No. 08-1224

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

CONSOLIDATED BRIEF OF THE CATO INSTITUTE AND PROF. RANDY E. BARNETT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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November 4, 2009

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INTEREST OF *AMICI*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*. It also files *amicus* briefs with the courts, including in cases focusing on the Commerce Clause and the Necessary and Proper Clause such as *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Baylor v. United States*, 517 F.3d 899 (6th Cir. 2008), *cert. denied*, 128 S.Ct. 2982 (2008). The present case centrally concerns Cato because it represents yet another attempt by the federal government to overstep its constitutional powers.

Prof. Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center. After graduating from

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[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in part or in whole; and no person or entities other than *amici*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

Northwestern University and Harvard Law School, Professor Barnett tried many felony cases as a prosecutor in the Cook County States' Attorney's Office in Chicago. In 2004 he argued *Gonzales v. Raich* in the U.S. Supreme Court. Since entering teaching, he has taught constitutional law, contracts, and criminal law, among other subjects. Prof. Barnett has published more than ninety articles and reviews, as well as eight books. His book, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004), and other scholarship concerns the original meaning of the Commerce and Necessary and Proper Clauses and the relationship of the Necessary and Proper Clause to the other powers enumerated in the Constitution.

SUMMARY OF ARGUMENT

This case presents the Court with "the arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments." THE FEDERALIST NO. 37, p. 227 (James Madison) (Clinton Rossiter ed., 1961) ("THE FEDERALIST"). At issue is the constitutionality of 18 U.S.C. § 4248 (the "Act") which imposes on the States and its citizens, a federal system of civil commitment. Congress did not identify the source of its authority to legislate in an area historically reserved to the States and uniquely within their ken. The Government now seeks to uphold the Act as "Necessary and Proper" to Congress' power "to establish a federal penal system."

Pet. Br. at 22, *citing* U.S. CONST. art. I, § 8, cl. 18. Alternatively and implicitly, the Government relies upon the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3), and attempts to distinguish this Court's decisions in *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). *See* Pet. Br. at 42-44. Neither the Necessary and Proper Clause nor the Commerce Clause is a permissible footing for the Act and, therefore, the Act is unconstitutional. As this Court recognized almost 150 years ago, "[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole," than the Government's unconstitutional assertion of power against its own citizens. *Ex Parte Milligan*, 71 U.S. 1, 118-119 (1866) (granting *habeas corpus* petition).

The Necessary and Proper Clause is not an independent source of Congressional power; rather, it allows Congress to carry out its enumerated powers with "appropriate" means that are "plainly adapted to a [constitutional] end." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Indeed, *M'Culloch* teaches that the Necessary and Proper Clause provides a basis for searching judicial review of legislative action, and is part of the Constitution's system of checks and balances. By its own terms, the Necessary and Proper Clause permits Congress to enact legislation that "**shall be necessary and proper *for carrying into execution***" the powers granted to it in the Constitution.

The Act fails to pass Constitutional muster, first, because it does not even involve a matter within the scope of any enumerated power. Both supporters of the Constitution and its skeptics appropriately feared that Congress would rely upon the Necessary and Proper Clause to enact whatever laws it wanted. The Constitution itself is clear: the Necessary and Proper Clause allows Congress to make laws only "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States. . . ."

Thus, legislation adopted under the Clause may be justified only by an enumerated power, not by an implied power. Congress may carry into execution the powers specifically delegated to it, and the Necessary and Proper Clause permits adoption of reasonable means to carry into execution the enumerated power. But there the power ends. Indeed, the Tenth Amendment was adopted to ensure that Congress did not rely upon the Clause to expand its powers those enumerated. As it must, this Court has guarded against the danger perceived at the founding of the Republic: **in the 190 years since *M'Culloch*, this Court has never upheld a statute based on the Necessary and Proper Clause that was not tethered to a specific enumerated power**.

The Government reasons that, because Congress has the power to enact criminal laws, it must therefore have the power to establish and maintain a penal system. But the power to operate a penal system is not a constitutional end, and cannot itself imply the

further power to provide for civil commitment of persons who would otherwise be released at the ends of their sentences. Thus, the Act cannot rest on the application of the Necessary and Proper Clause to an unenumerated implied power such as the power "to establish a federal penal system."

Nor does the Act "carry into execution" even the Government's implied power "to establish a federal penal system," let alone any enumerated power. Even for matters plainly within the scope of an enumerated power, Congress may not enact laws that do not really further an enumerated end, or that do so at the expense of the rights reserved to the States or the people under the Tenth Amendment. The Court enforced such limits in *Printz v. United States*, 521 U.S. 898 (1997), and should enforce such limits here, too. **The civil commitment of prisoners at the conclusion of their terms has nothing to do with the creation or maintenance of the penal system itself (let alone anything to do with one of Congress' enumerated powers).** Even if Congress had been focused on establishing or maintaining the federal penal system, it would not have done so by passing the Act. The true aim of the Act is not to support the operation of the prison system at all, but to protect the public at large by continuing the confinement of potentially dangerous persons after the conclusion of their sentences. However well intentioned Congress may have been, it had no power to legislate for the purpose of protecting the public from dangerous persons.

The Act cannot be saved through expansion of Congressional authority under the Commerce Clause. The analysis under the Commerce Clause is substantially the same as discussed above. *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 622 (2002) ("BECK"). Notably, the Government does not and cannot affirmatively argue that the Act is a legitimate exercise of Congress' Commerce Clause power. **Civil commitment involves neither commerce nor interstate activity**. Mental illness demands physicians not merchants. Instead, the Government merely argues that the Act is not an exercise of the general police power excluded from the Commerce Clause, without showing that the Act is grounded in powers included within the Commerce Clause. Pet. Br. at 42-43.

In the end, Congress cites no constitutional basis for the Act, and the Government's *post hoc* justifications prove only that there is none. The decision of the Fourth Circuit must be affirmed.

ARGUMENT

I. The Constitution Creates a Federal Government of Limited Enumerated Powers and Every Act of Congress Must Have a Constitutional Source.

The federal government exists, intentionally so, as a government of limited powers:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (citations and quotations omitted); *M'Culloch*, 17 U.S. at 405 ("Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."). After all, when the Constitution was drafted, our nascent Nation had just declared independence from the Super-Power of its day because "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these states." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

In response to this "long train of abuses and usurpations," our forefathers found it their "duty" not only "to throw off such government," but also "to provide new guards for their security." *Id.* The Constitution was that safeguard. *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.").

History taught our Nation's founders that such safeguards were absolutely necessary to maintain our liberties:

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; . . . . [O]ur fathers . . . knew the history of the world told them . . . that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. . . . [T]hey secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb. . . .

Ex Parte Milligan, 71 U.S. at 124.

To ensure that these fundamental limits are applied, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607. Article I

begins: "All legislative powers *herein granted* shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I, § 1 (emphasis added). In this case, however, "Congress did not explicitly identify the source of federal authority on which it relied in enacting the civil commitment provision of the . . . Act." *United States v. Comstock*, 507 F. Supp. 2d 522, 530 (E.D.N.C. 2007). For the reasons discussed below, neither the Necessary and Proper Clause, nor the Commerce Clause can provide Congress with the authority for the Act.

II. The Act Is Not a Legitimate Exercise of The Necessary and Proper Clause.

A. The Necessary and Proper Clause Limits Congressional Power.

The Necessary and Proper Clause provides:

> The Congress shall have the Power . . . [t]o make all Laws which [1] **shall be** [2] **necessary and** [3] **proper** [4] **for carrying into Execution** [5] the foregoing Powers and all other **Powers vested by this Constitution** in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 18 (the "Clause") (emphasis added). In order to guard against another tyranny, the text of the Clause limits Congressional Power in five ways:

(1) it permits judicial review by stating that the requirements and limits specified by the Clause "shall be"

(2) it requires that laws be "necessary"

(3) it requires that laws be "proper"

(4) it permits only those laws that actually carry into execution those powers within its scope; and

(5) it defines the limited scope of the Clause, which applies only to "Powers vested by the Constitution."

While we initially discuss all five limitations in order to understand the role of the Necessary and Proper Clause as a check on Congressional power, this brief primarily focuses on the fourth and fifth limitations in Sections II(C)(2) and II(C)(1), respectively.

Shall Be

Chief Justice Marshall explained that the Clause creates a basis for judicial review to circumscribe congressional action:

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; **it would become the painful duty of this tribunal**, should a case requiring such a decision

> come before it, **to say, that such an act was not the law of the land**.

M'Culloch, 17 U.S. at 423. The requirement that the laws "shall be necessary and proper," does not permit Congress to decide for itself what is necessary and what is proper. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 276 (1993) ("LAWSON"), *cited in Printz*, 521 U.S. at 924. Instead, the Necessary and Proper Clause provides a basis for judicial review. *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 208-215 (2003) ("BARNETT").

The frequently quoted test for such review is: "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." *M'Culloch*, 17 U.S. at 421 (emphasis added).

When required, this Court has in fact relied upon the Necessary and Proper Clause to determine that a Congressional act "was not the law of the land." *See Printz*, 521 U.S. at 923-24 (Brady Act was not Necessary or Proper because it violated state sovereignty in the execution of the Commerce Clause).

In exercising that judicial review, this Court must effectuate the twin requirements that legislation be both necessary and proper. *See* BARNETT at

215-220; LAWSON at 307-08, *citing* Andrew Jackson, *Veto Message*, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 263 (Philip B. Kurland & Ralph Lerner eds., 1987) ("This privilege . . . is not '*necessary*' to enable the bank to perform its public duties, nor in any sense '*proper*,' because it is vitally subversive of the rights of the States.").

Necessary

While "necessary" does not mean "absolutely necessary," it certainly has limits. BARNETT at 203-215. This Court asks whether legislation was really enacted to further the end on which its constitutionality was purportedly based. BECK at 609. "The legislature must utilize means 'really calculated to' effect an end entrusted to its care, and may not use its constitutional powers as a 'pretext' for achieving other ends." BECK at 612, *citing M'Culloch*, 17 U.S. at 423. "The longer the chain of cause and effect between the means and the professed end, the less plausible is the claim that the measure will really perform the function asserted." BECK at 613.

Proper

In addition to being necessary, laws must also be proper. Proper regulation limits the scope of regulation. *See Comstock*, 507 F. Supp. 2d at 540-41, *citing M'Culloch*, 17 U.S. at 423 and *Morrison*, 529 U.S. at 618 n.8. *Accord* LAWSON at 271 ("[T]he word 'proper'

serves a critical . . . constitutional purpose by requiring executory laws to be *peculiarly within Congress's domain or jurisdiction* – that it, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe upon the retained rights of the state or of individuals.") (italics in original).

For Carrying into Execution

The Necessary and Proper Clause may only be used to carry into effect certain powers: "It is never the end for which other powers are exercised, but a means by which other objects are accomplished." *M'Culloch*, 17 U.S. at 411.

Powers Vested by this Constitution

The plain language of the Clause applies by its own terms first, to "the foregoing powers," and second to "all other Powers vested by this Constitution." The "foregoing powers" apply to those in Article I, § 8, cls. 1-17. The "other Powers vested by this Constitution" must be found within the Constitution itself because "[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, or to the people." U.S. CONST., amend. X.

Notwithstanding the text of the Clause, during the ratification debate, the "Antifederalists" expressed

concern about a broad reading of it (like that advanced by the Government today):

> To the argument that no Bill of Rights was necessary because the Constitution was one of enumerated powers, . . . the Antifederalists . . . pointed out the implications of the "necessary and proper" clause in combination with these broadly defined powers. If Congress had the power to make war, and decided that curtailment of freedom of the press was necessary and proper to this end, what was to prevent Congress from passing a law to this effect?

The Antifederalists, Edited by Cecelia M. Kenyon, lxx (1985 Ed.).

For example, the thirteenth letter of "Agrippa," dated Jan. 14, 1788, argued that, based on the Necessary and Proper Clause, "By sect. 8 of article 1, Congress are to have the unlimited right to regulate commerce, external and *internal*, and . . . They have indeed very nearly the same powers claimed formerly by the British parliament." Antifederalists at 142-43; *accord* BECK at 588 ("George Mason's widely circulated critique of the Constitution objected to [the Clause] in the following terms: 'Under the own Construction of the general Clause at the End of the enumerated Powers, the Congress may . . . extend their Powers as far as they think proper; so that the State Legislatures have no Security for the Powers they presumed to remain to them; or the People for their Rights."), *citing* 13 THE DOCUMENTARY HISTORY

OF THE RATIFICATION OF THE CONSTITUTION 350 (1983). Based upon this fear, the Antifederalists argued for adoption of the Bill of Rights, including the Tenth Amendment, to clearly and unambiguously limit Congressional power.

Addressing these concerns, Alexander Hamilton explained that the Necessary and Proper Clause **did not** expand Congress' power beyond those enumerated in Article I, § 8. Hamilton asked rhetorically: "What are the proper means of executing such a power but *necessary* and *proper* laws?" THE FEDERALIST NO. 33, p. 202. James Madison argued that the Clause was redundant because, even without it, Congress would enjoy the same powers by "unavoidable implication." THE FEDERALIST NO. 44, p. 285.

Thus, Hamilton reasoned that any reasonable fears of federal power could stem only from Congress' express powers: "If there be anything exceptionable, it must be sought for in the specific powers upon which this general declaration [the Clause] is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless." THE FEDERALIST NO. 33, p. 203.

Hamilton further contended that the Bill of Rights was not only unnecessary, but a dangerous implication of powers that the Constitution was intended to deny to the federal government:

> I go further and affirm that bill of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in

> the proposed Constitution, but they would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

THE FEDERALIST NO. 84, p. 513.

While the Federalists and Antifederalists disagreed as to how to limit the powers of Congress, they both agreed that such limitations were necessary to preserve our freedoms.

The meaning of the Necessary and Proper Clause was hotly debated in the first Congress in connection chartering a national bank. *See* BARNETT at 188. Madison delivered the following speech from the floor of Congress on February 2, 1791:

> Whatever meaning this clause may have, none can be admitted, that would give unlimited discretion to Congress.
>
> Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.
>
> The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and, as it were, technical means of executing those powers. In the sense it has been explained by

the friends of the Constitution, and ratified by the State Conventions.

The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans."

* * *

Mark the reasoning on which the validity of the bill depends. To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishment, etc. implied as the means.

If implications, thus remote and thus multiplied, can be linked together a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.

BARNETT at 190-91, quoting 1 ANNALS OF CONG. 1947-49 (Joseph Gales ed., 1791) (emphasis added).

As President, Thomas Jefferson ridiculed the chain of inferences offered to sustain expansion of Congress' powers:

> Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines are necessary for copper; a company is necessary to work mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built?" Under such a process of filiation of necessities the sweeping clause makes clean work.

BARNETT at 191 n.50 (citation omitted). The Government's arguments here resonate with what Jefferson disparaged as a "filiation of necessities."

The Role of the Necessary and Proper Clause

The Necessary and Proper Clause is an integral part of the structure of the Constitution. Like other structural constraints, the jurisdictional boundaries affirmed by its text serves a vital role in preserving the checks and balances that restrain the federal government which, otherwise, would go unchecked:

> A jurisdictional understanding of the [Clause] illuminates the meanings of the Ninth and Tenth Amendments and clarifies the Constitution's methods for safeguarding federalism and the separation of powers. . . . The principal function of the Ninth Amendment is . . . to prevent misconstruction of the [Clause]. . . . The Ninth Amendment does not add new

> constraints to Congress's power, but it preserves those constraints that the [Clause] had already built into the Constitution. . . . [T]he Tenth Amendment . . . expressly confines the national government to its delegated sphere of jurisdiction. . . . The Tenth Amendment, as with the rest of the Bill of Rights, is this declaratory of principles already contained in the unamended Constitution via the [Clause].

LAWSON at 326-30.

B. The Necessary and Proper Clause, By Itself, Creates No Constitutional Power and, Therefore, the Act Cannot Be Based Solely on the Necessary and Proper Clause.

As a consequence of its own textual limitations, the Necessary and Proper Clause "by itself, creates *no* constitutional power." *United States v. Comstock*, 551 F.3d 274, 278 (4th Cir. 2009) (italics in original); *accord Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960) (same).

Scholars have held this view for more than two hundred years. *See* BARNETT at 212-13, *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 287 (1803) ("The plain import of the clause is, that congress shall have all the incidental or

instrumental powers, necessary and proper for the carrying into execution all the express powers; . . . It neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant."); *accord* LAWSON at 275 (with citations).

Because the Necessary and Proper Clause is not an independent source of Congressional power, it cannot on its own support the Act.

C. The Necessary and Proper Clause Must Carry into Execution an Enumerated Power and, Therefore, the Act Cannot Be Predicated on Congress' Implied Power to Establish a Federal Penal System.

The Necessary and Proper Clause permits Congress to enact laws "for carrying into Execution" the enumerated powers. *Comstock*, 551 F.3d at 279 ("[T]o sustain [the Act] under the Necessary and Proper Clause, the Government must show that the statute is necessary to achieve ends within Congress's *enumerated* powers.") (italics in original), *citing Sabri v. United States*, 541 U.S. 600, 605 (2004). The Government's argument – that the Clause by itself authorizes legislation on a subject outside the scope of enumerated powers – consistently has been rejected since the founding of the Republic.

1. This Court has never upheld legislation under the Necessary and Proper Clause that did not carry into execution an enumerated power.

The Government contends that the Act is justified by "Congress's Undisputed Authority to Establish A Federal Penal System." Pet. Br. at 22. However, the authority to establish a federal penal system is not an enumerated power; instead, it is implied from Congress' express power to punish certain crimes.

In each of the cases cited by the Government on this issue (Pet. Br. 22-23), the Necessary and Proper clause was, in fact, predicated on an enumerated power. *See Sabri*, 541 U.S. at 605 (statute proscribing bribery of state, local and tribal officials of entities receiving at least $10,000 in federal funds, was justified by the spending clause in Art. I, § 8, cl. 1); *Jinks v. Richland County*, 538 U.S. 456, 462 (2003) (tolling incident to supplemental jurisdiction statute necessary and proper for carrying into execution, *inter alia*, Congress' power to "constitute Tribunals inferior to the supreme Court"); *Burroughs v. United States*, 290 U.S. 534, 544 (1934) (Federal Corrupt Practices Act of 1925 enacted "to preserve the purity of presidential and vice presidential elections" set out in Art. II, § 1); *M'Culloch*, 17 U.S. at 407 (Congress' power to incorporate a bank based upon "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies").

The other cases cited by the Government that analyze the Necessary and Proper Clause likewise involved enumerated powers. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (Controlled Substances Act was "well within its authority to make all Laws which shall be necessary and proper to regulate Commerce among the several States.") (internal quotations and ellipses omitted); *Morrison*, *supra* (Government invoked Commerce Clause to justify the Civil Remedies for Violence Against Women Act); *Lopez*, *supra* (Government invoked Commerce Clause to justify the Gun-Free School Zone Act of 1990); *Greenwood v. United States*, 350 U.S. 366, 369, 375 (1956) (civil commitment of the insane is necessary and proper to the "unexhausted" power to prosecute the robbery of a U.S. Post Office and an assault of a postal employee[2]).

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[2] *See* U.S. CONST. art. I, § 8, cl. 7. As Chief Justice Marshall explained, the power to establish post-offices includes the power to punish the crimes "stealing or falsifying a record or process of a court of the United States, or . . . perjury in such Court." *M'Culloch*, 17 U.S. at 417; BECK at 606. Alternatively, *Greenwood* could have been based upon Congress' power "[t]o constitute tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9. Indeed, in *Greenwood*, the Court could not carry out its own powers to prosecute the defendant without committing him civilly because he was incompetent to stand trial for the crimes committed. The act under review had been the subject of a "long study" by the Judicial Conference of the United States (*Greenwood*, 350 U.S. at 373), suggesting that the federal courts determined that Congress' act was needed to carry out the judicial function. Even then, the Court carefully noted "[w]e reach the narrow constitutional issue raised by the order of commitment in the circumstances of this case." *Id.* at 375. The Court

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Moreover, since *M'Culloch*, this Court has affirmatively required that laws adopted under the Necessary and Proper Clause be predicated upon an enumerated power. *See United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("The commerce power . . . extends to those activities which so affect interstate commerce, or the assertion of the power of Congress over it, as to make the regulation of the appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."); *United States v. Darby*, 312 U.S. 100, 121 (1941) (upholding portions of FLSA under commerce clause, noting that legislation is sustained "when the means chosen, although not themselves within the granted power, [are] nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940) ("Congress may impose penalties in aid of the exercise of any of its enumerated powers."); *Everard's Breweries v. Day*, 265 U.S. 545, 560 (1924) (power to regulate intoxicating liquors for medicinal purposes is necessary and proper under the Eighteenth Amendment); *Battle v. United States*, 209 U.S. 36, 37-38 (1908) (criminal

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reiterated: "We decide no more than the situation before us presents and equally do not imply an opinion on situations not before us." *Id.* at 376. Understandably, the Government does not offer *Greenwood* as support for its position that the Necessary and Proper Clause may carry into effect unenumerated powers. *See* Pet. Br. at 22-23.

statute punishing murder on federal enclave was based on Congress' plenary power over federal enclaves); *California v. Pacific R.R. Co.*, 127 U.S. 1, 39 (1888) (power to construct highways and bridges is incident to commerce power); *United States v. Fox*, 95 U.S. 670, 672 (1877) (Congress cannot penalize state fraud committed pre-bankruptcy despite its power under Article I, § 8, cl. 4 "to establish uniform laws on the subject of bankruptcies throughout the United States."); *Kohl v. United States*, 91 U.S. 367, 372 (1875) (power of eminent domain to acquire property to establish courts and post offices is necessary and proper to enumerated powers).[3]

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[3] In *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 300 (1920), in response to the argument that the Necessary and Proper Clause cannot be based upon an implied power, this Court held that, because the power to prohibit intoxicating liquors and non-intoxicating liquors was a "single broad power," it was not sanctioning the application of an implied power to an implied power. *Id.* at 299. In particular, because Congress could exercise its war power (U.S. CONST. art. I, § 8, cl. 11) to preserve the use of grains, cereals, and fruit for the war effort, that enumerated power was broad enough to prohibit the manufacture and sale of intoxicating liquors through the War-Time Prohibition Act, and the same "broad power" could also regulate non-intoxicating liquors (*i.e.*, "near beer"). Nonetheless, the Court, in *dicta*, disparaged the argument presented here (*id.* at 300), relying on *Battle*, *Pacific Railroad* and *Kohl*, none of which supported the *dicta*. The dissenting justices rejected this *dicta*, echoing Madison's slippery slope argument:

> The argument runs . . . that under a power implied because necessary and proper to carry into execution the above named powers relating to war, . . . Congress could prohibit the sale of intoxicating liquors. In order

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The Government provides no support for its contention that the Necessary and Proper Clause may "carry[ ] into execution" the power "to establish a federal penal system."

2. The Act does not carry into execution any Congressional power, let alone an enumerated power.

"[T]he government acknowledged that the power to legislate provided by the Necessary and Proper Clause must be rooted in an enumerated power in Article I or some other Article of the Constitution." *United States v. Wilkinson*, 626 F. Supp. 2d 184, 187 (D. Mass. 2009) (dismissing civil commitment proceedings under the Act as unconstitutional). Yet, the Government has been unable to establish, or even hint, that the Act was necessary or proper (and it must prove both) for carrying into execution one of the enumerated powers.

In the district court, the Government relied solely on the Necessary and Proper Clause standing alone.

> to make such a prohibition effective the sale of non-intoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this non-intoxicant must be implied. The query at once arises: If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.?

Ruppert, 251 U.S. at 305-08 (McReynolds, J., dissenting).

Comstock, 507 F. Supp. 2d at 530. On appeal, the Government based its argument chiefly on the Necessary and Proper Clause, and briefly the Commerce Clause. *Comstock*, 551 F.3d at 278-79. In its petition for certiorari, the Government argued that the Act was "a rational incident to the government's undisputed authority under Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibility for its prisoners." Cert. Pet. at 18.

In its brief on the merits, the Government is still searching for some constitutional power with which to justify the Act. Yet, the only constitutional or statutory provision it cites is the Necessary and Proper Clause itself. *See* Pet. Br. at 1-2. The Government contends that the Act is justified by "Congress's Undisputed Authority to Establish A Federal Penal System." Pet. Br. at 22. Recognizing that the power to establish a federal penal system is not, itself, an enumerated power, the Government points to the following clauses of U.S. CONST. art. I, § 8, as the sources for "powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners":

- Cl. 1 (to lay and collect taxes)
- Cl. 3 (to regulate interstate commerce)
- Cl. 7 (to establish post offices)
- Cl. 14 (to regulate the armed forces); and

- Cl. 17 (to exercise jurisdiction over the District of Columbia, federal territories and federal enclaves)

Pet. Br. at 23. Although the Government ties the enactment of **other** "criminal statutes prohibiting and punishing certain conduct," (Pet. Br. at 23), to these enumerated powers, it makes no effort to tie **this Act** to **those powers**. Nor could it.

The Act has nothing to do with taxation, post-offices, or the armed forces. Nor does the Act have anything to do with the District of Columbia or any federal territory or federal enclave. This leaves only the Commerce Clause. But the Act neither involves interstate commerce, nor any other activity that is essential to a broader scheme by which interstate commerce is regulated.

Even assuming *arguendo* that the "power to establish a federal penal system" were a proper object of the Necessary and Proper Clause, the Government still fails to articulate how the Act carries out even that implied power. The question is not whether the Act somehow relates to a Congressional power, but whether the Act is necessary and proper to carry into execution that power. *M'Culloch*, 17 U.S. at 411 ("It is never the end for which other powers are exercised, but a means by which other objects are accomplished."). The Act does not carry into execution the power to establish a penal system. Even under Hamilton's broadest notion of "necessary," locking up persons indefinitely is not "conducive" or "convenient"

to the establishment of a prison. The implied power to build a prison to effectuate its enumerated powers does not give Congress the ability to invent new ways to ensure its occupancy.

In the end, the paucity of the Government's justification for this exercise of power leads to the inescapable conclusion that "under the pretext of executing its powers," the Congress has enacted a law "for the accomplishment of objects not intrusted to the [federal] government," and, for this reason, it is "the painful duty of this tribunal, . . . to say, that such an act [is] not the law of the land." *M'Culloch*, 17 U.S. at 423.

III. The Act Does Not Fall Within Congress' Authority Under the Commerce Clause.

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

"Commerce," of course, involves economic activity. *Mobile v. Kimball*, 102 U.S. 691, 702 (1880) ("Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824) ("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, and is regulated by prescribing rules for carrying on that intercourse."). But, not all economic activity has been perceived to be commerce. *See Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888) (Iowa statute prohibiting alcohol did not violate commerce clause, drawing a distinction "between manufactures and commerce").

The Court has long expressed the need to guard the borders of Congressional power. In *NLRB v. Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937). Similarly, in *Maryland v. Wirtz*, the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce. 392 U.S. 183, 196 (1968), *overruled on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

The authority to regulate intrastate matters affecting interstate commerce rests, not on the Commerce Clause, but on the Necessary and Proper Clause, where such regulation is necessary and

proper to carry into effect Congress' power to regulate interstate commerce. *See Darby*, 312 U.S. at 118:

> 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 regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. *See McCulloch v. Maryland*. . . .

See also Raich, 545 U.S. at 34 (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). Taken together, these cases recognize that Congress can regulate intrastate activity where such regulation is connected and appropriate to Congress' power to regulate the interstate market.

Effectuating the language of the Necessary and Proper Clause, the Supreme Court has insisted that Congress may enact laws necessary (*i.e.*, "plainly adapted") to its power under the Commerce Clause (*i.e.*, tethered to an enumerated power, so long as it is not "a pretext"), and proper (*i.e.*, not a violation of the rights of the States or the people, and consistent

"with the letter and spirit of the constitution"). Thus, in *Gibbons*, Congress could reach intrastate monopolies that impeded Congress' regulation of Commerce between the States. In *Darby*, Congress could reach wages paid for intrastate manufacture of lumber that impeded Congress' power to control interstate competition. In *Wrightwood*, Congress could reach the intrastate sale of milk to effectuate its regulation of the interstate milk market. In *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress could reach intrastate wheat consumption to effectuate its regulation of the nationwide wheat market. And, in *Raich*, Congress could reach locally grown marijuana to effectuate its regulation of the nationwide drug market. In each case, Congress was faced with issues involving nationwide markets, and those challenging the regulation contended that the otherwise enforceable regulation could not reach them because their activities were wholly intrastate. This Court, however, sanctioned Congress' exercise of power because the intrastate regulation was necessary (*i.e.*, plainly adapted) to Congress' exercise of its power over interstate commerce and was proper (*i.e.*, not an undue intrusion upon areas of regulation traditionally reserved to the states).

In contrast, in *Lopez*, the Court noted that the statute at issue, which reached non-economic activity, "is 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." 514 U.S. at 561.[4] In *Morrison*, the Court rejected the argument that the aggregate economic effect on interstate commerce of non-economic conduct is sufficient to justify Congress to regulate the non-economic conduct. 529 U.S. at 617-618 ("We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."). Indeed, the Act is further removed from economic activity than the statute in *Morrison*. If gender-motivated crimes are not economic activity, then certainly dangerous thoughts are not economic activity.

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[4] To date, the Court has yet to uphold a Commerce Clause regulation of any intrastate activity that is not itself economic in nature. *See Morrison*, 529 U.S. at 613 ("thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). The majority in *Raich* found, rightly or not, that the cultivation of marijuana for home consumption was an economic activity akin to the economic activity in *Wickard*. *See Raich*, 545 U.S. at 18 ("Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."), *cited in* Randy E. Barnett, *Foreword: Limiting Raich,* 9 LEWIS & CLARK L. REV. 743, 747 n.17 (2005). This Court should correct any misconception that *Raich* extended the Commerce Power to reach non-economic intrastate activity and, to the extent that *Raich* did extend the Commerce Power, that decision should be overruled.

In his concurring opinion in *Raich*, Justice Scalia did not contend that Congress had the power under the Commerce Clause to regulate non-economic activity. Instead, he justified the prohibition on intrastate non-economic activity under the Necessary and Proper Clause as an "essential" means for the regulation of interstate commerce:

> Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling **effective regulation of interstate commerce** can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures **necessary to make the interstate regulation effective**. As *Lopez* itself states, and as the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its **regulation of interstate commerce**. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local."

Raich, 545 U.S. at 38 (Scalia, J., concurring) (emphases added). These conclusions are all inescapable because legislation under the Necessary and Proper Clause must, by definition, carry into effect one of

Congress' enumerated powers, in this case the Commerce Clause.[5]

Indeed, "[t]he Court could have explained this economic conduct limitation [in *Lopez* and *Morrison*] as an interpretation of the Necessary and Proper Clause designed to prevent Congress from employing means remote from its power to regulate interstate commerce." BECK at 622. After all, "a legislator truly interested in the control or promotion of interstate commerce would be unlikely to regulate school-zone gun possession or gender-motivated violence as means to that end. Precisely because the activities bear only remotely on the interstate market, it is implausible that Congress regulated them *because of* their effect on commerce." BECK at 624 (italics in original). "While one can sketch such a connection through a lengthy chain of cause and effect relationships, the connection is so remote and attenuated that one cannot say these statutes are 'plainly adapted' to the achievement of any end delegated to Congress by the Commerce Clause. . . . [The] *Lopez/Morrison* rule appears to implement, in a rough (but judicially manageable

[5] The problem with this analysis was not its substance but the deference afforded to Congress' assessment that the regulation of non-economic interstate activity was "essential" to the broader regulatory scheme. *See Raich*, 545 U.S. at 37 ("The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."). Significantly, Chief Justice Rehnquist, who penned the "broader regulatory scheme" doctrine in *Lopez*, dissented in *Raich*.

fashion) the . . . principles from *McCulloch*." BECK at 625.

Here, the Act does not involve the regulation of commerce in any fashion. Nor does the Act reach intrastate economic activity that substantially affects Congress' power to regulate interstate commerce. Instead, Congress seeks to authorize the civil commitment of persons deemed to be "sexually dangerous," a subject matter not even remotely economic in nature. Finally, the Act cannot be justified as an "essential" means of carrying into execution a broader regulation of interstate commerce. Therefore, it is unconstitutional.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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November 4, 2009