California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 109 (1980) (Powell, J.)), and in particular, the other Clauses in Article I, Section 8 of the Constitution.

B. The Structural Context of the Commerce Clause

The lucid wordsmiths drafting the Clauses conferring the specific enumerated powers in Article I selected words and phrases (and powers) comprising these Clauses with exactitude to eliminate all ambiguity concerning the nature and breadth of the powers delegated. The elegant federal model has been dismantled as Congress, in enacting a tsunami of criminal legislation impermissibly intruding upon police power reserved to the States, has ignored the clear-cut, bright-line elucidation of powers in Article I. And certain courts have muddled and expanded

the original, unambiguous enumeration of limited powers there. These decisions strip the historical context and ignore the very structure of the Article itself.

The Honorable Judge Silberman, analyzing the Commerce Clause in Seven-Sky v. Holder, 661 F.3d 1, 16 (Nov. 8, 2011) (U.S. App. D.C.), stated:

> At the time the Constitution was fashioned, to "regulate" meant, as it does now, "[t]o adjust by rule or method," as well as "[t]o direct." To "direct," in turn, included "[t]o prescribe certain measure[s]; to mark out a certain course," and "[t]o order; to command...".

Circuit Judge Silberman denied a challenge to the ACA Individual Mandate based on the Commerce Clause with, in the words of the venerable Judge Learned Hand, "[a] sterile literalism... [which] loses sight of the forest for the trees." New York Trust Co. v. Comm'r, 69 F.2d 19, 20 (2d Cir. 1933), cited and quoted with approval in United States v. Ansberry, 976 F.3d 1108, 1138 (10th Cir. Sep. 23, 2020; See Pictet Overseas, Inc. v. Helvetia Trust, 905 1183, 1191 (11th Cir. 2018) (Pryor, Circuit Judge, concurring); Helvering v. Gregory, 69 F.2d 809, 810-11 (2d Cir. 1934) (Hand, Circuit Judge) (In the context of construing particular words, nothing "can ever obviate recourse to the setting in which all appear, and which all collectively create"). Judge Silberman in Seven-Sky, supra, perpetuates the enumerated power categorical error by ignoring: (a) the historical context of the Clause as discussed and (b) the meticulous design of Article I, §8 dividing the powers delegated into separate clauses without cross-reference or overlap.

The powers to create, define and punish crimes are conferred in Art. I, §8, cls. 6 & 10, but nowhere else. The Commerce Clause is not an Offence Clause; does not read, "Congress shall have the power to create, define and/or punish felonies affecting commerce among the several State..." and, by its own terms, is qualitatively and categorically different than the powers to punish enumerated in two distinct Clauses in the same Article. The Constitution did not confer distinct powers to punish in a "lump" (United States v. Myers, 272 U.S. 52, 230 (1928) (Taft, C.J.)). As a consequence, the power to regulate interstate commerce has often been misconstrued, misinterpreted and, through implication, misapplied.

Unauthorized expansion of the powers to punish pursuant to the pretext of regulating commerce effectively renders the Offence Clauses superfluous. (See United States v. Lopez, supra, at 588). For example, Congress is authorized in separate Clauses to punish (i) counterfeiting currency and (ii) piracy (Art. I, §8, cl. 6 and cl. 10, respectively). Arguably, criminal activity involving either can substantially affect interstate commerce and, if an expanded interpretation of the Commerce Clause is suffered, then Congress no longer requires separate authorization under cls. 6 & 10 to create new felonies (outside of the Federal Enclave).[4] Congress may simply invoke the power to punish under the newly rewritten, recast and repurposed Commerce Clause. The Offence Clauses and the Enclave become mere surplusage[5] irrelevant to the vision of the Architects of our Nation. No constitutional Clause, properly understood, subsumes and negates the need for any other.

The plain error in rewritten Commerce Clause construction made crystal clear: the Drafters might have stopped upon enumerating power sufficient to punish counterfeiting and piracy in the Commerce Clause. Signifying their obvious (and discrepant) intent, they did not and, while the distinction in the verbiage (indeed, in verbs) among the Clauses is plain, it has been ignored. Since the Commerce Power does not reach to punish these enumerated crimes, the conclusion the ambit of power granted under the Commerce Clause is insufficient to create, define or punish new felonies unenumerated in the Constitution such as Section 2252 is manifest. The meaning and purpose of the enumerated power to regulate interstate commerce is fleshed out through the contextual analyses above not through a mechanical interpretation involving engrafting a scope the Architects of the Clause never intended. The boundary of the power grant is manifestly closer to the extent of power vested in the Commerce Department and progeny promulgated in its Code of Federal Regulations (and well shy of the U.S. Criminal Code).

In "The Original Meaning of the Commerce Clause" (Randy E. Barnett, 68 U. Chi.

L. Rev. 101-147 (2001)) ("Original Meaning, Commerce Clause, Barnett"), Randy Barnett intensively analyzes methods of deriving understanding of the Commerce Clause. In Section I, §A, he eschews focusing on the "original intentions" explaining:

> [Because] original intentions could have shaped [the understanding of the Clause]... [b]ut, at best, evidence of the framers' and ratifiers' intentions (as distinct from evidence of how they used the words they used) is circumstantial evidence of meaning while at worst it can distract from the words of the document that were actually employed [id. at 106]....

He instead favors analysis focusing on the "original meaning" of the Clause:

> [Because] a commitment to original meaning is... a crucial part of the commitment to a written constitution.... [and] [w]ith written constitutions, as with contracts, we want evidence of what the terms meant in the particular context of the written text at issue [such as] a provision in the original Constitution... [Id.].

The 'blind-spot' error Barnett makes here is dismissing an already-acknowledged "original intent" (See Section X(A), supra) maintained in half of the spliced-in-two Commerce Clause/Dormant Commerce Clause fabrication.

However, with unmatched analytical skill dissecting the original meaning of the Commerce Clause, Barnett arrives at the conclusion "[t]he power to regulate does not generally include the power to prohibit" (Id. at 139). See Lambert, supra, at 603 (Sutherland, J., concurring); Original Meaning, Commerce Clause, Barnett, supra, 139-42. From every angle, the Commerce Power is constrained to fixed limits. Nothing in the history, text and structure of the Commerce Clause (or any other Clause in the Constitution) authorizes, directly or by implication, Congress to expand the power to punish (or even prohibit) to the exercise of the nationwide police power embodied in Section 2252.

In closing, this extensive treatment of why the lower courts lack subject-matter jurisdiction in light of the original meaning, intent and purpose of pertinent provisions of the Constitution, Petitioner points to the concurrence of the Circuit Judge Torruella in United States v. Joubert, 778 F.3d 247 (1st Cir.) cert. denied, 135 S.Ct. 2874 (2015). The concurrence exemplifies adherence to First Principles

CONCLUSION

More than 80-years ago, the august guardian of the Constitution, Justice Sutherland sounded the klaxon against federal criminalization of State law:

> Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over powers of the states is that the end of the journey may find the states so despoiled of their powers, or-- what may amount to the same thing-- so relieved of the responsibilities which possession necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified. [Carter v. Carter Coal Co., supra, 298 U.S. at 295-96].

With utmost respect, Petitioner states the words of Justice Sutherland provide guidance with respect to issues raise in this Petition. The Commerce Clause has been transformed from a provision constructed to protect and facilitate commerce among the several States into a blunt instrument for the expansion of the Federal Criminal Code. The Commerce Clause, as intended, is the Dormant Commerce Clause. Substitution by rewrite beyond the original intent and meaning is an anathema and disrupts: (a) The integrity of the Offence Clauses; (b) The doctrine of enumerated powers as applied to Art. I, §8; (c) Principles of federalism and dual sovereignty and, ultimately, (d) The Rule of Law. The expansion of the power to punish has resulted in a bloated U.S. Code; an ongoing torrent of "federalization of crime" (McLean, supra, at 1230); and Congress seizing power way beyond the outer limit of what the Constitution confers upon the Legislative Branch. Compare "There are so many federal laws that no one, including the Justice Department, the principal law enforcement agency knows the actual number of crimes." Gamble v. United States, 139 S.Ct. 1960 n.98 (2019) (Ginsburg, J., dissenting) (citations removed) with "[t]he powers delegated... to the federal government are few and defined..." Federalist No. 45 (J. Madison).

The power to punish is now untethered to specific offenses enumerated in Articles I and III. As a result, limitations upon the exercise of federal power

have been eviscerated and the power reserved to the States and to the people virtually extinguished. The Judiciary has an absolute authority to enforce the limits of federal power by striking down acts of Congress exceeding those limits (NFIB, supra, at 175-76) and "must maintain the design contemplated by the Framers." (United States v. Lopez, supra, at 575 (Kennedy, J., concurring)). See Gamble, supra, at 350 (Thomas, J., concurring) ("In our constitutional structure, our role of upholding the law's original meaning is reason enough to correct course."). "No higher duty rests upon [a] court than to exert its full authority to prevent all violations of the principles of the Constitution" (Downes v. Bidwell, 182 U.S. 244, 282-83 (1901) (Brown, J.) (Abdication of thie duty "will be an evil day for American liberty" (Id.)). And the Judiciary must also check the Legislature, "acting as an intermediate body between the people and the legislature to keep the legislature within the limits of its authority (Federalist No. 78 at 242 (A. Hamilton)). Nothing justifies using any means-- by dictum or misinterpretation-- to backdoor the expansion of the powers to punish in circumvention of the Constitution as written under the guise of regulating commerce. Such "cookery" must be condemned and case aside (as Plato advocated in his classic essay, Gorgias). (See Gamble, supra, at 350) ("[C]ontinued adherence to palpable error is a violation of duty"); Commonwealth v. Posey, 8 VA. 109, 116 (1781) (opinion of Tazwell, J.) ("Although I venerate precedents, I venerate the written law more").

The lower court holdings perpetuate an unconstitutional exercise of legislative power and must be vacated. This Petition for issuance of a Writ of Certiorari must be granted for Petitioner to be heard in full; the issues of public importance raised require review and determination in favor of Petitioner; and upon reconsideration, the Court must rectify the miscarriage of justice in this case.

FOOTNOTES

(1) See "The Illegitimate War on Drugs," by Roger Pilon in After Prohibition (Timothy Lynch) at 23-39, pub. 2000, Cato Institute.

(2) The "Federalist" papers consist of individual essays originally published under the pseudonym, "Publius," and later collected in a single volume entitled, "Federalist." The authors were Alexander Hamilton, James Madison and John Jay, with each separately writing essays circulated following the Constitution's Adoption at the General Convention in Philadelphia in 1787 when the Constitution was presented for Ratification to the original Thirteen States under the Articles of Confederation. The essays "represent the classic explanation and defense of the Constitution in its original form" (Peter E. Quiot, "The Federalist Papers and the Constitution of the United States" 77 Ky. L.J. 369, 371-72 (1982)).

This Honorable Court has cited and relied upon Federalist papers as a font of illumination to discern the meaning and intent of the Framers and Drafters of the Constitution. See Printz v. United States, 521 U.S. 898, 910 (1970) (Scalia, J.) (The Federalist essays are "usually regarded as indicative of the original understanding of the Constitution").

Unless otherwise specified, references to the "Federalist" papers in this Petition are to the 1961 C. Rossiter Edition.

(3) One distinguished constitutional scholar draws the following perceptive distinction between interpretation and construction: "Interpretation is an activity identifying semantic meaning of a particular use of language in context. Construction is the activity of applying that meaning in particular fact circumstances." (Randy E. Barnett, "Interpretation and Construction" 24 Harv. J.L. & Pub. Poly. 65, 66 (2011) ("Barnett") quoted with approval in Herrera v. Santa Fe. Pub. Schs., 41 F.Supp.3d 1186, 1275 (D. N.M. 2014)).

Barnett reflects the great 19th-Century legal scholar Francis Lieber who defined 'interpretation' as "[t]he part of finding out the true sense of any form of words: that is, the sense which their author[s] intended to convey, and of enabling others to derive from them the very same idea." ("Legal and Political Hermeneutics" 44 (Roy M. Mersky & J. Myron Jacobstein eds., 1970) (1839)). Lieber distinguished 'construction' as "the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text-- conclusions... within the spirit, though not the words of the text" (Id.). See John Boriver, "A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union" (edition unknown).

There is a long chain of this Court's decisions holding "the original meaning of the written Constitution was fixed at the time of enactment" and this fixed-in-time meaning (critical to the Rule of Law) should be followed by constitutional actors until it is properly changed by written amendment. See, e.g., Fulton v. City of Philadelphia, 201 L.Ed.2d 137, 184 (2020) (Barrett, J. with Kavanaugh, J., joins and Breyer, J. joins to all but the first paragraph, concurring) ("As [Justice Scalia] put it, 'What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text'" [citation removed]); Hester v. United States, 179 S.Ct. 509, 509 (2019) (Alito, J., concurring in Cert. Denial) (Stressing importance of the original meaning of the Constitution).

> The original meaning of the text in context provides the law that governs those who govern us; and those who are bound by the Constitution, whether judges or legislators, may not properly change the meaning without going through the written amendment process (Barnett, supra, at 66).

(4) Pursuant to Art. I, §8, cl. 17 (the "Enclave Clause"), Congress has the exclusive right to exercise jurisdiction (including the power to punish) over the "Seat of Government," ceded lands, other "places purchased by the consent of the Legislature of the State...".

However, Justice Thomas in his concurrence in Lopez, 514 U.S. 549, supra, stated:

> [P]owers granted to Congress... may become wholly superfluous... due to... distortion of the Commerce Clause. For instance, Congress has plenary power over the District of Columbia and the territories. See US Const., Art. I, §8, cl 17, and Art. IV, §3, cl 2. The grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress has not ceded plenary authority over the whole Nation [514 U.S. 644 n.3].

(5) Justice Thomas in his concurrence in Lopez, supra, also stated:

> The Constitution... does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce... among the several states..." In contrast, the Constitutional itself temporarily prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade to enact unproportioned taxation. Art. V. Clearly the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective...
>
> But on this Court's understanding of congressional power... to enact such laws as are 'necessary and proper' to carry into execution its [Commerce Power] [citation removed]... many of Congress' other enumerated powers under Art. I §8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may... punish counterfeiters of U.S. coin and securities, cl 6. Likewise, Congress would not need separate authority to... punish Piracies and Felonies committed on the high seas, cl 10....
>
> [M]uch if not all of Art. I, §8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl 3 that makes the rest of §8 superfluous simply cannot be correct [514 U.S. 587-89].... Such a formulation of federal power is no test at all: it is a blank check [Id. at 602].

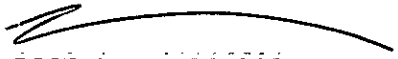
(6) "In NFIB, supra... Chief Justice Roberts wrote an opinion addressing several issues" (Texas v. United States, 945 F.3d 355, 387 (5th Cir.)). In Part III(A), the Chief Justice concluded the individual mandate of the Patient Protection and Affordable Care Act is not a valid exercise of Congress' power under the Interstate Commerce Clause" (id. at 388; NFIB, supra, at 560) "and can not be sustained under the Necessary and Proper Clause" (NFIB, supra at 560); See Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 538 (1885) (Field, J.) ("Rights of sovereignty were not to be taken away by implication").

In NFIB, supra, the dissenting opinion joined by Justices Scalia, Kennedy, Thomas and Alito, noted an expansive reading of the Interstate Commerce Clause would render the provision a "font of unlimited power" (567. U.S. at 653)... "[a] hideous monster whose devouring jaws... spare neither sex nor age, nor high, nor low, nor sacred, nor profane" (Id., quoting Federalist No. 33 at 202 (A. Hamilton)).

SIGNATURE PAGE

PETITIONER DECLARES UNDER PAIN AND PENALTY OF PERJURY THE STATEMENTS SET FORTH IN THIS PETITION ARE TRUE AND ACCURATE TO THE BEST OF HIS KNOWLEDGE, INFORMATION AND BELIEF.

Respectfully Submitted,



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