No. 25-518

In the Supreme Court of the United States

CANNA PROVISIONS, INC.; GYASI SELLERS; WISEACRE FARM, INC.; VERANO HOLDINGS CORP.,
Petitioners,

v.

PAMELA J. BONDI, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF MICHAEL COLOSI AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

CAMERON HALLING
NATHAN HOTES
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201

FRANK GARRISON
Counsel of Record
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
(202) 807-4929
FGarrison@pacificlegal.org

Counsel for Amicus Curiae Michael Colosi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Constitution:

Statute:

Other Authorities:

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Michael Colosi is a U.S. citizen living in Charlotte County, Florida. The County told Colosi that, before building his home, he must pay a nearly $200,000 development fee because the Florida scrub-jay—a species classified as "threatened" under the Endangered Species Act—might someday nest on his land.[2] Colosi sued, alleging that the federal government has no authority to regulate an intrastate species without a direct connection to interstate commerce. Colosi and Petitioners face the same dilemma: they are injured by federal regulation of activities the Constitution does not authorize the federal government to regulate.

The Pacific Legal Foundation, a nonprofit law firm litigating at all levels of the federal and state courts, represents Colosi directly and here as amicus. PLF has represented many plaintiffs and amici in cases advocating for people harmed by violations of the Commerce and Necessary and Proper Clauses.[3] PLF

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[1] Pursuant to Rule 37.2, Amicus Curiae provided timely notice to all parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] A federal officer told Colosi to cede land or pay a minimum of $180,000. Compl. pp. 10-11, *Colosi v. Charlotte County,* No. 2:24-cv-01004-JES-KCD (M.D. Fla. Oct. 29, 2024).

[3] *See, e.g.*, *Minerva Dairy v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018), *cert. denied*, 588 U.S. 907 (2019); *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017); *Sissel v. U.S. Dep't of Health & Hum. Servs.*, 760 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 577 U.S. 1113 (2016);

advocates for the use of natural resources to produce, innovate, and build. The federal government's expansion beyond its enumerated powers enables nationwide environmental regulations that cripple resource use.

INTRODUCTION AND SUMMARY OF ARGUMENT

Canna Provisions is not the first petitioner to ask this Court to clarify the Commerce and Necessary and Proper Clauses' scope, but its case presents a unique opportunity to temper wrongly decided past precedent and protect property rights.

Petitioners, "four businesses that . . . cultivate, manufacture, possess, and/or distribute marijuana wholly within Massachusetts in full compliance with its laws," sued to avoid economic harm and future federal prosecution. App. 2a. They assert that the "Controlled Substances Act [CSA] . . . 'as applied to [their] intrastate [activities],' exceeded Congress's powers under Article I of the United States Constitution."[4] *Id.*

This Court, twenty years ago, interpreted the Commerce and Necessary and Proper Clauses to encompass the "power to prohibit the local cultivation and use of marijuana in compliance with [state] law." *Raich*, 545 U.S. at 5. The majority analogized the case to precedent allowing Congress "to regulate purely

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United States v. Lopez, 514 U.S. 549 (1995) (superseded by statute); *Jones v. United States*, 529 U.S. 848 (2000); *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gonzales v. Raich*, 545 U.S. 1 (2005).

[4] Canna Provisions makes other CSA-specific and Due Process arguments not discussed in this brief.

local activities that . . . have a substantial effect on interstate commerce" under the Commerce and Necessary and Proper Clauses. *Id.* at 17 (citing *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)). In doing so, the majority effectively broadened the Commerce and Necessary and Proper Clauses by holding that Congress may regulate activities when it has "a rational basis" for believing that those "activities, taken in the aggregate, substantially affect interstate commerce." *Id.* at 22 (citing *Lopez*, 514 U.S. at 557).

Canna Provisions' argument proceeded as one might expect under a flaccid level of scrutiny. The United States District Court of Massachusetts ruled that "Congress had a rational basis for concluding that . . . use of marijuana . . . 'substantially affect[s] interstate commerce,'" App. 36a, despite finding "persuasive reasons for a reexamination" of *Raich*. Even so, the District Court advised Canna Provisions to "seek the attention of the Supreme Court." App. 22a. The First Circuit affirmed, holding that Congress had a rational basis for believing Canna Provisions' "much larger" effect on the intrastate market, compared to personal use in *Raich*, would substantially affect commerce. App. 14a.

This Court's precedent and, thus, the First Circuit's decision, are antithetical to the Commerce and Necessary and Proper Clauses' original public meaning. The founding generation described commerce as "selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001). This narrow definition persisted for over a century before jurisprudence shifted during

the New Deal. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

The New Deal Court's unconstitutional expansion of the Constitution's enumerated powers had broad, negative effects for the rule of law. Congress now regulates intrastate activity in traditional state domains like contract arbitration and criminal law. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Scarborough v. United States*, 431 U.S. 563 (1977) (superseded by statute). This brief highlights one particular area of expansion and its harmful effects: federal environmental law's infringement on private property rights, and how a great deal of that jurisprudence violates the Commerce and Necessary and Proper clauses.

Michael Colosi's story illustrates these points. Colosi's effort to build a house was blocked by federal regulation because a threatened, intrastate species, the Florida scrub-jay, may nest on the land. When challenged as to the condition it placed on Colosi's planned land use, the federal government used the Commerce and Necessary and Proper Clauses to justify its regulation of intrastate species with no aggregate impact on interstate commerce. Its argument is made possible by this Court's acceptance of the rational basis test in its Commerce and Necessary and Proper Clause jurisprudence. Colosi is not the first, and will not be the last, landowner harmed by government overreach under unconstitutional federal laws.

This Court should seize this chance to correct its Commerce and Necessary and Proper Clause precedents before federal overreach harms more people.

ARGUMENT

I. Modern Commerce Clause Jurisprudence Has Strayed from the Clause's Original Public Meaning

For a hundred sixty years, the United States largely respected the original public meaning of the Commerce and Necessary and Proper Clauses, limiting them to reach only interstate trade and its instrumentalities. But in 1937, this Court shifted its stance by extending the reach of commerce to intrastate actions "closely connected with commerce" in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Since then, this Court has increasingly distorted the scope of these clauses by upholding federal laws increasingly disconnected from interstate commerce. *See Raich*, 545 U.S. at 19, 22 (requiring Congress to have a "rational basis" for finding the regulated "activities, taken in the aggregate, substantially affect interstate commerce"). Widening the Commerce and Necessary and Proper Clauses to this extent distorts their original public meaning.

A. The Commerce Clause, as Originally Understood, Addressed Only Interstate Trade and Its Instrumentalities

The Commerce Clause's original public meaning supports narrowing its scope. The founders consistently assured the ratifying public that the Commerce Clause would remain limited to trade between the states. The Commerce Clause's meaning is found in (1) the text of the Constitution, (2) the public ratification debates, and (3) statements by the Constitution's advocates. Courts understood and echoed public perception for over a century.

1. The Text of Article I, § 8, Limits the Commerce Clause to Interstate Trade and Its Instrumentalities

The original public meaning of the Commerce Clause is reflected in the clause's text. This Court has long held that "[i]f the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338-39 (1816). The Commerce Clause states that "Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cls. 1, 3.

Dictionaries of the founding era clarify the meaning of the Commerce Clause. At ratification, dictionary definitions of "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring).[5] The term regulate meant "to make regular." Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. at 139 (citing 2 Samuel Johnson, A Dictionary of the English Language (J.F. Rivington et al. 6th ed 1785) (defining regulate as "1. To adjust by rule or method. . . . 2. To direct")). "[A]mong the several states" refers to "between people of different states." *Id.* at 132; THE FEDERALIST NO.

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[5] *See also* 1 Samuel Johnson, A Dictionary of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick").

45 (James Madison). The Commerce Clause, properly understood, thus means Congress shall have power to make regular selling, buying, and bartering between the several states.[6]

No evidence differentiates commerce's legal meaning from its colloquial use. One scholar examined "the legal works used most commonly by the founding generation" in "collections . . . in the Bodleian Library at the University of Oxford, England; in Oxford's Codrington Library; and in the . . . Middle Temple in London, one of England's Inns of Court" and concluded that "[c]hanging . . . to [the] legal meaning of 'commerce' makes no difference." Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 805 (2006). Contemporary caselaw's use of commerce draws the same conclusion. *See id.* at 807 n.97.[7]

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[6] Some later scholarship has argued that "commerce" originally included "all gainful activity" or "intercourse." *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 17 (1999); *see* Natelson, 80 ST. JOHN'S L. REV. at 790, 800 (citing Akhil Reed Amar, *America's Constitution: A Biography* 107 (2005)). These definitions incorrectly read founding dictionaries, *see* Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702 n.53 (1996), and fail to address the ratification conventions. *See* Barnett, 68 U. CHI. L. REV. at 104-05.

[7] *See also Bromwich v. Lloyd*, (1704) 2 Lut. App. 1582, 1585, 125 Eng. Rep. 870, 871 (K.B.); *Woolvil v. Young*, (1697) 5 Mod. 367, 367, 87 Eng. Rep. 710, 710 (K.B.); *Williams v. Williams*, (1693) Carth. 269, 269-70, 90 Eng. Rep. 759, 759 (K.B.); *Cramlington v. Evans*, (1690) 2 Vent. 296, 300, 86 Eng. Rep. 449, 452 (Exch.); *Gull v. Carswell*, (1709) Burrell. 295, 295, 167 Eng. Rep. 580, 580 (Adm.)).

The Commerce Clause's structure validates the clause's narrow scope. This Court warned against interpreting statutes in ways that "render another section of the statute surplus in its entirety." *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 845-46 (1988) (Kennedy, J., dissenting). Interpreting "commerce . . . among the several states" as "gainful activity" creates surplus within the Commerce Clause. "[G]ainful economic activity" would include outward trade with "foreign Nations" and "Indian Tribes." Natelson, 80 ST. JOHN'S L. REV. at 831.

The rest of Article I, § 8, amplifies the problem. The Constitution allows Congress to regulate bankruptcy, intellectual property, the postal system, currency, dockyards, and standards of weights and measures. *See* Natelson, 80 ST. JOHN'S L. REV. at 832-34; *see also Lopez*, 514 U.S. at 588-89 (Thomas, J., concurring). These powers are surplus if Congress can regulate all gainful activity. *Ibid.* Justice Thomas suspects Congress's power to "punish Piracies and Felonies committed on the high Seas" and "raise and support an Army and Navy" would be surplus because safety would increase trade. *Lopez*, 514 U.S. at 588-89 (arguing that the substantial effects test makes all of Article I, § 8, "mutually overlap"). Expanding Congress's power from "regulating commerce" to "prohibiting commerce," necessary to justify the CSA, causes other problems, as well: Congress would be empowered to devalue money, U.S. Const. art. I, § 8, cl. 5, and ban state elections. U.S. Const. art. I, § 4, cl. 1. The broader one defines "regulate commerce among the states," the more nonsensical Article I, § 8, becomes.

2. Founding Debates over the Commerce Clause Clarify Its Scope

Nor could the voting public derive any separate definition from public debates. The ratification debates "uniformly used [commerce] to refer to trade or exchange."[8] Barnett, 68 U. CHI. L. REV. at 116-26 (finding commerce used in reference to trade in seven state ratification debates and uncovering no contrary evidence). The statements most restricting commerce to trade, and contrasting commerce with agriculture and manufacturing, include:

- Massachusetts: Thomas Dawes urged voters not to "take a short view of our agriculture, commerce, and manufactures." *Id.* at 117 (citing Jonathan Elliot, ed., 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 57 (Taylor & Maury 2d ed. 1863)).
- New York: Governor Clinton referred to "[t]he situation of [each state's] commerce, its agriculture, and the system of its resources." *Id.* at 118 (citing Elliot, *supra*, at 261).
- North Carolina: William Davie defines commerce as "the nurse of both [agriculture and manufacturing]." *Id.* at 121 (citing Jonathan Elliot, ed., 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 20 (Taylor & Maury 2d ed. 1863)).

Political pamphlets on the Constitution echo this refrain. Federalist essays limited commerce to trade

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[8] The debates sometimes referred to "trade and commerce," possibly separating the two. Barnett, 68 U. Chi. L. Rev. at 124. The two terms were likely a couplet akin to "cease and desist." *Ibid.*

multiple times.[9] Other pamphlets reflected this perspective. *Lopez*, 514 U.S. at 590-91 (Thomas, J., concurring).[10] The ratification debates support a limited federal government. The Constitution delegates "enumerated" and "define[d]" powers to the federal government while leaving "numerous and indefinite" powers to the States. THE FEDERALIST NO. 39 (James Madison); *id.* NO. 45 (James Madison); *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). The Constitution functions as a fiduciary document, where the American people (the principal) delegate enumerated powers to the federal government (the agent).[11] Enumerating

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[9] *See* THE FEDERALIST NO. 12 (Alexander Hamilton) (discussing the "blended and interwoven" interests of "agriculture and commerce"); *id.* NO. 17 (Alexander Hamilton) ("[T]he supervision of agriculture . . . [is] proper to be provided for by local legislation [and] can never be [a] desirable care[] [for] a [government of] general jurisdiction."); *id.* NO. 21 (Alexander Hamilton) (separating that "state of commerce, of arts, [and] of industry"); *id.* NO. 34 (Alexander Hamilton) ("expenses arising from . . . the encouragement of agriculture and manufactures . . . [are] objects of state expenditure"); *id.* NO. 35 (Alexander Hamilton) ("the mechanic and manufacturing arts furnish . . . mercantile enterprise and industry"); *ibid.* ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts, to which his commerce is so nearly allied?"); *id.* NO. 36 (Alexander Hamilton) (separating "agriculture, commerce, [and] manufactures").

[10] *See A Jerseyman: To the Citizens of New Jersey*, Trenton Mercury, Nov. 6, 1787, *in* 3 *The Documentary History of the Ratification of the Constitution* 147 (1976) (noting that agriculture will serve as a "source of commerce"); Marcus, New Jersey Journal, Nov. 14, 1787, *id.* at 152 (both the mechanic and the farmer benefit from the prosperity of commerce).

[11] Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* (2017); Frank Garrison et al., *The Fiduciary Constitution, Separation of*

the national powers was necessary "to ensure ordered liberty." Garrison et al., GEO. J.L. & PUB. POL'Y at 5. The ratifying public would be unlikely to conclude the federal government could use a loophole to regulate local farming and manufacturing.

Indeed, the ratification debates contain "almost no dissatisfaction with that Clause; on the contrary, anti-federalists pronounced themselves quite satisfied with it." Natelson, 80 ST. JOHN'S L. REV. at 839. Madison described the Commerce Clause as "an addition which few oppose, and from which no apprehensions are entertained." THE FEDERALIST NO. 45 (James Madison). The anti-federalists would never have pronounced themselves satisfied with the Clause if they understood the scope that this Court would accord it beginning in 1937.

Early American caselaw and scholarship respected the original public meaning of "Commerce." This Court extended the Commerce Clause to include necessary instrumentalities, such as navigation and the control of monopolies, but the power was never disconnected from interstate commercial trade. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824); *see also*

Powers, and Legal Landscape after SEC v. Jarkesy, GEO. J.L. & PUB. POL'Y at 2 (forthcoming Feb. 2025); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 193 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Gary Lawson et al., *The Origins of the Necessary and Proper Clause* 68-70 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care*, 69 FLA. L. REV. 1385 (2017).

Swift & Co. v. United States, 196 U.S. 375 (1905). Scholarship on the original meaning of the Constitution largely aligns with this Court's early rulings. *See* Barnett, 68 U. CHI. L. REV. at 135 n.169 (citing St. George Tucker, Appendix, *in* 1 William Blackstone, *Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 250 n* (William Young Birch and Abraham Small 1803)).

B. The Necessary and Proper Clause Cannot Justify Broadening the Commerce Clause

The Commerce Clause's original meaning is incomplete without discussing the Necessary and Proper Clause. Article I, § 8, grants Congress the "Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art. I, § 8, cls. 1, 18. To be sure, Congress can enact laws that facilitate its enumerated powers. But like with the Commerce Clause, this Court's jurisprudence over the Necessary and Proper Clause has strayed from the Constitution's original meaning.

The constitutional analysis of the Necessary and Proper Clause mirrors the Commerce Clause. Founding-era dictionaries fail to support an expansive reading. Steven G. Calabresi, Elise Kostial & Gary Lawson, *What* McCulloch v. Maryland *Got Wrong: The Original Meaning of "Necessary" Is Not "Useful," "Convenient," or "Rational,"* 75 BAYLOR L. REV. 1, 43-44 (2023) (citing 2 Samuel Johnson, Dictionary of the English Language 189 (J.F. Rivington, et al. 6th ed 1785) (defining necessary as "Needful indispensably requisite" and proper as "fit accommodated adapted

suitable qualified")). Applying the Necessary and Proper Clause to anything with potential impact on enumerated powers results in surplusage. An expanded Necessary and Proper Clause would undermine the system of enumerated powers and endanger liberty. The Constitution simply does not grant unbounded power to the federal government. Lawson, 107 HARV. L. REV. at 1231.

The ratification process for the Necessary and Proper Clause clarified the clause's meaning. Antifederalists expressed concerns about the Necessary and Proper Clause, but the public instead believed the Federalist claims that the clause was merely preventative. *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003). Hamilton stated that the clause "could only have been [introduced] for greater caution, and to guard against . . . those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union."[12] THE FEDERALIST NO. 33 (Alexander Hamilton). To Madison, the clause prevented "construing the term 'expressly' with so much rigor, as to disarm the government." THE FEDERALIST NO. 44 (James Madison). The Federalists convinced the public by pointing to contemporary scholarship promoting clauses with "silently inherent" meanings as "good practice" despite their "lack of substantive effect." Natelson, 80 ST. JOHN'S L. REV. at 797 & n.39 (citing

[12] Hamilton later changed his view. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1398 n.24 (1987) (citing David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 160-69 (1987)). But the original public meaning concentrates on what the voting public, influenced by Hamilton during ratification, believed.

Boroughe's Case, (1596) 4 Co. Rep. 72b, 73b, 76 Eng. Rep. 1043, 1044 (K.B.) (reporter's commentary)).

The Tenth Amendment to the Constitution affirms the enumerated powers by declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively." U.S. Const. amend. X. Thus even if the Necessary and Proper Clause originally granted Congress undelegated powers, the Tenth Amendment established that it could not be a power to expand Congress's prescribed authority. Indeed, the Tenth Amendment's original purpose was "to emphasize, clarify, and amplify restrictions on federal power," and clarify that the Necessary and Proper Clause "does not authorize the kinds of liberty-infringing laws to which the Antifederalists properly objected." Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 471, 480 (2008). The power to regulate local agriculture and manufacturing, separate powers not delegated to the federal government, thus belong to the states.

At bottom, the original meaning of the Necessary and Proper Clause cannot support the substantial effects test or rational basis qualifier upheld by this Court. The Necessary and Proper Clause "must always be tied to the implementation of some independently granted federal power." *Id.* at 481. The substantial effects test of *Wickard*, 317 U.S. at 128-29, expands the clause to include anything that "overhangs the market," "lead[ing] to absurd results" where the federal government regulates "family or friends sleeping at one's home (because it might overhang the market for hotels), how one cooks in one's kitchen (because it might overhang the market for restaurants),

or even uncompensated sexual acts where prostitution is legal (because they might overhang the market for prostitution)." Calabresi, 75 BAYLOR L. REV. at 77. The rational basis test goes even further, upholding a law when "*any reasonably conceivable or imaginable* factual basis" exists connecting it to commerce. *Id.* at 40; *Katzenbach v. McClung*, 379 U.S. 294 (1964). Whether "those facts actually exist" or were "relied on" is irrelevant. Calabresi, 75 BAYLOR L. REV. at 39. The rational basis test gives Congress "essentially unlimited legislative jurisdiction," an outcome antithetical to the Necessary and Proper Clause's original meaning and the structure of the Constitution. *Id.* at 40.

C. Recent Supreme Court Precedent Implies This Court has Acknowledged its Mistake

This Court has pushed back against extreme attempts to expand the Commerce and Necessary and Proper Clauses. In *Lopez*, 514 U.S. 549, the Court invalidated a federal law regulating gun possession within schools as incompatible with the Commerce and Necessary and Proper Clauses. This Court voiced concern that "under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id.* at 564.

The majority, fearing any other outcome would make them "hard pressed to posit any activity by an individual that Congress is without power to regulate," refused to "pile inference upon inference in a manner that would . . . convert congressional

authority under the Commerce Clause to a general police power." *Id.* at 564, 567. *Lopez* served as a first step but was limited by the government's overstretched argument. *See id.* at 600 (Thomas, J., concurring) ("When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words.").

United States v. Morrison, 529 U.S. 598, 616 (2000), again cabined the Commerce and Necessary and Proper Clauses' scope. The majority invalidated a federal remedy for victims of gender-motivated violence, articulating that "the limitation of congressional authority is not solely a matter of legislative grace." *Ibid.* *Morrison* and *Lopez* brought Commerce and Necessary and Proper Clause jurisprudence closer to their original meaning. Still, neither majority challenged the substantial effects test, and *Lopez* reiterated the unfounded claim that "commerce among the states" extends to any object Congress has a "rational basis" to believe has a substantial effect on interstate commerce in the aggregate. *Id.* at 610; *Lopez*, 514 U.S. at 557.

Raich, unfortunately, as explained, later affirmed the substantial effect test, diminishing the importance of *Lopez* and *Morrison*.

The substantial effects test persists, but caselaw since *Raich* has pushed closer to restoring the Constitution's original meaning. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 520, 539, 544 (2012), this Court examined an individual mandate imposing a "shared responsibility payment" on those who "do not comply with the individual mandate." The majority found the law not to constitute commerce, emphasizing how "the Constitution . . .

enumerates[] the Federal Government's powers" and warning that "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions." *Id.* at 534, 557. But the majority brushed aside the inconsistency between the substantial effects test and the Court's attempts to limit the Commerce and Necessary and Proper Clauses to the Constitution's original meaning. Still, Justice Thomas highlighted the government's "unprecedented claim . . . that it may regulate . . . *inactivity* that substantially affects interstate commerce [as] a case in point" for his argument that the Commerce Clause has "virtually no limits." *Id.* at 708 (Thomas, J., dissenting) (citing *Morrison*, 529 U.S. at 627 (Thomas, J., concurring)). Justice Thomas's solitary push for this Court to reconsider the substantial effects test under the Commerce and Necessary and Proper Clauses' original public meaning has gained support from at least one other justice on the Court. *See Sackett v. EPA*, 598 U.S. 651, 708 (2023) (Thomas, J., concurring) ("the Court's Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution") (joined by Justice Gorsuch). Now is the time for the Court to confront the issue.

II. *Canna Provisions* Provides an Opportunity to Align Commerce Clause Jurisprudence with Its Original Meaning and Protect Property Owners

Raich and the precedent it relied on conflict with the Constitution and the results for businesses and citizens have been devastating. Overturning that test and abandoning the rational basis test offers the simplest relief for victims of the federal government and

aligns best with earlier precedent. This Court considers many factors when deciding whether to overturn a precedent, including its "disruptive effect on other areas of the law." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). Granting the petition would allow the Court to protect traditional liberties, specifically property rights.

The story of Michael Colosi exemplifies the substantial effects test's disruptive impact on environmental law and property rights. The young tech entrepreneur aimed to construct a residential home on one or two acres of his 5.07 acres of undeveloped land in Florida. *See* Compl. ¶¶ 3-4, *Colosi*, No. 2:24-cv-01004-JES-KCD. Given the shortage of affordable housing across the United States, one would expect the federal government to promote homebuilding. James S. Burling, *Nowhere to Live: The Hidden Story of America's Housing Crisis* xxiii (Skyhorse Publishing, 2024) ("Nationally, just to replace aging or destroyed housing stock, one million homes must be built each year. Yet, we are building only half that number.") (citing The Editorial Board, *Rent Control Backfires Again in St. Paul*, Wall St. J., Nov. 10, 2021, https://bit.ly/4oYbMdt). Instead, the FWS sought to require Colosi to pay exorbitant fees because "a federally protected bird, the Florida scrub-jay, might nest on his land." *See* Compl. ¶¶ 1-2, *Colosi*, No. 2:24-cv-01004-JES-KCD.

The FWS's efforts to extend environmental law to regulate intrastate species—with no effect on commerce—are disruptive, unworkable, and inconsistently applied.

The ESA prohibits the take of endangered or threatened species ("protected species") and allows the FWS to prosecute property owners who modify protected species' habitat. 16 U.S.C. § 1538(a)(1)(B) (barring "take" of protected species); *see Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) (allowing the FWS to extend "take" to include habitat modification). FWS exercises this power purportedly pursuant to the Commerce Clause. *See Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (D.C. Cir. 1997). But to the extent the Commerce Clause (or Necessary and Proper Clause) allows for Congress to regulate interstate species via the ESA, it cannot be read so broadly as to allow the regulation of intrastate species with no direct commercial value. The Florida scrub-jay, which the FWS considers indigenous to Florida alone, has never affected *interstate* commerce. No evidence of the bird's commercial value exists. With no clear economic argument, the government defends itself by claiming the ESA is a comprehensive regulatory scheme, seeking to tie the case to government programs like the CSA. The government's argument is absurd. The ESA is not a comprehensive regulatory scheme of economic activity, and no connection has been made between the Florida scrub-jay and any interstate species or the larger economy. This Court has dismissed arguments making far less attenuated connections. *See Lopez*, 514 U.S. at 564 (rejecting that crime prevention will affect commerce).

Unfortunately, the government presents arguments like these because they often succeed under the nonexistent level of judicial review sanctioned by this Court's precedent. The examples abound. Commerce and Necessary and Proper Clause

jurisprudence has allowed the federal Surface Mining and Reclamation Act to supersede state "land-use regulation," an "inherent police power[]," because of its tangential connection to "destructive interstate competition." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275, 282 (1981). And more relevant here it enables courts to interpret the "comprehensive regulatory scheme" language in *Raich* to permit ESA regulation of valueless intrastate species. *See People for Ethical Treatment of Prop. Owners*, 852 F.3d at 1006-07 (upholding an intrastate prairie dog regulation as "essential to the ESA's comprehensive regulatory scheme"); *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174-77 (9th Cir. 2011) (upholding intrastate delta smelt regulations because the ESA as a whole "substantial[ly] relate[s] to interstate commerce").

PLF has identified 376 intrastate species protected by the ESA, so Colosi is unlikely to be the last homeowner to face these challenges. Mitchell Sacchi, *Intrastate Species Under the Endangered Species Act* (Pacific Legal Found., 2025), bit.ly/48wzwj3.

This Court has, at times, curtailed the federal government's use of the Commerce and Necessary and Proper Clauses in environmental law. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 163-64 (2001), this Court reversed a Seventh Circuit decision permitting Congress to regulate all waters "[w]hich are or would be used as habitat by other migratory birds." The Seventh Circuit found the overall impact of the "'destruction of the natural habitat of migratory birds' on interstate commerce . . . was [significant] because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe

migratory birds." *Id.* at 166. Under this rationale, the Commerce and Necessary and Proper Clauses would justify the federal regulation of backyard ponds because a bird stopped there for the night twenty years ago. The Court resolved the issue on separate grounds. *Id.* at 173. Similarly, the EPA for decades extended the Clean Water Act (CWA) to "the outer limits of Congress's commerce power" and regulated local wetlands for decades. *Sackett*, 598 U.S. at 664; *see Rapanos v. United States*, 547 U.S. 715 (2006). But in 2023, the use of Commerce and Necessary and Proper Clause jurisprudence "to regulate anything that substantially affects interstate commerce by itself or in the aggregate" was unanimously curtailed in *Sackett*, 598 U.S. at 700 (Thomas, J., concurring). Despite these victories, the "deeper problems with the Court's Commerce Clause jurisprudence" remain unaddressed. *Id.* at 708 (Thomas, J., concurring).

The government's use of the substantial effects test to overreach in environmental regulation, reflected in other subject matters throughout the U.S. Code, is an important question of federal law that must be addressed. The substantial effects test becomes "unworkable" when the government constantly attempts, and sometimes succeeds, in expanding it by misquoting or misapplying Commerce and Necessary and Proper Clause precedent. The substantial effects test has disrupted the constitutional balance: favoring the federal government and allowing extensive overreach. At bottom, the substantial effects test "affirmatively destroys" the reliance interests of Colosi and others on the Constitution's original meaning since there is no reasonable way to predict where the federal government will next extend its authority. *See Loper Bright Enters. v. Raimondo*, 603

U.S. 369, 375 (2024) (overturning *Chevron* deference, another rule heavily relied on by the administrative state, partially because the consolidated power introduced more variance). Such a situation calls for a complete reset, not half measures.

CONCLUSION

The Commerce and Necessary and Proper Clauses' original public meaning conflicts with current Supreme Court doctrine interpreting them. This dissonance has broad negative impacts on property owners, local governments, and the liberty that the enumerated powers are meant to protect. This Court should grant the petition.

Respectfully submitted,

NATHAN HOTES
CAMERON HALLING
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201

FRANK GARRISON
Counsel of Record
3100 Clarendon Blvd.
Suite 1000
Arlington, VA 22201
(202) 807-4929
FGarrison@pacificlegal.org

Counsel for Amicus Curiae Michael Colosi

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