No. 03-1454

In the

Supreme Court of the United States

JOHN D. ASHCROFT, Attorney General, et al.,

Petitioners,

v.

ANGEL McCLARY RAICH, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Does the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*, exceed Congress' power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal "medicinal" use or to the distribution of marijuana without charge for such use?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of neither party on the merits. Written consent was granted by counsel for all parties and lodged with the clerk of this Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has participated in numerous cases addressing the balance of power between the states and the federal government, including this Court's landmark Commerce Clause cases on which this case turns. For example, PLF participated as amicus curiae in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), *Jones v. United States*, 529 U.S. 848 (2000), and *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001).

Amicus Curiae will discuss the development of the *Lopez* "substantial effects" standard and the limits of the commerce power. PLF takes no position on the validity of the Controlled Substance Act (CSA) or on the medicinal use of marijuana.

INTRODUCTION

This Court has recognized three categories of activity that Congress is empowered to regulate under the Commerce Clause. First, Congress has authority to regulate the use of the channels of interstate commerce. *Lopez*, 514 U.S. at 558.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party authored any part of this brief and no person or entity made a monetary contribution for the preparation or submission of this brief.

Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* And third, Congress is authorized to regulate those activities "that substantially affect interstate commerce." *Id.* at 559. The "substantial effects" category is the most far reaching of the three and the most likely basis for determining the validity of the Controlled Substances Act, as applied to the intrastate, noncommercial cultivation, possession, and distribution of marijuana for purported medicinal purposes.

In *Lopez* and *Morrison*, this Court established a simple framework for analyzing Commerce Clause enactments that are based on the regulation of activities that substantially affect interstate commerce. However, the lower courts have generally not been faithful in applying this framework to various federal statutes, such as the Hobbs Act, the Endangered Species Act, and the Clean Water Act.

To avoid invalidating a federal act or limiting Congress' power under the Commerce Clause, the lower courts typically misapply *Lopez* and *Morrison* by aggregating intrastate, noncommercial activities to find substantial effects on interstate commerce. Or, they simply declare that the challenged statute implements an important national scheme substantially affecting interstate commerce which requires the regulation of individual intrastate, noncommercial activities. The Ninth Circuit decision in this case is a notable exception. Whatever this Court decides on the merits of this case, it should reflect the fact that

> in those cases where [this Court has] sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Morrison, 529 U.S. at 611.

We, therefore, urge this Court to uphold the Commerce Clause limits this Court outlined in *Lopez* and *Morrison* and not authorize the regulation of intrastate, noncommercial activities to broaden the scope of the federal commerce power.

SUMMARY OF THE ARGUMENT

In *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court found that the federal government could regulate local economic activity such as excess wheat grown on a farm for sale and farm consumption, even though the wheat by itself had only a *de minimis* effect on interstate commerce. This Court reasoned that federal regulation of such wheat was a necessary part of a federal economic program to support national and international wheat markets in that homegrown wheat could, in the aggregate, substantially influence price and market conditions. Under this *Wickard* aggregation principle, federal regulatory power under the Commerce Clause greatly expanded, allowing federal regulation of just about anything. *See* Richard A. Epstein, *Propter Honoria Respectum, Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 188-89 (1996).

Two recent decisions of this Court, however, attempted to limit federal regulatory power under the Commerce Clause generally and *Wickard* specifically. In *Lopez* and *Morrison*, this Court invalidated federal laws that attempted to regulate wholly intrastate noneconomic activities that had, at best, only attenuated effects on interstate commerce. These cases both turned on the nature of the activity: "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case . . . . 'Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity . . . .'" *Morrison*, 529 U.S. at 610.

In *Lopez*, this Court struck down the Gun Free School Zones Act because the regulated activity—possession of a gun

in a school zone—had nothing to do with economic activity and did not substantially affect interstate commerce. In *Morrison*, this Court invalidated a provision of the Violence Against Women Act that allowed victims of "gender-motivated violence" to sue in federal court. This Court found that physical attacks by one person against another, a wholly intrastate activity, was not economic activity on its face and isolated events could not be aggregated to find substantial effects on interstate commerce.

Both *Lopez* and *Morrison* strongly affirmed that federal power under the Commerce Clause has inherent limits designed to prevent the federal government from becoming a government of general powers, like the states. To protect the "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-68, "first principles" require that Commerce Clause enactments actually govern interstate commerce.

But "first principles" are often ignored in the courts below, notwithstanding the pronouncements of this Court in *Lopez* and *Morrison*. Therefore, this Court should unambiguously declare that Congress has no power to regulate intrastate, noncommercial endeavors as activities that substantially affect interstate commerce.

ARGUMENT

I

THE MODERN "SUBSTANTIAL EFFECTS" STANDARD LIMITS THE COMMERCE POWER TO ECONOMIC ACTIVITY

This Court has relied on "substantial effects" to uphold a variety of laws under the Commerce Clause, but three cases are noteworthy for their expansive application of the commerce power. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn* represent the outer

limits of Congress' authority to regulate under the Commerce Clause.

In the first case, the Jones & Laughlin Steel Corporation was charged with unfair labor practices under the National Labor Relations Act when the corporation apparently discharged certain employees because of their union affiliation. As a defense, Jones & Laughlin Steel argued that the Act was constitutionally infirm because it was not directed at commerce but was a gambit aimed at subjecting all industrial labor relations to federal control without regard to the effects on interstate commerce. *See Jones & Laughlin Steel*, 302 U.S. at 29.

To determine the object of the Act, this Court looked to the statutory language itself and observed that the Act empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* at 30. The Act, in turn, defined "commerce" in the traditional sense to mean "trade, traffic, commerce, transportation, or communication among the several states." *Id.* at 31. The Act went further and also defined the term "affecting commerce."

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Id.

Because the National Labor Relations Act explicitly limited the Board's jurisdiction to only those labor practices actually "affecting commerce," this Court found the Act was a valid Commerce Clause enactment. By "its terms," this Court noted, the Act does "not impose collective bargaining upon all industry regardless of effects upon interstate or foreign

commerce." *Id.* Rather, this Court found, "[i]t purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Id.*

The significance of this analysis, as would later become clear in *Lopez* and *Morrison*, lies in this Court's search for a jurisdictional element tying the regulated activity to impacts affecting commerce (so as to limit the scope of the Act to the delegated authority) and this Court's reliance on the terms of the Act itself; on what the Act expressly purports to regulate.

After upholding the Act facially, this Court considered whether the regulated activity was within constitutional bounds as applied in that particular case; that is, whether the unjustified firing of employees would affect (i.e., burden or obstruct) interstate commerce. *Id.* at 32. The record showed that Jones & Laughlin Steel was the fourth largest steel producer in the country with nineteen subsidiaries and integrated operations throughout the nation that included production as well as transportation and sale of products in interstate commerce. *Id.* at 25-26. In counterpoint, however, was the fact that the discharged employees worked only in the local manufacturing plant and were not involved in transporting or selling the product in interstate commerce. *Id.* at 40. According to this Court, this latter fact was not determinative. *Id.* Rather, the case turned on how the stoppage of Jones & Laughlin Steel's manufacturing operations by industrial strife—which the National Labor Relations Act was designed to prevent—would affect interstate commerce. *Id.* at 41.

In considering the matter, this Court relied on what it called the fundamental principle "that the power to regulate commerce is the power to enact 'all appropriate legislation' for its protection and advancement." *Id.* at 37. "That power is plenary," this Court said, "and may be used to protect interstate

commerce 'no matter what the source of the dangers which threaten it.'" *Id.* This Court said further:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Id.

This statement describes the third category of Commerce Clause enactments—the regulation of activity that substantially affects interstate commerce. As with similar statements of the "substantial effects" category of Commerce Clause regulation, this Court was focused on finding a "close and substantial" impact on interstate commerce and determining whether the regulation was necessary "to protect that commerce."

In view of Jones & Laughlin Steel's far-flung activities, this Court found the stoppage of its intrastate manufacturing operations by industrial strife would have a serious effect on interstate commerce that is direct, immediate, and even catastrophic. *Id.* at 41. When an industry on a national scale makes its relation to interstate commerce a "dominant factor," this Court concluded, Congress may regulate labor relations "to protect interstate commerce from the paralyzing consequences of industrial war." *Id.*

In *United States v. Darby*, this Court upheld the Fair Labor Standards Act, which prohibited the shipment, in interstate commerce, of goods that were produced without compliance with the Act's standards for employee wages and hours. *Darby*, 312 U.S. at 109. This Court determined interstate commerce is injured when it is used as an instrument of unfair competition "in the distribution of goods produced under substandard labor conditions." *Id.* at 115. This case extended the reach of the

Commerce Clause to local manufacturing operations—an intrastate activity—that this Court had previously determined was beyond the scope of congressional authority. *Id.* at 115-117. This Court explained the scope of that authority in these terms:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make the regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. at 118.

Once again, this Court's inquiry was directed at both the significance of the regulated activities' effect on interstate commerce and the legitimacy of the end, or purpose, of the regulation (i.e., whether Congress was exercising control over interstate commerce).

In a further extension of the "substantial effects" category of Commerce Clause enactments, this Court upheld the economic regulation of local wheat production in *Wickard v. Filburn* under the Agricultural Adjustment Act of 1938.

Among other things, that Act involved a national regulatory scheme to control the price of wheat by regulating the volume of wheat on the market. "Acreage limitations were the Act's primary tool for controlling the supply of federally subsidized crops." Jim Chen, *Filburn's Legacy*, 52 Emory L.J. 1719, 1734 (Fall 2003). Before the 1941 planting season, it was clear that the low prices for wheat were the result of excessive supply. *Id.* "Only stiffer penalties on excess production could

prevent already overflowing stocks from surpassing the all-time high, which had been reached in 1940." *Id.*

Under the Act, the Secretary of Agriculture was directed "to proclaim a national acreage allotment for each year's wheat crop . . . ." *Id.* at 1735. Because of a growing fear of a glut in the market and the associated price crash, allotments were set and penalties raised for excess crops during the 1941 growing season. *Id.* Roscoe Filburn was subject to this regulation.

Filburn was a lifelong farmer who raised dairy cattle and poultry. He also grew wheat which he sold, fed to his cattle and poultry, and used for household consumption. *Id.* at 1734. Additionally, Filburn ran a commercial business selling milk and eggs to about 75 customers a day from the cattle and poultry he fed with the wheat. *Id.* Filburn's allotment was 11.1 acres, but he planted 23 acres instead. The extra acreage yielded 239 bushels of wheat in excess of Filburn's allotment. Filburn was, therefore, fined for the excess, which he subsequently challenged in federal court.

On review, this Court found that home-grown wheat competes with wheat in interstate commerce either by entering the market or, if consumed by the grower, reducing the purchase of wheat in the market. *Wickard*, 317 U.S. at 128. And while the grower's "own contribution to the demand for wheat may be trivial by itself," this Court held that the aggregate economic effect of "others similarly situated, is far from trivial" and can be regulated. *Id.*

By amassing trivial effects of similar activity to find a "substantial effect" on interstate commerce, *Wickard* pushed the very limits of Congress' Commerce Clause authority. Never had this Court so liberally construed or so broadly applied the commerce power.

Together, *Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in a new era of expanding federal regulation of

intrastate activity that seemed to recognize no limit on congressional authority under the Commerce Clause. *See* Arthur B. Mark III, *United States v. Morrison, The Commerce Clause and the Substantial effects test: No Substantial Limit on Federal Power*, 34 Creighton L. Rev. 675 (April 2001) (arguing that aggregation under the substantial effects standard provides no meaningful stopping point to the reach of the commerce power).

Indeed, the lower courts have relied on these cases to justify federal regulation of intrastate, noncommercial activity, such as arson, robbery, and other crimes, without regard to the inherent limitations of the commerce power. However, in *Lopez* and *Morrison*, this Court declared it had gone far enough in broadening the scope of the Commerce Clause and drew a constitutional line at *Wickard* over which Congress may not pass.

Contrary to the prevailing view in the lower courts that federal jurisprudence required the proverbial rubber stamp on Congress' Commerce Clause enactments, this Court found in *Lopez* and *Morrison* that its Commerce Clause cases, including *Jones & Laughlin Steel*, *Darby*, and *Wickard*, established definite limits to the commerce power. From these limits, this Court built a simple framework for analyzing "substantial effects" and determining the constitutionality of certain Commerce Clause legislation, such as the CSA in this case.

A. Under *Lopez*, Intrastate Activity May Be Regulated for its Substantial Effects on Interstate Commerce Only If the Regulated Activity Is Economic in Nature

Alfonso Lopez, Jr., was indicted for violating the Gun-Free School Zones Act of 1990. *Lopez* at 551. That Act made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C.

§ 922(q)(1)(A). The term school zone was defined as "in, or on the grounds of, a public, parochial or private school" or within a distance of 1,000 feet of such a school. 18 U.S.C. § 921(a)(25).

On March 10, 1992, Lopez, a 12th-grade student, arrived at school with a concealed .38 caliber handgun and five bullets. *Lopez*, 514 U.S. at 551. He was arrested and initially charged with firearm possession under state law, but the state law charges were dropped when federal officers charged Lopez with a federal crime under § 922(q) of the Gun Free School Zones Act. *Id.*

Lopez sought to dismiss the indictment as beyond the commerce power of Congress. *Id.* But the district court upheld the Act holding that § 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce." *Id.* at 551-552. On appeal, however, the Fifth Circuit reversed and held that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." *Id.* at 552. This Court affirmed. *Id.*

Starting with first principles, this Court observed that the "Constitution creates a Federal Government of enumerated powers." *Id.* This principle was "adopted by the Framers to ensure protection of our fundamental liberties" by maintaining the balance of power between the States and the Federal Government so as to reduce the risk of abuse from either side. *Id.* As for the enumerated power, delegated to Congress, "'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,' Art. I, § 8, cl. 3", this Court emphasized the inherent limitations found in the very language of the clause. *Lopez*, 514 U.S. at 553.

When this Court first defined the commerce power in *Gibbons v. Ogden*, 22 U.S. 1 (1824), it recognized that

> [c]omprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

Lopez, 514 U.S. at 553 (citing *Gibbons*). Another inherent limitation to the commerce power, recognized by this Court, was that the commerce power is the power to regulate or to "prescribe the rule by which commerce [itself] is governed." *Id.*

In *Lopez*, this Court credited *Jones & Laughlin Steel*, *Darby*, and *Wickard* for creating an era of constitutional jurisprudence that greatly increased the commerce power of Congress beyond the limits previously defined by this Court. *Id.* at 556. But, as this Court pointed out, even these expansive precedents affirmed that the commerce power is "subject to outer limits." *Id.* at 557.

What are those limits? This Court cited the admonition of *Jones & Laughlin Steel* that the commerce power is constrained by our dual system of federal and state government and may not be stretched to encompass "indirect and remote" effects on interstate commerce so as to extinguish "the distinction between what is national and what is local and create a completely centralized government." *Id.* (citing *Jones & Laughlin Steel*).

This Court also took pains to characterize *Wickard* as this Court's "most far reaching example of Commerce Clause authority over intrastate activity." *Id.* at 560. But, this Court emphasized that at least that case involved some *economic activity* and that the Agricultural Adjustment Act upheld by this Court was directed at regulating competition in commerce which was directly affected by home-grown wheat. *Id.* This Court concluded that it had always observed the constitutional

structure, even in those cases where the congressional enactment was upheld based on "substantial effects," and that this Court's inquiry in such cases was "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.*

After laying the foundation of a limited commerce power, this Court had no difficulty finding that the Gun-Free School Zones Act had exceeded Congress' Commerce Clause authority and was constitutionally invalid. The framework this Court followed in reaching this conclusion is simple and straight forward.

This Court readily determined that *Lopez* was a "substantial effects" case. For that determination, this Court looked at the object of § 922(q) and observed that it did not purport to regulate the use of channels of interstate commerce or prohibit the interstate transportation of a commodity through the channels of commerce. *Id.* at 559. Likewise, because the statutory provision prohibited mere possession of a gun in a school zone, it could not be justified as a regulation to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Id.* at 561. If § 922(q) was to be upheld, it would have to be under the third category of Commerce Clause enactments—"as a regulation of an activity that substantially affects interstate commerce." *Id.* at 559

First, this Court looked at the text of the statute and found that, unlike the act in *Wickard*, § 922(q) by its own terms had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* 561. This obvious conclusion was compelled by the express language of the Act which made the mere possession of a firearm in a school zone a crime.

This Court also found that the regulated act, the possession of a gun, was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be

undercut unless the intrastate activity were regulated." *Lopez* at 561. In fact, the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id.* Section 922(q) could not be sustained, therefore, under this Court's cases, like *Wickard*, that allowed congressional regulation of activities "that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* Interestingly, this Court came to this conclusion even though the prohibited activity, possession of a gun, involved a commercial item.

After rejecting the aggregation approach to sustaining the regulation of an intrastate activity that is not economic in nature, this Court sought next to determine whether § 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id.* For that determination, this Court turned again to the language of the Act and found that it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Because no substantial effect was "visible to the naked eye," in the text of the Act itself, this Court also looked to the legislative history to locate any express congressional findings that demonstrated Congress' belief that the possession of a gun in a school zone substantially affected interstate commerce. *Id.* at 562-563. But this Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that § 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime interferes with the national economy in two respects: (1) violent crime increases the cost of insurance throughout the nation and (2) violent crime deters people from traveling to unsafe areas. *Id.* at 563-564. The government also argued that guns in school

undermine the learning environment, producing less productive citizens, which hurts the national economy. *Id.* at 564. To underscore the limitations on the commerce power, this Court addressed the implications of those arguments.

The government acknowledged under its "costs of crime" argument that Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id.* Likewise, this Court found that under the government's "national productivity" argument, Congress could regulate anything related to individual economic productivity. *Id.* If these arguments were accepted, this Court concluded it would be "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id.* "Depending on the level of generality," this Court observed, "any activity can be looked upon as commercial." *Id.* at 565.

This was the fallacy in the government's arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. *Id.* at 567. Although some of this Court's earlier cases leaned in that direction and suggested a possible expansion of the commerce power, this Court set aside § 922(q) as an invalid Commerce Clause enactment and declined in *Lopez* to go any further. *Id.* "To do so," this Court stated, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-568 (citing *Gibbons* and *Jones & Laughlin Steel*).

B. *Morrison* Affirmed That the "Substantial Effects" Standard Applies to Intrastate Activity Only if the Activity Is Economic in Nature

Morrison is instructive because of what it says about this Court's decision in *Lopez*. In the fall of 1994, Christy

Brzonkala enrolled at Virginia Polytechnic Institute. *Morrison*, 529 U.S. at 602. Shortly after meeting fellow students Antonio Morrison and James Crawford, Brzonkala alleged they assaulted and repeatedly raped her. *Id.* Brzonkala filed a complaint against the students under the school's Sexual Assault Policy. *Id.* at 603. After a hearing, the school's Judicial Committee found Morrison guilty of sexual assault and suspended him for two semesters. *Id.* Morrison's punishment was set aside, however, on administrative appeal. *Id.* Crawford was not punished due to lack of evidence. *Id.*

Brzonkala then filed a suit in federal court against Morrison and Crawford under § 13981 of the Violence Against Women Act of 1994. That Act provided a federal civil remedy for victims of gender-motivated violence and stated that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). The Act defined a crime of violence motivated by "gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). The district court dismissed the suit because it determined that § 13981 was an invalid Commerce Clause enactment. The en banc court of appeals and this Court both affirmed.

Returning to "first principles," this Court reaffirmed that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. *Morrison*, 529 U.S. at 607. As this Court emphasized, "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id.* at 608.

Because § 13981 focused "on gender-motivated violence wherever it occurs" and was not directed at the instrumentalities of interstate commerce or interstate markets, or even things or persons in interstate commerce, the majority determined that the

Act fell within the third category of Commerce Clause enactments and could only be sustained as a regulation of activity that substantially affects interstate commerce. *Id.* at 609. To conduct its analysis, this Court concluded that *Lopez* provided the appropriate framework. *Id.*

According to this Court, four factors contributed to the decision in *Lopez*. The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate an economic activity. *Id.* at 610. The second factor was that the Act contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 611. This factor was important to establish that the Act was in "pursuance of Congress' regulation of interstate commerce." *Id.* The third factor was that neither the statute "nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce" of the regulated activity. *Id.* at 612. And, the fourth factor was that the connection between the regulated activity and a substantial effect on interstate commerce was remote. *Id.*

With this framework underlying this Court's Commerce Clause analysis, resolution of the *Morrison* case was clear. *Id.* at 613. First, this Court held, as it must, that the statute, by its terms, had nothing to do with commerce: "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* As a result, gender-motivated crimes are not the type of activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id.* at 610-611. Not even *Wickard*'s aggregation principle was availing. *Id.* at 611 n.4.

This was critical to the outcome of the case. As the majority observed, the noneconomic, criminal nature of the

prohibited activity in *Lopez* was central to its decision in that case. *Id.* at 610. But this Court did not stop there. To further illustrate the importance of this factor, this Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate commerce *only* when the regulated activity was economic in nature. *Id.* at 611, 613.

Next, this Court held that the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce. *Id.* at 613. Rather than limit its reach to a discrete set of gender-motivated violent crimes that had an explicit connection with or effect on interstate commerce, § 13981 was drawn too broadly and included purely intrastate violent crime. *Id.* The language of the Act did not support the conclusion, therefore, that § 13981 was adequately tied to interstate commerce. *Id.*

Unlike the situation in *Lopez*, however, this Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614. Among others, those effects included deterring victims from traveling interstate or engaging in interstate business. *Id.* at 615. Diminishing national productivity, increased medical costs, and a decrease in the supply and demand of interstate goods were also cited. *Id.* But this Court did not believe that these findings were sufficient to uphold the Act under the Commerce Clause. *Id.* "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not make it so." *Id.* at 614. That determination, the majority held, is for the courts to decide. *Id.*

Finally, because Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, this Court decided that Congress' findings

were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which this Court had already rejected in *Lopez*. *Id.* at 615. This Court was unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity's attenuated effects on interstate commerce. *Id.* at 617. Therefore, this Court held that Congress did not have authority under the Commerce Clause to enact § 13981 of the Violence Against Women Act. *Id.* at 619.

II

"FIRST PRINCIPLES" RECOGNIZE THE INHERENT LIMITS OF THE COMMERCE CLAUSE AND DICTATE THAT COMMERCE CLAUSE ENACTMENTS PURSUE A LEGITIMATE COMMERCE CLAUSE OBJECTIVE—THE GOVERNANCE OF INTERSTATE COMMERCE

This Court's repeated reference to "first principles" seems to get lost in the academic debate over this Court's Commerce Clause jurisprudence. However, in *Lopez* and *Morrison*, this Court's understanding of "first principles" determined the outcome of those cases. As explained in *Lopez*, and reiterated in *Morrison*, this Court understood "first principles" to mean that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the States which are numerous and indefinite. *Lopez*, 514 U.S. at 552.

This limitation on federal authority was necessary, this Court stressed, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-555. Consequently, while some cases had broadly construed the power delegated to Congress to regulate commerce, this Court noted in *Lopez* that it had never abandoned "first principles" and its cases had set

distinct limits on Congress' exercise of the commerce power. *Id.* at 556-557.

This conclusion was not just an observation. It was a statement of substantive law. This Court took pains to trace the development of its Commerce Clause cases from *Gibbons v. Ogden*, in which this Court initially defined the nature of the commerce power, to *Jones & Laughlin Steel*, *Darby*, and finally *Wickard*. *Id.* at 553-556. Nearly half of the majority opinion in *Lopez* is devoted to extracting from these cases the fundamental concept that the Commerce Clause has distinct limits.

In its Commerce Clause cases, this Court variously, but consistently, defined those limits in terms of the legitimate ends for which the commerce power could be employed. Starting with *Gibbons*, this Court affirmed that the commerce power was the power to regulate commerce. *Id.* at 553. In other words, the *Gibbons* Court recognized that Congress has authority to regulate commerce itself. This Court saw that as an inherent limitation on the commerce power. *Id.*

In *Gibbons*, this Court observed that the constitutional grant of authority to regulate interstate commerce presupposes that Congress cannot regulate that which is not interstate commerce, such as purely intrastate commerce. *Id.* (citing *Gibbons*). And while this Court seemed to lean away from this restrictive view of the commerce power in its earlier cases, this Court did not lose sight of the principle that the legitimate end of the commerce power is the regulation of interstate commerce.

Even when this Court was stretching the bounds of the Commerce Clause to encompass some types of intrastate activity, the touchstone of this Court's "substantial effects" cases was whether the statute governed interstate commerce.

In *Jones & Laughlin Steel*, this Court held that Congress may regulate intrastate activities the control of which is

"essential or appropriate to protect [interstate] commerce from burdens and obstructions." *Jones & Laughlin Steel*, 301 U.S. at 37. Likewise, in *Darby*, this Court held that Congress can regulate intrastate activities for the "attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118. And, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), which was decided the same year as *Wickard*, this Court held that the power of Congress to regulate commerce "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *Id.* at 119.

The unifying theme in these cases is that the power to regulate interstate commerce is limited to the power to enact "all appropriate legislation" for "its protection and advancement." *Jones & Laughlin Steel*, 301 U.S. at 37. This fundamental principle greatly simplifies Commerce Clause analysis under the "substantial effects" category and is the key to understanding *Lopez* and *Morrison*.

In *Lopez* this Court opened with its holding:

> The Act neither regulates a commercial activity nor contains a requirement that the possession [of a gun] be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . . ."

Lopez, 514 U.S. at 551.

That statement of this Court's ultimate holding in the *Lopez* case is a succinct pronouncement of the constitutional standard for determining if a statute "substantially affects" interstate commerce. A statute that, by its terms, does not regulate a commercial or economic activity and does not expressly require that the regulated activity have any connection with interstate commerce is clearly not enacted to protect or

advance interstate commerce. Such a statute cannot be said, therefore, to be in pursuance of a legitimate Commerce Clause end—the exercise of Congress' power to govern interstate commerce.

This conclusion follows from this Court's understanding of "first principles" which dictate meaningful limits to the commerce power to protect the federal-state balance. Accordingly, the first *Lopez* factor is directed at determining whether Congress chose to regulate an economic or commercial activity, whereas the other three *Lopez* factors are directed at determining whether Congress required the regulated activity to have a direct and concrete connection to interstate commerce.

> In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest.

Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 255 (1964).

III

THIS COURT NEEDS TO REINFORCE *LOPEZ* AND *MORRISON* WITH A CLEAR STATEMENT THAT CONGRESS CANNOT REGULATE INTRASTATE ACTIVITY UNDER THIS COURT'S "SUBSTANTIAL EFFECTS" STANDARD UNLESS THE ACTIVITY IS ECONOMIC IN NATURE

Although this Court delineated the scope of the Commerce Clause in *Lopez* and *Morrison*, federal regulation of local activities that have nothing to do with interstate commerce continues, even in the face of constitutional challenge. This type of regulation often is justified by the lower courts' putative application of the "substantial effects" standard. *See*, for

example, *United States v. McFarland*, 311 F.3d 376, 378-379 (5th Cir. 2002) (Federal conviction under the Hobbs Act for convenience store robberies in Fort Worth, Texas. Court found substantial effects on interstate commerce without evidence that the stores had any "facilities, property, employees, bank accounts, or activities" outside the city.); *Jones v. United States*, 529 U.S. 848 (Federal conviction for arson of an owner-occupied home. Lower court found substantial effects on interstate commerce based on fact that home received out of state natural gas and was covered by out of state mortgage and insurance policy. Reversed by this Court on statutory grounds.); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (Violation of Clean Water Act for discharge without a permit. Court found that Congress could regulate trivial discharges to small intrastate, nonnavigable wetlands based on *Wickard* aggregation.); and, *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (Prohibition on the "taking" of isolated, noncommercial cave-dwelling insects under the Endangered Species Act upheld. Court found Congress may prohibit "takes" of noncommercial species because such regulation is a necessary part of a scheme to protect the nation's genetic heritage which substantially affects interstate commerce.) (Currently on petition for writ of certiorari in this Court, Case No. 3-1454.)

These and similar cases involve the regulation of intrastate, noncommercial activity that far exceeds the constitutional limits set in *Lopez* and *Morrison*. Indeed, they go beyond the expansive reading of the commerce power in *Wickard*: "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity . . . ." *Morrison*, 529 U.S. at 610.

This Court has never upheld federal regulation of intrastate activity, based upon that activity's substantial effects on interstate commerce, unless the activity was "some sort of

economic endeavor." *Morrison*, 529 U.S. at 611. The key in this case, then, as with other "substantial effects" cases, is whether the activity the federal government seeks to regulate is "some sort of economic endeavor" that also has a substantial effect on interstate commerce. Federal Commerce Clause regulation that goes beyond this limit, and encompasses intrastate, noncommercial activity, acknowledges no stopping point to federal power. Rather, it destroys all distinction between what is national and what is local in violation of this Court's precedents and constitutional constraints.

Clearly, *Lopez* and *Morrison* do not provide an effective guide to defining the reach of federal regulation under the Commerce Clause when applied to intrastate, noncommercial activity. Nor do these cases provide a stable bulwark for the protection of our fundamental liberties by maintaining the balance of power between the States and the Federal Government. *See Lopez*, 514 U.S. at 552. But if the commerce power is constrained by our dual system of government, and this Court is willing to stand on "first principles" as it said it did in *Lopez* and *Morrison*, then this Court should more clearly define the scope of the commerce power.

This case presents Commerce Clause issues like those discussed above and addressed in *Lopez* and *Morrison*. This case provides the Court an opportunity, therefore, to state unequivocally that Congress *cannot* regulate intrastate activity that is not economic in nature under the "substantial effects" category of Commerce Clause enactments.

However this Court decides this case, it should not adopt a mode of analysis that enlarges the federal commerce power or justifies the regulation of intrastate, noncommercial activity which this Court has never before sustained.

CONCLUSION

The purpose of the *Lopez* inquiry is to determine if Congress *intended* to regulate commerce and then to ascertain "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557. A straightforward application of the "*Lopez* factors" would demonstrate that a federal statute that purports to regulate intrastate, noncommercial activities cannot be sustained under the Commerce Clause. This Court should make it clear that such a statute does not substantially affect interstate commerce.

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Respectfully submitted,

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