

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 OFFICIAL 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 *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONERS**

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**BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation (“AFPF”) respectfully submits this *amicus curiae* brief in support of Petitioners.¹

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the vertical and horizontal separation of powers, federalism, and constitutionally limited government. As part of this mission, AFPF appears as *amicus curiae* before state and federal courts.

AFPF believes that under the U.S. Constitution, the general power of governing rests with the States—not the federal government—and that most decisions should be made at the state and local levels, reflecting the needs and priorities of their communities. AFPF writes here to address why the Controlled Substances Act (“CSA”), as applied to Petitioners, exceeds constitutional limits on federal authority as an original matter and cannot be squared with basic

¹ All parties have received timely notice of *amicus curiae*’s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

principles of federalism. More broadly, AFPPF believes that *Gonzales v. Raich*, 545 U.S. 1 (2005)—a constitutional aberration granting the federal government authority to trample on States’ core power to choose whether and how to regulate local private conduct—was wrongly decided and should be squarely overruled.

SUMMARY OF ARGUMENT

This case is not about sound public policy or the wisdom of Massachusetts’ regulatory choices. The core question here is whether the federal government may trespass on and override exercises of States’ traditional police power to regulate purely local activity and decide for themselves how best to protect the health, safety, and welfare of their residents. Under our system of federalism, the answer is no.

To doubly protect individual liberty, the U.S. Constitution not only separates legislative, executive, and judicial power but further splits government power between two separate sovereigns: the States and the federal government. This vertical and horizontal diffusion of power is designed to minimize the risk of tyranny and abuse at either level. The Constitution’s structural safeguards of liberty also give wide latitude to state and local governments to experiment and make policy choices that work for their communities.

Federalism is a distinctly American innovation pioneered by the Framers. Under this system of dual sovereignty, the federal government’s powers are not unlimited but rather narrow and defined. Thus, while the Constitution grants Congress authority “to

regulate Commerce” “among the several States,” U.S. Const., art. I, § 8, cl. 3, and “make all Laws which shall be necessary and proper for carrying into Execution” that power, *id.* cl. 18, it does not grant the federal government a general police power. The Constitution reserves that power to the States. *Id.* amend. X.

As applied to Petitioners—which “cultivate, manufacture, possess, and/or distribute marijuana wholly within Massachusetts in full compliance with its laws and regulations,” App. 2a; *see* App. 31a—the CSA is an affront to our system of federalism. It federally criminalizes wholly *intrastate* activity not intended for and without any empirically demonstrable link to *interstate* commerce. This assertion of general police power is unconstitutional.

More broadly, Petitioners highlight fundamental problems with this Court’s current Commerce Clause jurisprudence and the need for a course correction. The judicially created “substantial effects” test flowing from *Wickard v. Filburn*, 317 U.S. 111 (1942), and related precedent, strays from the Constitution’s original public meaning to expand the scope of federal regulatory power well beyond that which the People agreed to surrender. Worse still, *Raich*’s “rational basis” gloss on *Wickard* gives the federal government almost unlimited authority over local conduct.

This judicial rewrite of the Constitution should not be allowed to stand. The Petition provides an ideal vehicle to begin to “temper” this Court’s “Commerce Clause jurisprudence in a manner that both makes sense of [its] more recent case law and is more faithful to the original understanding.” *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

This Court should sweep *Raich* into the dustbin and squarely overrule it.

For the foregoing reasons, this Court should grant the Petition.

ARGUMENT

I. Federalism Protects Liberty.

“[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government,” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and “split[s] the atom of sovereignty” between these two spheres of government, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Under our federalist system, “[t]he States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’ The Federal Government, by contrast, has no such authority[.]”² *Bond v. United States (Bond II)*, 572 U.S. 844, 854 (2014) (cleaned up); see *Raich*, 545 U.S. at 66 (Thomas, J., dissenting) (noting “States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens”). This means that the “general power of governing” belongs to the States, not the federal government. See *NFIB v. Sebelius*, 567 U.S. 519, 535–36 (2012). “[A] federal police power” simply “does not exist.” *United States v. Kebodeaux*, 570 U.S. 387, 402

² “Where the Constitution is silent about the exercise of a particular power . . . the Federal Government lacks that power and the States enjoy it.” *U.S. Term Limits*, 514 U.S. at 848 (Thomas, J., dissenting).

(2013) (Roberts, C.J., concurring); see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821) (“Congress cannot punish felonies generally[.]”).

This vertical separation of powers “is one of the Constitution’s structural protections of liberty.” *Printz v. United States*, 521 U.S. 898, 921 (1997); see Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418–19 (2008). “State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992) (cleaned up).

It is “a check on the power of the Federal Government[.]” *NFIB*, 567 U.S. at 536. “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States (Bond I)*, 564 U.S. 211, 222 (2011). Dual sovereignty provides “a double security [] to the rights of the people.” Federalist No. 51 (Madison). This structural guardrail against tyranny ensures that “[i]f their rights are invaded by either, they can make use of the other as the instrument of redress.” Federalist No. 28 (Hamilton). Federalism also “promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’” *Raich*, 545 U.S. at 42 (O’Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

II. Congress’s Legislative Power Is Not Plenary But Narrow and Limited.

Principles of federalism are enshrined in our Constitution’s text and structure. The federal government “is entirely a creature of the Constitution” and therefore “[i]ts power and authority have no other source.”³ *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality). Under the Constitution, it is “one of enumerated powers.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). “The enumeration presupposes something not enumerated[.]” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). Simply put, that document “cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.” *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000).

To the contrary, the federal government “can claim no powers which are not granted to it by the [C]onstitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.”⁴ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Those powers are “few and defined” and were meant to “be exercised principally

³ The federal government’s “only true source of power” is “the people of the several States[.]” *U.S. Term Limits*, 514 U.S. at 847 (Thomas, J., dissenting).

⁴ “[T]he Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens.” *Shelby Cty. v. Holder*, 570 U.S. 529, 543 (2013) (citing U.S. Const. amend. X). Where it “is silent, authority resides with the States or the people.” *Chiafalo v. Washington*, 591 U.S. 578, 605 (2020) (Thomas, J., concurring in judgment).

on external objects, as war, peace, negotiation, and foreign commerce[.]” Federalist No. 45 (Madison). By contrast, the Constitution reserved to the States “numerous and indefinite” powers that “extend to all the objects” that “concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *Id.*; see U.S. Const. amend. X. This federalist structure was created to ensure “a healthy balance of power between the States and the Federal Government [and] reduce the risk of tyranny and abuse from either front.” *Lopez*, 514 U.S. at 552 (cleaned up).

To exercise power, the federal government “must show that a constitutional grant of power authorizes each of its actions.” *NFIB*, 567 U.S. at 535. “Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” *Morrison*, 529 U.S. at 607. Without a constitutional grant of authority to Congress, it simply cannot act. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”).

Congress’s limited legislative powers are enumerated in Article I of the Constitution. See U.S. Const. art. I, §§ 1, 8. As relevant here, Article I grants Congress authority “to regulate Commerce” “among the several States,” *id.* § 8, cl. 3, and the power to “make all Laws which shall be necessary and proper for carrying into Execution” its enumerated powers, *id.* cl. 18. Neither provision authorizes the federal government to regulate wholly *intrastate* conduct that is not intended to and does not enter the stream of *interstate* commerce.

A. The Commerce Clause Only Grants Congress the Power to Regulate Interstate Trade and Transportation.

“[A]s originally understood,” the Commerce Clause “empower[ed] Congress to regulate the buying and selling of goods and services trafficked across state lines.” *Taylor v. United States*, 579 U.S. 301, 313 (2016) (Thomas, J., dissenting) (cleaned up). Its “text, structure, and history all indicate that, at the time of the founding, the term ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” *Sackett v. EPA*, 598 U.S. 651, 708 (2023) (Thomas, J., concurring) (cleaned up).

“Constitutional analysis must begin with ‘the language of the instrument,’ which offers a ‘fixed standard’ for ascertaining what our founding document means.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 235 (2022) (citations omitted). “The public meaning of ‘commerce’ at the time of the Constitution’s ratification was hardly obscure[.] . . . ‘Commerce,’ at that time, meant ‘trade’ or economic ‘intercourse,’ which consisted of ‘exchange of one thing for another,’ ‘interchange,’ or ‘traffick.’” *United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022) (citing 1 S. Johnson, *A Dictionary of the English Language* 422 (6th ed. 1785)); see N. Webster’s 1828 Dictionary (defining “commerce” as “an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick”).

As Chief Justice Marshall put it: “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse

between nations, and parts of nations, in all its branches[.]” *Gibbons*, 22 U.S. (9 Wheat.) at 189–90. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936) (“[T]he word ‘commerce’ is the equivalent of the phrase ‘intercourse for the purposes of trade,’ and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states.”). Consistent with that description, “when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably.” *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). At the founding, the general public also commonly understood “commerce” to have this meaning. *See Raich*, 545 U.S. at 59 (Thomas, J., dissenting) (citing Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857–62 (2003)).

This understanding of commerce “stood in contrast to productive activities like manufacturing and agriculture.” *Raich*, 545 U.S. at 58 (Thomas, J., dissenting); *see Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (contrasting commerce with manufacturing). “[T]he founding generation would not have seen production activities . . . as being part of commerce.” William J. Seidleck, *Originalism and the General Concurrence: How Originalists Can Accommodate Entrenched Precedents While Reining in Commerce Clause Doctrine*, 3 U. Pa. J. L. & Pub. Affs. 263, 269 (2018).

In short, when the Constitution was ratified, the public meaning of “[c]ommerce itself” was “trade and transportation thereof, as opposed to activities preceding those things.” *Rife*, 33 F.4th at 842 (citations omitted); *see Lopez*, 514 U.S. at 587

(Thomas, J., concurring) (“Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.”). And “despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress.”⁵ *Lopez*, 514 U.S. at 591 (Thomas, J., concurring).

As a further limitation, as originally understood the Clause empowered Congress to regulate *interstate* (as opposed to *intrastate*) trade and transportation. And the Clause’s plain text “strongly supports a conclusion that the phrase ‘among the several States’ refers to ‘between people of different states.’” Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 132 (2001). That is, “Congress’s power under the Interstate Commerce Clause operates only on commerce that involves ‘more States than one.’” *Haaland v. Brackeen*, 599 U.S. 255, 323 (2023) (Gorsuch, J., concurring) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194).

As a matter of first principles, “the Constitution does not give Congress power to regulate intrastate commerce.” *Am. Trucking Ass’ns v. City of L.A.*, 569

⁵ Given its limited intended scope, the Framers did not view the Commerce Clause as a threat to liberty. James Madison, for example, characterized it as “an addition which few oppose and from which no apprehensions are entertained.” Federalist No. 45. Tellingly, no one at the Constitutional Convention cited it “as the basis for independent affirmative regulation by the federal government.” Albert Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 471 (1941).

U.S. 641, 655 (2013) (Thomas, J., concurring) (citation omitted); see *License Tax Cases*, 72 U.S. (5 Wall.) 462, 470–71 (1867) (“Congress has no power of regulation nor any direct control” over “internal commerce or domestic trade of the States”). Indeed, in *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869), this Court described the Clause “as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested,” *id.* at 43–44. *Cf.* *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895).

In sum, the Commerce Clause gives Congress “power to specify rules to govern the manner by which people may exchange or trade goods from one state to another[.]” Barnett, 68 U. Chi. L. Rev. at 146. As conceived by the Framers and memorialized in the Constitution, “[i]t was a shield against state exactions and no two-edged sword for positive federal attack.” Abel, 25 Minn. L. Rev. at 469. But that is all.

B. The Necessary and Proper Clause Is Not a Free-Standing Source of Federal Power.

Nor does the Necessary and Proper Clause authorize Congress to reach intrastate matters the Constitution reserves to the States. See U.S. Const. amend. X. Justice Scalia colorfully described the Clause as the “best hope of those who defend *ultra vires* congressional action[.]” *Printz*, 521 U.S. at 923. But it “does not give Congress *carte blanche*.” *United States v. Comstock*, 560 U.S. 126, 158 (2010) (Alito, J., concurring). It “is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted

‘foregoing’ powers of § 8 ‘and all other Powers vested by this Constitution[.]’” *Kinsella v. United States*, 361 U.S. 234, 247 (1960). The “Clause empowers Congress to enact only those laws that ‘carr[y] into Execution’ one or more of the federal powers enumerated in the Constitution.” *Comstock*, 560 U.S. at 159 (Thomas, J., dissenting) (quoting U.S. Const. art. I, § 8, cl. 18). It is not a free-floating source of federal power and thus cannot save laws that are untethered to any of Congress’s enumerated powers.⁶

As Chief Justice Marshall described the Clause’s sweep: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch*, 17 U.S. (4 Wheat.) at 421. This means that for a law to fall within the scope of Congress’s power under the Necessary and Proper Clause it “must be directed toward . . . the powers expressly delegated to the Federal Government by some provision in the Constitution,” and “there must be a necessary and proper fit between the ‘means’ (the federal law) and the ‘end’ (the enumerated power or powers) it is designed to serve.” *Comstock*, 560 U.S. at 160 (Thomas, J., dissenting). It cannot be used to evade

⁶ Federalists “insisted” it “was not an additional freestanding grant of power, but merely made explicit what was already implicit in the grant of each enumerated power.” Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 185 (2003).

constitutional limits on Congress’s legislative power. *See, e.g., Siegel v. Fitzgerald*, 596 U.S. 464, 474 (2022).

To the contrary, as a textual matter, the Clause requires that a law must be *both* “necessary and proper[.]” U.S. Const. art. I, § 8, cl. 18. These are “distinct requirements[.]” Gary Lawson & Patricia Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 276 (1993). “[T]he word ‘necessary’ . . . refers to a telic relationship, or fit, between executory laws and valid government ends.”⁷ *Id.* at 272. “The means Congress selects will be deemed ‘necessary’ if they are ‘appropriate’ and ‘plainly adapted’ to the exercise of an enumerated power[.]” *Comstock*, 560 U.S. at 160–61 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). “Plainly adapted” connotes “some obvious, simple, and direct relation between the statute and the enumerated power.”⁸ *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring). *Cf. Dewitt*, 76 U.S. (9 Wall.) at 44 (intrastate “prohibition of the sale of the illuminating oil” not “appropriate

⁷ Founding-era “dictionary definitions and the word’s etymology” suggest “the best synonyms of ‘necessary’ are ‘needful and proper’ or ‘congruent and proportional,’ not ‘useful’ and ‘convenient.’” Steven Calabresi, Elise Kostial, and Gary Lawson, *What McCulloch v. Maryland Got Wrong: The Original Meaning of “Necessary” Is Not “Useful,” “Convenient,” or “Rational,”* 75 Baylor L. Rev. 1, 47 (2023).

⁸ “[A]ppropriate’ and ‘plainly adapted’ are hardly synonymous with ‘means-end rationality.’” *Sabri*, 541 U.S. 612 (Thomas, J., concurring in the judgment).

and plainly adapted for carrying into execution” Congress’s taxing power).

“The word ‘proper’ was ‘used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.” *Artis v. District of Columbia*, 583 U.S. 71, 106 (2018) (Gorsuch, J., dissenting) (quoting Lawson & Granger, 43 Duke L. J. at 297); see N. Webster’s 1828 Dictionary (“Proper” means “1. Peculiar; naturally or essentially belonging to a person or thing; not common.”). “To be ‘proper,’ a law must fall within the peculiar competence of Congress under the Constitution.” *Zivotofsky v. Kerry*, 576 U.S. 1, 48 (2015) (Thomas, J., concurring in judgment, dissenting in part). “Our constitutional structure imposes three key limitations on that jurisdiction: It must conform to (1) the allocation of authority within the Federal Government, (2) the allocation of power between the Federal Government and the States, and (3) the protections for retained individual rights under the Constitution.” *Id.* (Thomas, J., concurring in judgment, dissenting in part) (citation omitted).

“No law that flattens the principle of state sovereignty, whether or not ‘necessary,’ can be said to be ‘proper.’” *Bond II*, 572 U.S. at 879 (Scalia, J., concurring in judgment). “Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment.” *Raich*, 545 U.S. at 52 (O’Connor, J., dissenting). And “no matter how ‘necessary’ or ‘proper’ an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.”

Comstock, 560 U.S. at 161 (Thomas, J., dissenting) (quoting U.S. Const. art. I, § 8, cl. 18). That is the equilibrium between State and federal power the Constitution demands.

III. The “Substantial Effects” Test For Federal Power Has No Basis In the Constitution.

Over time, however, that constitutionally required balance has broken down as Congress’s authority to regulate commerce “has evolved,” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring in judgment), through a process of accretion over a series of this Court’s cases. And this “Court’s Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution.” *Sackett*, 598 U.S. at 708 (Thomas, J., concurring). While the People, through the Constitution, gave Congress “a mild, modest little power” to regulate domestic commerce among the States, “[t]he commerce power that the courts have given Congress is a rather formidable creation of indefinite extent which federalizes, so to speak, whatever it touches.” Abel, 25 Minn. L. Rev. at 481. The “rootless and malleable,” *Morrison*, 529 U.S. at 627 (Thomas, J., concurring), substantial-effects test is a prime example of this serious constitutional problem.

“The Constitution not only uses the word ‘commerce’ in a narrower sense than [this Court’s] case law might suggest, it also does not support the proposition that Congress has authority over all activities that ‘substantially affect’ interstate commerce.” *Lopez*, 514 U.S. at 587 (Thomas, J., concurring). But “[i]n the New Deal era . . . this Court

adopted a greatly expanded conception of Congress' commerce authority by permitting Congress to regulate any private intrastate activity that substantially affects interstate commerce, either by itself or when aggregated with many similar activities.”⁹ *Sackett*, 598 U.S. at 696 (Thomas, J., concurring) (citing *Wickard*, 317 U.S. at 127–29; *United States v. Darby*, 312 U.S. 100, 119 (1941)). *But cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (“attempted regulation of intrastate transactions which affect interstate commerce only indirectly” exceed constitutional limits on federal power). These decisions “ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.” *Lopez*, 514 U.S. at 556.

“By departing from” the Clause’s “limited meaning,” this line of precedent “ha[s] licensed federal regulatory schemes that would have been unthinkable to the Constitution’s Framers and ratifiers.” *Sackett*, 598 U.S. at 708–09 (Thomas, J., concurring) (cleaned up); *see, e.g., Raich*, 545 U.S. 1 (local cultivation of marijuana); *Wickard*, 317 U.S. 111 (local wheat farming). And it has led us to a strange place where, for example, federally “regulating the taking of a hapless toad that, for reasons of its own, lives its

⁹ Importantly, “activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.” *Raich*, 545 U.S. at 34 (Scalia, J., concurring). Under current precedent, this power “derives from the Necessary and Proper Clause.” *Id.* (Scalia, J., concurring). *But see Lopez*, 514 U.S. at 588–89 (Thomas, J., concurring).

entire life in California constitutes regulating ‘Commerce . . . among the several States.’” *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (citation omitted). This Alice-in-Wonderland understanding of interstate commerce defies common sense and is at odds with the Constitution’s text, history, and structure.

“[T]he very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with th[e Supreme] Court’s early Commerce Clause cases.” *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); see *Lopez*, 514 U.S. at 599 (Thomas, J., concurring) (noting test’s “recent vintage”). And today this judicial addition to the Constitution “has come to overshadow the original structure to which it was attached,” *Rife*, 33 F.4th at 843, severely distorting the division of sovereign powers memorialized in that document and threatening individual liberty in the process.

With the notable exception of *Raich*, even this Court’s more modern “precedents emphasize that ‘[t]he Constitution requires a distinction between what is truly national and what is truly local.’ The substantial-effects approach is at war with that principle.”¹⁰ *Taylor*, 579 U.S. at 319 (Thomas, J., dissenting) (quoting *Morrison*, 529 U.S. at 617–18). This holds particularly true for the test’s “aggregation

¹⁰ *Lopez* “took a significant step toward reaffirming this Court’s commitment to proper constitutional limits on Congress’ commerce power.” *Alderman v. United States*, 562 U.S. 1163, 1168 (2011) (Thomas, J., dissenting from denial of certiorari).

principle,” which “has no stopping point.” *Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

IV. *Raich* Allows Congress to Reach Private Conduct Lacking Any Demonstrable Nexus With Interstate Commerce.

It gets worse. The “substantial effects” gloss on Congress’s power to regulate interstate commerce flowing from New Deal-era precedent like *Wickard*, 317 U.S. 111, allowed the federal government to reach a wide swath of private activity the Framers wisely left to the States. But *Raich* goes one step further by severing any meaningful link between an actual, empirically demonstrable effect on interstate commerce and Congress’s authority to regulate. It does so by importing the deferential “rational basis” standard into the already lax substantial-effects inquiry. *See Raich*, 545 U.S. at 22. Under *Raich*, the federal government can “regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential,” *id.* at 46 (O’Connor, J., dissenting), even where doing so intrudes on “States’ core police power[]” “to protect the health, safety, and welfare of their citizens,” *id.* at 42 (O’Connor, J., dissenting). “One searches” the majority opinion “in vain for any hint of what aspect of American life is reserved to the States.” *Id.* at 70 (Thomas, J., dissenting).

Wickard, which “expanded the scope of the Commerce Clause” to authorize federal regulation of local activity “such as a wheat farmer’s own production,” *Hodel*, 452 U.S. at 308 (Rehnquist, J., concurring in the judgment), “has been regarded as the most expansive assertion of the commerce power

in our history,” *NFIB*, 567 U.S. at 657 (Scalia, J., dissenting).¹¹ But even *Wickard* at least emphasized that “questions of the power of Congress are not to be decided by reference to any formula” that “foreclose[s] consideration of the *actual effects* of the activity in question upon interstate commerce.” 317 U.S. at 120 (emphasis added). There, this Court had “real numbers at hand” and “review[ed] in detail” on stipulated facts the actual impact of the intrastate conduct on interstate commerce. *See Raich*, 545 U.S. at 53 (O’Connor, J., dissenting). “[T]he record in the *Wickard* case itself established the causal connection between the production for local use and the national market[.]” *Id.* at 20 (majority op.). Under that analysis, Congress’s power only extends to conduct that actually—as opposed to conceivably—affects interstate commerce. *See id.* at 50–55 (O’Connor, J., dissenting).

Raich misread *Wickard* and removed even *that* modest speedbump, reasoning that there is no “need” to “determine whether” wholly intrastate “activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”¹² *Id.* at 22 (majority op.); *see Taylor*, 579 U.S. at 320 (Thomas, J., dissenting). *But cf. Comstock*, 560 U.S. at 152 (Kennedy, J., concurring in the judgment) (“The rational basis referred to in the Commerce Clause context is a demonstrated link

¹¹ *Wickard* may well be a “Necessary and Proper Clause case disguised as a Commerce Clause case[.]” Calabresi *et al.*, 75 Baylor L. Rev. at 75. If so, it should be unmasked as such.

¹² The *Raich* majority mistakenly read *Wickard* as a rational-basis case. *See* 545 U.S. at 19. Not so. *See* Pet. 21–24.

in fact, based on empirical demonstration.”). This judicial innovation expanded federal power to regulate, prohibit, and even criminalize intrastate activity, such as “the local cultivation and use of marijuana in compliance with [State] law,” *Raich*, 545 U.S. at 5, even farther beyond constitutional boundaries. *Raich* thus took yet another step toward granting the federal government the general police power the Framers denied it, turning the Tenth Amendment on its head.

V. The Time Has Come to Repudiate *Raich*’s “Rational Basis” Gloss.

“Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding” Congress will continue to move the goal posts and claim even greater power to intrude on core “state police powers under the guise of regulating commerce.” *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *see, e.g., Tex. Top Cop Shop, Inc. v. Garland*, 758 F. Supp. 3d 607 (E.D. Tex. 2024) (Corporate Transparency Act). The time has come for this Court to do so.

At a minimum, this Court should not allow *Raich*’s atextual and ahistorical enlargement of Congress’s Commerce Clause power to authorize it to regulate intrastate conduct with any theoretically conceivable relationship to interstate commerce to remain on the books. As Petitioners explain, *Raich* is an outlier decision that was poorly reasoned, *see* Pet. 21–26, is neigh impossible to square with this Court’s precedent, *see* Pet. 26–33, and has not stood the test of time, *see* Pet. 36–40.

Even on its own terms, *Raich*’s continuing vitality is open to question. Subsequent developments “have greatly undermined its reasoning.” *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236 (2021) (Thomas, J., statement respecting denial of certiorari). Here, Petitioners allege that *none* of the predicate assumptions *Raich* relied on—a comprehensive federal scheme banning all production and sale of marijuana, *see* 545 U.S. at 13, 19–22, 28,¹³ a risk that allowing intrastate production and possession would increase illicit interstate commerce,¹⁴ *see id.* at 12, 20 & n.20, and this Court’s conclusion that marijuana is fungible,¹⁵ *see id.* at 18–20—hold true today. For this reason alone, “[a] prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper[.]” *Standing Akimbo*, 141 S. Ct. at 2238 (Thomas, J., statement respecting denial of certiorari).

The Petition presents an ideal (and rare) opportunity to begin to “temper” and “modify,” *Lopez* 514 U.S. at 601–02 (Thomas, J., concurring), this

¹³ Current federal policy “bears little resemblance to the watertight nationwide prohibition” at issue in *Raich*. *Standing Akimbo*, 141 S. Ct. at 2238 (Thomas, J., dissenting from denial of certiorari). And as the district court found, “the Complaint has alleged persuasive reasons for a reexamination of the way the [CSA] regulates marijuana[.]” App. 22a.

¹⁴ *See, e.g.*, Compl. ¶ 65 (seed-to-sale tracking “prevent[s] leakage” “into illicit interstate commerce”); *id.* ¶ 74 (similar).

¹⁵ *See, e.g.*, Compl. ¶ 22 (“each marijuana product sold under Massachusetts’ regulations is traceable to its origin and distinct from illicit interstate marijuana”); *id.* ¶ 103 (state-regulated marijuana “is not fungible with . . . marijuana that has travelled in illicit interstate and international commerce”).

Court's Commerce Clause and Necessary and Proper Clause jurisprudence to bring it closer in line with the Constitution's original public meaning. This Court should take up that task.

This Court should end *Raich*'s "rational basis" error by squarely overruling that aberration and making clear that the Constitution requires more before the federal government may intrude on the core police powers it reserves to the States. As Petitioners explain, *see* Pet. 34–35, the sky will not fall if this Court takes that modest step. On the contrary, our constitutional republic will be healthier for it.

CONCLUSION

This Court should grant the Petition.

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