

No. 20-1735

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IN THE  
**Supreme Court of the United States**

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ÁNGEL MANUEL ORTIZ-DIAZ, ET AL.,

*Petitioners,*

v.

UNITED STATES, ET AL.,

*Respondents.*

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**On Petition for Writ of Certiorari to the United  
States Court of Appeals for the First Circuit**

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**BRIEF OF *AMICUS CURIAE* PROFESSOR  
JEFFREY C. TUOMALA IN SUPPORT OF  
PETITIONERS**

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JEFFREY C. TUOMALA  
LIBERTY UNIVERSITY  
SCHOOL OF LAW  
1971 University Blvd.  
Lynchburg, VA 24502  
434-592-5300  
jtuomala@liberty.edu

---

MATTHEW J. CLARK\*  
*\*Counsel of Record*  
ALABAMA CENTER FOR LAW  
AND LIBERTY  
2213 Morris Ave., Fl. 1  
Birmingham, AL 35203  
matt@alabamalawand  
liberty.org  
256-510-1828

Counsel for *Amicus Curiae*

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Professor Jeffrey C. Tuomala has taught Constitutional Law at Liberty University School of Law for sixteen years. Since law school in the 1970s, Professor Tuomala has shared the lament that the Supreme Court's implementation of the substantial effects test in Commerce Clause cases has given Congress the go-ahead to convert the federal government from one of limited and enumerated powers into a government of general powers. Under the tutelage of the late Herbert W. Titus, founding Dean of Regent University School of Law, Professor Tuomala realized the importance of restoring Mr. Chief Justice John Marshall's method of constitutional analysis, particularly as it relates to the Commerce Clause and Necessary and Proper Clause. Modern jurists have failed to recognize the centrality of Marshall's object analysis as a limitation on Congress.

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<sup>1</sup> Pursuant to Rule 37.2, all parties were given ten days' notice of intent to file this brief and have consented to its filing. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

The Supreme Court's Commerce Clause jurisprudence has allowed Congress to change the nature of the federal government from one of enumerated powers into one of general powers. One can imagine pundits commenting on this case—"the Framers would be shocked to learn that the Commerce Clause gives Congress the power to regulate cock-fighting in Puerto Rico." This brief proposes a restoration of the sound and principled basis for deciding Commerce Clause cases that gets beyond the clever arguments distinguishing or analogizing this case to precedents without a careful grounding in first principles of constitutional interpretation.

In *Gibbons v. Ogden*, Chief Justice John Marshall identified two components in analyzing enumerated powers cases: first, a subject matter component; and second, an object component. *Gibbons*, 22 U.S. (9 Wheat.) 1, 189 (1824). In Commerce Clause cases, the subject matter of a statute must align with the subject matter of the Constitution's text, i.e., it must "regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. If the subject matter of the statute regulates interstate commerce, the Court must then determine whether the object (i.e., purpose) of the statute aligns with the object of the Commerce Clause. The object of the Commerce Clause, stated generally, is to establish a free and common market among the



several states. Congress is limited to regulating the subject of interstate commerce for the object of ensuring free trade.

Marshall believed that the power to regulate interstate commerce resided exclusively in the federal government. While states may lawfully regulate the subject matter of interstate commerce, they must do so for the police power purposes of promoting health, safety, welfare, or morals. While Congress and the states may regulate the same subject matter (i.e., interstate commerce), they must do so for their respective objects (i.e., establish free trade or exercise the police powers). Marshall drew this distinction between subject and object in both *Gibbons* (22 U.S. at 210) and *Willson v. Black Bird Creek Marsh Co.*, (27 U.S. (2 Pet.) 245, 251-52 (1829)). If a state regulation (enacted as an exercise of its lawful police powers) imposes an incidental burden on interstate commerce, it is for Congress, not the courts, to decide whether to preempt the state law as an undue burden.

The first major deviation from the Marshall legacy came in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). *Cooley* ruled that Congress and the states have concurrent power to regulate interstate commerce. *Id.* at 318-20. This effectively eliminated the object test as a standard for distinguishing between the respective powers of Congress and of the states regarding interstate commerce. The Court tried to draw a line between the respective federal and state powers to regulate interstate commerce by

distinguishing local and national subject matter. This distinction proved to be unworkable.

The second major deviation from the Marshall legacy came in the case of *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903). *Champion* ruled that Congress could regulate the subject matter of interstate commerce for the objects of exercising the police powers. *Id.* at 356-57. While *Cooley* gave the states a share in an enumerated power, *Champion* gave Congress a share in the police powers.

The third and most radical deviation from the Marshall legacy was formulated in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Having done away with the object component in *Champion*, the Court now eliminated the subject component as well. No longer was Congress limited to regulating the subject matter of interstate commerce; it was free to regulate any activity that in the aggregate has a substantial effect on interstate commerce. Implicitly, Congress's power to regulate was no longer limited by any object other than what Congress might think would be good for America.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court placed one noteworthy subject matter limit on Congress. It reformulated the substantial effects test, holding that Congress could only regulate *economic* activity that in the aggregate has a substantial effect on interstate commerce. *Id.* at 560-61. While it was encouraging that this Court placed a limit on runaway federal power, *Lopez* still fell short of what the text

and original meaning of the Commerce Clause required. The *Lopez* Court restored neither the subject matter test nor the object test.

## ARGUMENT

### I. The Disconnect Between the Court's Commerce Clause Jurisprudence and the Doctrine of Enumerated Powers.

#### A. A federal government of “few and defined” enumerated powers.

In *United States v. Lopez*, the Court approvingly quoted James Madison—“the powers delegated by the proposed Constitution are few and defined.’ . . . The Federalist No. 45.” 514 U.S. at 552. Yet it is the Court’s substantial effects test affirmed in *Lopez* that removed a chief restraint on Congress’s exercise of legislative power. The *Lopez* Court affirmed *Wickard v. Fiburn*, 317 U.S. 111 (1942), but it reformulated the substantial effects test, limiting Congress’s regulatory power to *economic* activities that in the aggregate have a substantial effect on interstate commerce. 514 U.S. at 556-60.

A chief purpose for calling for the Constitutional Convention was to resolve the trade wars that had arisen among the states. A biblically literate people familiar with Scripture recognized the blessings of free trade but also the danger of a centralized government. See *Isaiah* 60 (the blessings) and *I Samuel* 8 (the danger). In *Youngstown Sheet & Tube*

*Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson warned that “vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity.” 343 U.S. at 653 (Jackson, J., concurring). Ironically, it was Justice Jackson’s opinion in *Wickard v. Filburn* that formulated the substantial effect test giving Congress a primary tool for securing “vast accretions of federal power.”

### **B. The importance of a written Constitution.**

Chief Justice Marshall emphasized the importance of a written constitution: “The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Congress has the power to “regulate commerce among the several States,” not the power to regulate any activity “whatever its nature” that has a substantial effect on interstate commerce. *Wickard*, 317 U.S. at 125. Marshall noted that Congress has the discretion to select appropriate and conducive means for attaining the objects of the enumerated power. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). But Congress does not have the power to ignore the language or the object of an enumerated power.

The *Lopez* Court quoted portions of Marshall’s opinion in *Gibbons v. Ogden*, which carefully defined

the subject matter of the Commerce Clause—“commerce” and “among the states.” 514 U.S. at 553. But the *Lopez* Court then reaffirmed several cases implementing the substantial effects test that had eliminated the subject matter test. *Id.* at 556.

**C. The Court should correct any misperception that the meaning of the Constitution is evolving.**

Some of the language in *Lopez* suggests that the Court’s Commerce Clause jurisprudence follows a non-originalist, evolving meaning standard of constitutional interpretation. The Court stated that

[*NLRB v.*] *Jones & Laughlin* [*Steel Corp.*, 301 U.S. 1 (1937)], [*United States v.*] *Darby*, [312 U.S. 100 (1941),] and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. . . . But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

*Lopez*, 514 U.S. at 556.

This sends a mixed signal. One signal is that the Court’s jurisprudence has evolved to meet the needs of the day. The other signal suggests that the Court’s jurisprudence, at least since the implementation of

the substantial effects test, had now gotten it right. As noted above, the means that Congress adopts to exercise an enumerated power may change, but the object of enumerated powers do not change.

**D. The Court has consistently failed to identify the object of the Commerce Clause.**

The *Lopez* Court did not identify the legitimate object of the Commerce Clause. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court ruled that the appropriate level of scrutiny is the rational basis test, suggesting that Congress need only have a conceivable legitimate interest in regulating economic activity that has a substantial effect on interstate commerce. *Id.* at 28. It is true that Congress's power is limited to legitimate state interests, but they are further limited to those within the "scope of the constitution." The "scope of the constitution" is limited to the objects of the enumerated powers. *McCulloch*, 17 U.S. at 421.

All rational thinking adopts means designed to achieve an object. Ralph McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas*, 12-34 (Rev. ed., The Catholic University of America Press, 1997). Because the Court has not expressly identified the object or objects of the Commerce Clause, we must surmise what is implied. Implicit in the Court's formulation and application of the substantial effects test is that the only limiting object is "the general welfare," which is really no limit. In other words, Congress may regulate any economic

activity that in the aggregate that has a substantial effect on interstate commerce that it believes promotes the general welfare, i.e., is good for America.

### **E. Conclusion.**

The Court's attempt to place restrictions on Congress's power to regulate interstate commerce is encouraging. However, it must resolve certain doctrinal inconsistencies. The first and best step in that direction is reconsidering Chief Justice Marshall's view of the enumerated powers set out below and to recognize the three decisive departures that the Court has taken from Marshall's view.

## **II. This Court Should Restore the Doctrine of Enumerated Powers as Chief Justice Marshall Formulated It.**

### **A. The Court must begin by recognizing the importance of the subject and object analysis.**

In *Gibbons*, Chief Justice Marshall summarized the two steps for analyzing enumerated powers cases:

We know of no rule for construing the extent of such powers, other than is given [1] by the language of the instrument which confers them, [2] taken in connexion [sic] with the purposes for which they were conferred.

*Gibbons v. Ogden*, 22 U.S. 1, 189 (1824).

By “language of the instrument,” Marshall should be understood to mean the subject matter of a statute and the relevant text of the Constitution. The language of the Commerce Clause is brief: “Congress shall have the Power . . . To regulate Commerce . . . among the several States.” U.S. Const., art. I, § 8, cl. 3. The focus of attention in *Gibbons* was on defining the language “commerce,” “among the states,” and “regulate.” The Court concluded that licensing steamboats engaged in coastal trade aligned with the subject matter of the Commerce Clause. *Gibbons*, 22 U.S. at 189-97.

When the language of a statute (subject matter) aligns with the language of an enumerated power (subject), the Court should analyze it as an enumerated powers case rather than as a Necessary and Proper Clause case. Because the federal statute regulated subject matter that constituted interstate commerce, *Gibbons* is an enumerated powers case. However, whether a case is an enumerated powers case or a necessary and proper case, the key question to answer is “what is the object?” The object of the statute must align with the object of an enumerated power. Marshall had previously made this clear in *McCulloch v. Maryland* where he wrote:

[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not law of the land.”



*McCulloch*, 17 U.S. at 423.<sup>2</sup>

Interestingly, in *Gibbons*, it was Justice Johnson's concurrence that most directly identified an object of the Commerce Clause, that object being to eliminate trade barriers between the states. He wrote, "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 all invidious and partial restraints." *Gibbons*, 22 U.S. at 231 (Johnson, J., concurring).<sup>3</sup>

It is clear from Marshall's opinion in *Gibbons* that he believed the object of the Commerce Clause was broader than simply keeping the states from each other's throats. Two additional objects are fairly inferred from his opinion. The first is the removal of incidental burdens that the states may have created on interstate commerce while properly exercising their police powers, e.g., inspection of items of commerce coming into or going out of a state. Ogden claimed that the Constitution's recognition of the states' inspection power in Art. I, § 10, cl. 2 was proof that the states have a concurrent power to regulate interstate commerce. Marshall did not believe that the power to

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<sup>2</sup> Cf. Antonin Scalia, *A Matter of Interpretation* 37 (Princeton Univ. Press, new ed. 2018) (quoting Chief Justice Marshall's work in *McCulloch* discussing the importance of the objects in constitutional interpretation).

<sup>3</sup> James Madison reflected the same sentiment, writing in *The Federalist* No. 42: "A very material object of this power [i.e. the Commerce Clause] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter."

regulate interstate commerce was concurrent. He rejected Ogden's premise that inspection laws constitute regulation of interstate commerce. Inspection laws often do regulate the subject matter of interstate commerce, but they do so for police power objects of promoting health, safety, welfare, and morals. *Gibbons*, 22 U.S. at 203-07. The object test is determinative for identifying the power being exercised. If states did impose inspection laws as a pretext for simply restricting trade, the Court should strike those laws as *ultra vires*.

Second, Marshall believed Congress could play a more positive role of promoting harmonious relations among the states.<sup>4</sup> This was the implicit purpose of licensing boats engaged in interstate commerce. That purpose would be furthered by imposing regulations to prevent loss of life and injury to property. Licensing is thus proper even in the absence of state laws discriminating against interstate commerce or incidentally burdening interstate commerce. In *Gibbons*, Marshall was more focused on countering arguments that the states have concurrent power to regulate interstate commerce and that state laws are supreme to federal laws. *See Gibbons*, 22 U.S. at 207-13. He did not develop a "promotion-of-harmonious-relation" object in *Gibbons*.

The general purpose of the Commerce Clause is to ensure free commerce among the states and that they

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<sup>4</sup> James Madison likewise described the Commerce Power as among a class of powers "which provide for the harmony and proper intercourse among the States." *The Federalist* No. 42 (James Madison).

function as a common market. Three more particular objects (species) fall under of the general object (genus). The first is to eliminate intentional restrictions on commerce. The second is to allow Congress to preempt state laws that are lawfully enacted yet impose an undue incidental burden on interstate commerce. The third is to implement laws designed to further harmonious commercial relations among the states.

**B. The jurisdictional divide between the states and the federal government based on an object test is manifest in a proper understanding of dormant commerce clause doctrine.**

The importance of the object test in drawing jurisdictional lines between the federal government's enumerated powers and the states' reserved powers is highlighted in *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829), which is commonly considered a dormant commerce clause case. Delaware authorized Black Bird to build a dam on a waterway that was navigable for interstate commerce in order to drain a malarial swamp. Willson challenged the power of Delaware to authorize the dam as an unlawful exercise of the power to regulate interstate commerce. 27 U.S. at 251.

Chief Justice Marshall rejected Black Bird's argument. Delaware had exercised its lawful police powers to promote health, safety, welfare, or morals. The dam clearly interfered with interstate commerce, but its purpose was not to interfere with or regulate

interstate commerce. The dam was lawfully built, and the Court had no authority to decide whether the health benefits of building the dam to drain a malarial swamp outweighed the burden on interstate commerce. *Id.* at 252. That cost-benefit balancing calculation was for Congress to make, not the Court. Pursuant to its power to regulate interstate commerce, Congress could enact legislation preempting the state law.

**III. The Supreme Court's first deviation from the Marshall legacy was to treat the power to regulate interstate commerce as concurrently shared by Congress and the states.**

The Court did not go straight from Marshall's subject and object components to the substantial effects test that discards the subject and object components. The Court took two deviations from Marshall's legacy leading up to *Wickard v. Filburn*. The first deviation came in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), and the second came in *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903).

**A. The *Cooley* Court mistakenly claimed that the states have the concurrent power to regulate interstate commerce.**

In *Cooley*, the Court held for the first time that the states have a concurrent power to regulate interstate commerce. *See Cooley*, 53 U.S. at 320. This was a clear departure from Marshall's Commerce Clause

jurisprudence as articulated in *Gibbons* and *Black Bird Creek*. In ruling that Congress and the states have the power to regulate interstate commerce, the Court eliminated the object analysis for distinguishing cases falling within Congress's jurisdiction from cases falling within the states' jurisdiction. The *Cooley* Court's opinion is replete with references to subject matter and devoid of references to the object of the power to regulate interstate commerce.

**B. The *Cooley* Court formulated a new test for reviewing Commerce Clause cases.**

The *Cooley* Court fashioned a new test to distinguish state from federal powers in regulating interstate commerce. The distinction was based not on different objects but rather on supposedly different subject matter. The states were free to regulate local matters subject to Congressional preemption. Congress had the exclusive power to regulate subject matter national in nature. *Cooley*, 53 U.S. at 314, 319-20. The Court eventually abandoned the local-national subject matter distinction as unworkable. Calvin Massey & Brannon P. Denning, *American Constitutional Law: Powers and Liberties* 259 (6th ed. Wolters Kluwer 2019).

Congress had enacted a law incorporating state laws regulating the employment of pilots in harbors. The *Cooley* Court mistakenly inferred from the federal statute that Congress recognized the right of the states to concurrently regulate interstate commerce. Marshall had addressed this same federal statute in

*Gibbons*. He interpreted the federal statute as a statement that Congress did not intend to preempt state pilotage laws designed for police power purposes that incidentally burdened interstate commerce. *Gibbons*, 22 U.S. at 207-11.

**IV. The Supreme Court's second deviation from the Marshall legacy was to eliminate the object component and allow Congress to regulate the subject matter of interstate commerce for police power purposes.**

**A. The Court expanded the scope of Congress's power to regulate interstate commerce.**

The federal statute at issue in *Champion v. Ames* criminalized the transportation of lottery tickets through interstate commerce. 188 U.S. at 344-45. This satisfied the subject matter test because the statute regulated commercial activity that crossed state lines. However, the object of the statute was not to foster interstate commerce but to prohibit it. The object was to criminalize immoral conduct, an object that falls within the police powers reserved to the states. *Id.* at 356-57.

**B. The combined effect of *Cooley* and *Champion*.**

The effect of *Cooley* was to allow the states in some measure to regulate interstate commerce, although for what object it was not clear. The effect of *Champion* was that Congress had a great deal of

freedom to exercise the police powers. The prohibition principle that the Court established in *Champion* has a great deal of continuing relevance as a justification for federal criminal laws.

**V. The Supreme Court's third deviation from the Marshall legacy was to eliminate the subject and object components as it instituted the substantial effects test.**

**A. Although *Wickard* was not the decision in which the Supreme Court articulated the substantial effects test it is the most emblematic.**

The substantial effects test eliminates both the subject and object components of Marshall's Commerce Clause analysis. *Wickard v. Filburn's* formulation of the test was that Congress could regulate any activity that in the aggregate has a substantial effect on interstate commerce. 317 U.S. at 125, 128.

Chief Justice Marshall would have treated *Wickard* as a Necessary and Proper Clause case. Justice Jackson's opinion did make reference to the Necessary and Proper Clause, but he for the most part and others following him have treated *Wickard* as a Commerce Clause case. *See, e.g.*, 317 U.S. at 119. Regardless, *Wickard* ignored the free-trade object for which the Commerce Clause was adopted.

The farming activity for which Filburn was convicted under the Agriculture Adjustment Act was

neither commercial nor interstate in nature. The object of the section of the Act under which he was convicted had nothing to do with free trade. The *Wickard* Court said that “One of the primary purposes of the Act in question was to increase the market price of wheat, and, to that end, to limit the volume thereof that could affect the market.” *Wickard*, 317 U.S. at 128. This is simply economic favoritism. Economic favoritism of one interest group to the harm of another is not even a legitimate state interest, let alone within the scope of an enumerated power as defined by Marshall. The impact of *Wickard v. Filburn* was far greater than granting Congress general powers of government; it granted powers that are beyond the legitimate ends of civil government.

Quite incredibly, Justice Jackson writing in *Wickard* claimed that the Court was simply restoring Chief Justice Marshall’s jurisprudence.

At the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*, 9 Wheat. 1, 22 U. S. 194-195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political, rather than from judicial, processes. *Id.* at 22 U. S. 197.

317 U.S. at 121.

*Wickard* misrepresents what Marshall wrote in *Gibbons*. Marshall wrote that the “wisdom and the



discretion of Congress . . . are the restraints on which the people must often rely solely, in all representative governments.” *Gibbons*, 22 U.S. at 197.

In effect, the only legal restraint on Congress’s power to act under the substantial effects test as articulated in *Wickard* is specific prohibitions that the Court might find in the Constitution. Arguably, economic favoritism for one interest group over another does violate a specific prohibition in the Article I, § 10, cl. 10—the prohibitions on special entitlements, i.e., titles of nobility.

**B. The Court’s *Lopez* decision placed a restraint on Congress but did so by simply making up a new rule.**

The Court in *Lopez* did not restore the subject or object components of Marshall’s analysis even though it provided a summary of the *Gibbons* opinion. Justice Rehnquist, writing for the Court, altered the substantial effects test by stating that Congress could regulate any economic activity that in the aggregate has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 559-60.

The *Lopez* Court suggested three means that Congress might employ to skirt its holding: first, regulate guns in school zones as part of a more comprehensive regulatory scheme; second, require some connection between the gun and interstate commerce; and third, build an evidentiary record of the effect guns have in interstate commerce. *See Lopez*, 514 U.S. at 561-63. Others have suggested that

Congress could have achieved the same ends by encouraging the states to enact the desired ban on guns pursuant to its Spending Clause powers. Massey and Denning, *supra*, at 185. The Court’s Spending Clause jurisprudence suffers from the same basic deficiency as its Commerce Clause jurisprudence. The first element of the Court’s Spending Clause test is that a law serve the general welfare. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Since the “general welfare” can easily be broadly construed to encompass all legitimate powers of civil government, and because the Court defers to Congress’s judgment, the general welfare standard really imposes no restriction at all. The Court should reconsider its Spending Clause precedents in an appropriate case and identify the proper object of that power.<sup>5</sup>

**C. The Court’s opinion in *Gonzales v. Raich* identified a rational basis standard of review that the *Lopez* Court left unsettled.**

The Court ruled in *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005) that the level of scrutiny to be applied is the rational basis test. The *Raich* opinion creates an ambiguity. Usually the Court asks if a statutory means bears a rational relation to a legitimate government interest. In *Raich* the Court asked if it was rational to believe that in the aggregate growing marijuana at home for medicinal use would have a

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<sup>5</sup> See *The Federalist* No. 41 (James Madison) (arguing that the “general welfare” must be understood by the Constitution’s specific enumerated powers rather than as “an unlimited power of providing for ... the general welfare).

substantial effect on interstate commerce. *Raich*, 545 U.S. at 28.

The Court discussed the rational basis test not as a nexus relationship between means and ends but rather as a quantitative measurement used to determine whether an activity is of significant magnitude to substantially affect interstate commerce. If it is conceivable that the activity would have that effect, then Congress can regulate it pursuant to its commerce power. Presumably, the *Raich* Court intended the rational basis test to apply to the nexus between the statutory means and government interest as well. If that assumption is correct, it leaves to Congress the power to legislate for the object of furthering any legitimate interest of civil government, including the police powers. So construed, application of the rational basis test in Commerce Clause cases is one more affirmation that the doctrine of enumerated powers is dead.

### CONCLUSION

The Court should grant certiorari in this case and use it as an opportunity to restore a sound Commerce Clause jurisprudence based on Chief Justice Marshall's framework of analysis that focuses on the subject and object components of the Clause.

Respectfully submitted,

JEFFREY C. TUOMALA  
LIBERTY UNIVERSITY  
SCHOOL OF LAW  
1971 University Blvd.  
Lynchburg, VA 24502  
434-592-5300  
jtuomala@liberty.edu

MATTHEW J. CLARK\*  
*\*Counsel of Record*  
ALABAMA CENTER FOR LAW  
AND LIBERTY  
2213 Morris Ave., Fl. 1  
Birmingham, AL 35203  
matt@alabamalawand  
liberty.org  
256-510-1828

Counsel for *Amicus Curiae*