

No. 26-93

In the Supreme Court of the United States

JOHN REAM,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,
ET AL.,

Respondents.

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

**BRIEF OF PACIFIC LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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QUESTIONS PRESENTED

1. Whether the federal prohibition on home distilling exceeds Congress's enumerated powers.

2. Whether the Court should overrule *Raich* or at least clarify that Congress's commerce power does not extend to regulation of local, noncommercial conduct and that its exercise is subject to meaningful judicial scrutiny.

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation matters affecting the public interest. PLF provides a voice for Americans who believe in limited government, private property rights, and individual freedom.

In furtherance of this mission, PLF attorneys have participated as lead counsel in several U.S. Supreme Court cases involving environmental regulation, administrative law, and property rights, including: *Sackett v. EPA*, 598 U.S. 651 (2023); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 586 U.S. 9 (2018); and *Rapanos v. United States*, 547 U.S. 715 (2006).

PLF has represented many plaintiffs and amici in cases advocating for people harmed by violations of the Commerce and Necessary and Proper Clauses.²

¹ Pursuant to Rule 37.2, Amicus Curiae provided timely notice to all parties by emailing all counsel of record. 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 See, e.g., *Minerva Dairy v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018), *cert. denied*, 588 U.S. 907 (2019); *People for the 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); *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. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gonzales v. Raich*, 545 U.S. 1 (2005).

PLF advocates using 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

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

Ream wishes to pursue the hobby of distilling spirits in his own home for personal consumption and sued to avoid future federal prosecution. App. 7, 9, 20, 32. He asserts that the “federal home-distilling prohibition exceeds Congress’s enumerated powers.” Pet. 7. The Sixth Circuit upheld the prohibition under the Taxing and Necessary and Proper Clauses. App. 16. Amicus agrees with Ream’s arguments for why the asserted need for collecting a tax cannot justify the government banning the very activity that it seeks to tax, which thereby destroys the tax’s existence. As *Silencer Shop Found. v. Bureau of Alcohol* recently held, imposing regulations to collect a non-existent tax is not a “proper” means of effectuating the taxing power. No. 6:25-CV-056-H, 2026 WL 2255460, at *17 (N.D. Tex. Aug. 5, 2026).

Amicus urges this Court to also consider the second argument that the government presented to the district court and Sixth Circuit—that the Commerce and Necessary and Proper Clauses justify the home-distilling prohibition. App. 74. The government relied on the substantial effects test that *Gonzales v. Raich*

articulated to justify the prohibition. App. 76, 81 (relying on 545 U.S. 1, 22, 26 (2005)).

Raich 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 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 *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

The government’s briefing below leaned into *Raich*’s flaccid level of scrutiny. It argued that “what mattered” in *Raich* “was that there was a ‘rational basis’ to conclude that failing to regulate the intrastate activity would undermine Congress’s interstate efforts, particularly in the context of a broader scheme to regulate the ‘production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.’” App. 81 (quoting *Raich*, 545 U.S. at 22, 26). It then concluded that “the wholly intrastate production of distilled spirits has an obvious effect on national ‘price and market conditions’ for distilled spirits and presents the same ‘enforcement difficulties’ in distinguishing between locally produced spirits and those manufactured elsewhere.” App. 81 (quoting *id.* at 19, 22).

But *Raich* is 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.

One of Amicus Curiae's former clients illustrates these points. Members of People for the Ethical Treatment of Property Owners (PETPO) were prevented from building homes on their properties because the Utah prairie dog—a threatened species found only within Utah—might use their land. When PETPO challenged that restriction, the federal government invoked the Commerce and Necessary and Proper Clauses to justify its regulation of intrastate species with no aggregate impact on interstate commerce. That argument was made possible by this Court's

application of the rational basis review in its Commerce and Necessary and Proper Clause jurisprudence. PETPO's members are not the first, and will not be the last, landowners 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. *See Bond v. United States*, 564 U.S. 211, 222 (2011) (“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”).

ARGUMENT

I. Modern Enumerated Powers Jurisprudence Has Strayed From The Constitution’s Original Public Meaning

For almost 150 years, this Court’s enumerated powers jurisprudence largely reflected 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 only 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 departs from 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).³ 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. 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.⁴

No evidence differentiates commerce’s legal meaning from its colloquial use. One scholar examined “the legal works used most commonly by the founding

³ 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”); Nathan Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789) (“trade or traffic”); Thomas Sheridan, *A Complete Dictionary of the English Language* 585-86 (6th ed. 1796) (“Exchange of one thing for another; trade, traffick”).

⁴ Some later scholarship has argued that “commerce” originally included “all gainful activities” 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, 19 (1999); see Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 790, 800 (2006) (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, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. at 104-05.

generation” in “collections . . . in the Bodleian Library at the University of Oxford, England; in Oxford’s Co-drington 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.” Natelson, 80 ST. JOHN’S L. REV. at 805. Contemporary caselaw’s use of commerce draws the same conclusion. *See id.* at 807 n.97.⁵

The Commerce Clause’s structure validates the clause’s narrow scope. Statutes should not be interpreted 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, compounds 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

⁵ *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.).

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 home-distilling ban, 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.”⁶ 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*

⁶ 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.*

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 multiple times.⁷ Other pamphlets reflected this perspective. *Lopez*, 514 U.S. at 590-91 (Thomas, J., concurring).⁸ As this Court observed in *Tennessee Wine*

⁷ 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”).

⁸ Citing pamphlets saying that “agriculture will serve as a ‘source of commerce.’” *Lopez*, 514 U.S. at 590-91 (Thomas, J.,

& *Spirits Retailers Ass’n v. Thomas*, “removing state trade barriers was a principal reason for the adoption of the Constitution.” 588 U.S. 504, 515 (2019). And “[F]ostering free trade among the States was prominently cited as a reason for ratification.” *Id.* at 516.

What is more, 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. (4 Wheat.) 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).⁹ Enumerating the national powers was

concurring) (quoting *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)). And citing pamphlets saying that “both the mechanic and the farmer benefit from the prosperity of commerce.” *Ibid.* (citing Marcus, New Jersey Journal, Nov. 14, 1787, *supra*, at 152).

⁹ Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* (2017); Frank Garrison et al., *The Fiduciary Constitution, Separation of Powers, and the Legal Landscape after SEC v. Jarkesy*, 23 GEO. J.L. & PUB. POL’Y 435, 436-37 (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 (2013); 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).

necessary “to ensure ordered liberty.” Garrison et al., 23 GEO. J.L. & PUB. POL’Y at 438. The ratifying public would be unlikely to conclude that 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 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 (i.e., the “foregoing 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 et al., *What McCulloch v. Maryland Got Wrong: The Original Meaning of “Necessary” Is Not “Useful,” “Convenient,” or “Rational,”* 75 BAYLOR L. REV. 1, 43 (2023) (defining “necessary” as “Needful; indispensably requisite”) (quoting 2 Samuel Johnson, *Dictionary of the English Language* (6th ed 1785)); *id.* at 44 (and defining “proper” as “[f]it; accommodated; adapted; suitable; qualified”) (quoting 2 Samuel Johnson, *Dictionary of the English Language* (1755)). 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 1231-32.

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."¹⁰ 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 *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 reaffirms the principle of 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

¹⁰ 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.

Clause originally granted Congress a power not specifically enumerated, the Tenth Amendment established that it could not be a power to expand Congress's prescribed authority. 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 Anti-federalists properly objected." Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 471, 480 (2008). The powers to regulate local agriculture and manufacturing, separate powers not delegated to the federal government, thus belong to the states.

As this Court even held last term, the Necessary and Proper Clause is not "elastic enough" to allow outcomes that "undermine the structure of [the federal] government established by the Constitution." *Landor v. La. Dep't of Corrections & Pub. Safety*, 609 U.S. ___, 146 S. Ct. 1931, 1947 (2026) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012)). Or outcomes that "violat[e] the principle of state sovereignty." *Ibid.* (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997)).

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." Lawson, *A Truism with Attitude*, *supra*, 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. Some formulations of the rational basis test go even further, upholding a law when "*any reasonably conceivable or imaginable* factual basis" exists connecting it to commerce. *Id.* at 39; *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; *see also 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*, 567 U.S. at 520, 539, 544, 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 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) (joined by Justice Gorsuch). And six justices recently construed the word “proper” in the Necessary and Proper Clause as preventing Congress from imposing spending conditions on nonconsenting individuals because, otherwise, Congress could use spending to “regulate directly . . . in innumerable spheres.” *Landor*, 146 S. Ct. at 1947. Now is the time for the Court to confront the larger issues with *Raich*.

II. *Ream* 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 it 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 one of Amicus Curiae’s clients, PETPO, exemplifies the rational basis test’s disruptive impact on environmental law and property rights. PETPO’s members had sought to build homes and start businesses in Utah. *People for the Ethical Treatment of Property Owners (PETPO) v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 996 (10th Cir. 2017). Instead, FWS’s overly burdensome regulations prevented them from doing so because of the presence of the Utah prairie dog. *Ibid.*

The FWS’s efforts to extend environmental law to regulate species that only live in one state (such as the Utah prairie dog)—with no effect on commerce—are disruptive, unworkable, and inconsistently applied. The ESA prohibits the “take” of endangered or threatened species (“protected species”) and FWS—until only recently—interpreted the “take” provision as allowing it 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 Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995) (allowing the FWS to extend “take” to include habitat modification).¹¹ This extension of the ESA imposed “unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who f[ound] his land conscripted to national zoological use.” *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting).

FWS justified that interpretation 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 if 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 Utah prairie dog, which only lives in Utah, has never affected *interstate* commerce. No evidence of its commercial value exists. The government defended itself in *PETPO* by invoking *Raich* and claiming that the ESA is a comprehensive regulatory scheme, seeking to tie the case to government programs like the Controlled Substances Act. *PETPO*, 852 F.3d at 1001 n.6.

But that is absurd. The ESA is not a comprehensive regulatory scheme of economic activity, and the asserted connection between the Utah prairie dog and any interstate species or the larger economy is

¹¹ The Trump Administration recently rescinded the FWS's rule interpreting the “take” provision as applying to habitat modification. *Rescinding the Definition of “Harm” Under the Endangered Species Act*, 91 Fed. Reg. 43300, 43300 (July 14, 2026) (to be codified at 50 C.F.R. Part 222).

unpersuasive. 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 that this Court's precedents allow.¹² Indeed, those precedents have led courts to interpret the “comprehensive regulatory scheme” language in *Raich* as permitting ESA regulation of noncommercial intrastate species. *See 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”).

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*, 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.” 531 U.S. 159, 163-64 (2001). 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

¹² Other 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).

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 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. Four justices in *Rapanos* criticized the federal government’s application of its CWA jurisdiction to “storm sewers and desert washes,” because that interpretation means that the “waters of the United States’ engulf entire cities and immense arid wastelands.” 547 U.S. at 722 (plurality). But in 2023, the EPA’s 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* because it exceeded the CWA’s grant of authority. 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).

At bottom, 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 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. It “affirmatively destroys” the reliance interests of PETPO and others on the Constitution’s original public meaning because there is no reasonable way to predict where the federal government will next extend its authority. Such a situation calls for a complete reset by overruling *Raich*, 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,

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