No. 10-36094

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA SHOOTING SPORTS ASSOCIATION,
SECOND AMENDMENT FOUNDATION, INC.,
and GARY MARBUT,

Plaintiffs-Appellants,

and

STEVE BULLOCK, the Attorney General of Montana,

Intervenor,

v.

ERIC H. HOLDER, JR.,
the Attorney General of the United States,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Montana, Missoula
Honorable Donald W. Molloy, District Judge

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

SHARON L. BROWNE
ADAM R. POMEROY
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation (a nonprofit corporation organized under the laws of California) hereby states that it has no parent company and issues no stock.

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) files the accompanying brief in support of neither party. Both parties have consented to the filing of this brief.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases addressing the balance of power between the states and federal government, including the United States Supreme 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); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Gonzales v. Raich*, 545 U.S. 1 (2005).

Amicus will discuss the development of the "substantial effects" standard and the limits of the commerce power. Amicus believes its legal and public policy expertise will assist this Court in its consideration of this case. Amicus takes no position on the validity of the Montana Firearms Freedom Act or the federal Gun Control Act and National Firearms Act.

## INTRODUCTION

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has recognized "three broad categories of activity" that Congress is empowered to regulate under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Congress may regulate the channels of interstate commerce; the instrumentalities of interstate commerce, and persons or things in interstate commerce; and activities that substantially affect interstate commerce. *Id*. The "substantial effects" category is the broadest category and all parties agree that it is the basis for determining the validity of the federal Gun Control Act and National Firearms Act as applied to the manufacture and sale of firearms made exclusively in Montana from materials originating in Montana and sold to customers in Montana, under Montana's Firearms Freedom Act.

In *United States v. Lopez*, 514 U.S. 549, *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court established a simple framework for analyzing Commerce Clause enactments that are based on the regulation of activities that substantially affect interstate commerce. Yet, the lower courts are not faithfully applying this framework to various federal statutes, such as the Hobbs Act, the Endangered Species Act, and the Clean Water Act. To avoid invalidating federal acts or limiting Congress' power in any way under the Commerce

Clause, lower courts misapply *Lopez*, *Morrison*, and *Raich* by aggregating intrastate noneconomic 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, noneconomic activities. Whatever this Court decides on the merits of this case, it should reflect the fact that "in those cases where we have 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.

Amicus therefore urges this Court to uphold the Commerce Clause's limits, particularly the "economic activity" limit, outlined in *Lopez*, *Morrison*, and *Raich*, as it applies the Supreme Court's "substantial effects" test.

## ARGUMENT

## I

## "FIRST PRINCIPLES" DICTATE DEFINED LIMITS ON FEDERAL POWER UNDER THE COMMERCE CLAUSE

The Commerce Clause is not an unfettered grant of power limited only by congressional discretion. Although the power is broad, the Supreme Court has consistently constrained the power within outer limits. Understanding those limits, however, requires more than simply trying to apply the Supreme Court's most recent

pronouncement upon the issue. As the Supreme Court admonished: "In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation." *Raich*, 545 U.S. at 15. In other words, "[w]e start with first principles." *Lopez*, 514 U.S. at 552.

First principles are the historical basis and context for the Commerce Clause. They are of the upmost importance because they explain how Congress overstepped its constitutional authority in *Lopez*, 514 U.S. 549, and *Morrison*, 529 U.S. 598, but acted permissibly in *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Raich*, 545 U.S. 1, and they will help this Court apply the Commerce Clause's "substantial effects" test. In order to interpret the constitutional grant of power, it is imperative to know *what* the Constitution says and *why* it says it**.** Ultimately, first principles show that Congress was to have power to broadly regulate commerce itself, but could not "authorize federal interference with social conditions or legal institutions of the states." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949).

### A. The Commerce Clause Was Designed to Economically Unify the Several States Without Authorizing Every Federal Interference

Historical evidence shows that the primary purpose of the Commerce Clause was to address and eliminate trade restrictions and barriers existing between the States, and not for any other purpose. *Raich*, 545 U.S. at 16 ("The Commerce Clause emerged as the Framers' response to the central problem giving rise to the

Constitution itself: the absence of any federal commerce power under the Articles of Confederation."). As the Supreme Court has explained, "[w]hen victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began." *H. P. Hood & Sons*, 336 U.S. at 533. Each state would "legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union." *Id*. (citations and punctuation omitted). In response the Constitution was eventually adopted, but "[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs." *Id*. at 533-34. "No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished. *There was no desire to authorize federal interference with social conditions or legal institutions of the states*." *Id*. at 534 (emphasis added).

Thus, for nearly a century, "the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce." *Lopez*, 514 U.S. at 553 (citations omitted); *see id*. at 552-58 (chronicling the historical development of Commerce Clause power); *Raich*, 545 U.S. at 15 (noting the

"considerable detail" *Lopez* provides about "our understanding of the reach of the Commerce Clause").

The forgoing historical facts do not, of course, mean that the Commerce Clause is confined solely to eliminating trade barriers and restrictions by and between the states. Although the resulting government was one of limited powers, the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.); *see also New York v. United States*, 505 U.S. 144, 157 (1992) (the Constitution was "phrased in language broad enough to allow for the expansion of the Federal Government's role"). "[A]s the needs of a dynamic and constantly expanding national economy have changed," *EEOC v. Wyoming*, 460 U.S. 226, 246 (1983) (Stevens, J., concurring), so too has the exact reach of the powers granted under the Commerce Clause. *But see*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001) ("The most persuasive evidence of original meaning . . . strongly supports [the] narrow interpretation of Congress's power [under the Commerce Clause]."). At the same time, however, when "construing the scope of the power granted to Congress by the Commerce Clause . . . [i]t is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself" namely that the Founders had "set out only to find a way to reduce trade restrictions." *See EEOC*,

460 U.S. at 244-45 (Stevens, J., concurring); *see also* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol'y 849, 858, 865 (2002) ("One thing is certain: the Founders turned to a federal commerce power to carve stability out of this commercial anarchy" and "keep the States from treating one another as hostile foreign powers.").

### B. The Commerce Power Was Expanded Beyond Trade to All Commercial Activities with Substantial Effects on Interstate Commerce, but Was Still Subject to Defined Limits

During the New Deal era, Congress' power under the Commerce Clause expanded beyond the original purpose of the clause, but did not become completely untied from it. "In response to rapid industrial development and an increasingly interdependent national economy, Congress 'ushered in a new era of federal regulation under the commerce power.' " *Raich*, 545 U.S. at 16 (citation omitted). Although the Supreme Court found much of Congress' New Deal legislation unconstitutional up until the late 1930's, a watershed case changed matters in 1937. In *NLRB v. Jones & Laughlin Steel Corp.* the Supreme Court upheld the National Labor Relations Act against a Commerce Clause challenge and, in the process, abandoned the distinction between "direct" and "indirect" effects on interstate commerce which had been used to narrowly circumscribe Congress' commerce power. 301 U.S. 1 (1937). The Court held that intrastate activities that "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" are within Congress' power to regulate. *Id*. at 37. Similarly, four years later the Supreme Court upheld the Fair Labor Standards Act, stating: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states." *United States v. Darby*, 312 U.S. 100, 118 (1941).

Thus, in *Wickard*, the Supreme Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. 317 U.S. at 128-29. Congress, in an effort to stabilize wheat prices during the Great Depression, imposed limits on the amount of wheat a farmer could produce. *Id*. at 115. Filburn violated the law by growing 239 more bushels of wheat than he was permitted. *Id*. at 114. Filburn argued that he could not be punished under the law because he had no intention to sell the wheat, and that his at-home production and consumption was not commerce. *Id*. at 119. The *Wickard* Court rejected explicitly his argument, stating: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125.

Thus, these cases established "Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect

on interstate commerce." *Raich*, 545 U.S. at 17 (citations omitted). And *Wickard* established that Congress may even "regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id*. at 18.

Yet even as these "modern-era precedents . . . expanded congressional power under the Commerce Clause [they] confirm that this power is subject to outer limits." *Lopez*, 514 U.S. at 556-57. As the Supreme Court warned, the scope of the 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 . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37). In other words, these expansionary cases still hewed to the first principles that Congress was to have power to broadly regulate commerce itself, but could not "authorize federal interference with social conditions or legal institutions of the states." *H. P. Hood & Sons*, 336 U.S. at 534.

## II

## THE "SUBSTANTIAL EFFECTS" TEST, AS LAID OUT BY *LOPEZ*, *MORRISON*, AND *RAICH*, ONLY PERMITS CONGRESSIONAL REGULATION OF ECONOMIC ACTIVITIES

For the next five decades after *Wickard* not a single congressional legislative action was struck down as exceeding the power granted under the Commerce Clause. This led some to believe that the federal judiciary was little more than the proverbial rubber stamp on Congress' Commerce Clause enactments. *See, e.g.*, Michael C. Carroll & Paul R. Dehmel, Comment: *United States v. Lopez: Reevaluating Congressional Authority Under the Commerce Clause*, 69 St. John's L. Rev. 579 (1995) (New Deal era cases turned the lower courts into "rubber stamps"); George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 Geo. Wash. L. Rev. 1349, 1377 (1993) ("many commentators consider the rational-basis test to be a rubber stamp of constitutionality"). Then in a series of three cases, the Supreme Court reemphasized that its Commerce Clause cases establish definite limits on the commerce power in line with first principles, built a simple framework for analyzing "substantial effects" cases, and clarified that the "substantial effects" test only applies to economic activity.[1]

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[1] Recently, the Ninth Circuit Court of Appeals addressed the "substantial effects" test in *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 10-15192, 2011 U.S. App. LEXIS 6203, at *29-*30 (9th Cir. Mar. 25, 2011). The court relied upon *Raich* to (continued...)

### A. *Lopez* Held That Intrastate Activity May Be Regulated for Its Substantial Effects on Interstate Commerce Only If the Regulated Activity Is Economic in Nature

In *Lopez* the Supreme Court considered the constitutionality of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q). The Act had 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." 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A)). In 1992, Alfonso Lopez, Jr., a 12th grade student, arrived at school carrying a concealed .38 caliber handgun and five bullets. He was arrested and eventually charged by federal officers under the Act. *Lopez*, 514 U.S. at 551. In holding the law unconstitutional and as exceeding Congress' power under the Commerce Clause, the Supreme Court began with "first principles." *Id.* at 552.

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[1] (...continued)
hold that the "substantial effects" test is not limited in application to economic activity. *Id*. at *29-*30 (citation omitted). That case should not be considered persuasive. First, instead of analyzing the case under all precedents regarding economic activity as required by First Principles, the panel opinion limited its analysis to only one decision. *Id.* As amicus discusses herein, precedent indicates that the panel analysis was incorrect. Second, Plaintiffs in the case (also represented by PLF attorneys) are preparing a petition for a writ of certiorari to be filed no later than June 23. Thus, this case may be a temporary aberration in the law.

The Supreme 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*. (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Then, after charting the history and evolution of Commerce Clause jurisprudence the Court noted that even the expansive New Deal decisions recognized that the power was necessarily "subject to outer limits." *Id*. at 557. The Court took pains to characterize *Wickard* as the Court's "most far reaching example of Commerce Clause authority over intrastate activity," concluding that even that case involved some *economic activity* and that the Agricultural Adjustment Act was directed at regulating competition in commerce which was directly affected, in the aggregate, by home-grown wheat. *Id.* at 560.

After laying the foundation of the limited, enumerated commerce power, the Supreme Court had no difficulty finding the Gun-Free School Zones Act unconstitutional. *Id*. at 559-68. The Court quickly determined *Lopez* was a "substantial effects" case and applied a four part analysis.

First, the Court looked at the text of the statute and found that, unlike the law in *Wickard*, the Gun-Free School Zones Act had "nothing to do with 'commerce' or

any sort of *economic* enterprise, however broadly one might define those terms." *Id*. at 561. The Court found that the regulated act, 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." *Id*. (emphasis added). In fact, the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id*. Thus, the act could not be sustained under *Wickard*'s aggregation principle[2] either. *Id*. The Court came to these conclusions even though prohibited activity, possession of a gun, involved a commercial item.

Second, the Court looked to whether the Act contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affected interstate commerce. *Id*. Turning to the plain language of the Act, it found no such express requirement or limitation to such instances. *Id*. at 562.

Third, because no substantial effect was "visible to the naked eye" in the text of the Act, the Court looked to the legislative history to locate any express congressional findings concerning the effect of the regulated activity on interstate commerce. *Id*. at 562-63. Again the Court found none. *Id*.

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[2] Under *Wickard*, Congress may regulate the local commercial activity where it has a rational basis to conclude that the activity, taken in the aggregate, substantially affects interstate commerce. 317 U.S. at 124-25, 129; *see also* Section I.B, *supra*, discussing *Wickard*.

Fourth, the Court examined the government's claim that gun-related violence increases the cost of insurance throughout the nation, has adverse effects on classroom learning, and deters people from traveling to unsafe areas. *Id*. at 563-64. According to the federal government's argument, gun-related violence thus represents a threat to interstate commerce. *Id*. The Court made it a point to "pause to consider the implications of the Government's arguments," *id*. at 563-65, finding that even though the underlying facts are accepted as true, under the government's "national productivity" argument, Congress could regulate anything related to *individual economic productivity*. *Id*. at 565. Under the government's theory "it is difficult to perceive any limitation on federal power" and accepting it would make the Court "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id*. at 564. The fallacy of the government's arguments was the lack of a logical stopping place; the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id*. at 567. This the Court would not do.

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

Five years after *Lopez* the Supreme Court considered a challenge to 42 U.S.C. § 13981, a provision of the Violence Against Women Act of 1994, in *Morrison*, 529

U.S. 598. Similar to the arguments put forth in *Lopez*, the federal government argued that Congress could regulate gender-motivated violence because it deters victims and potential victims from traveling in interstate commerce or engaging in interstate employment or business transactions and it decreases productivity while increasing medical and other costs—all of which together substantially effects interstate commerce. *Id*. at 615.

The Court again began its analysis by returning to first principles, reaffirming that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. *Id*. at 607. As the Court emphasized, "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id*. at 608. Noting that the Violence Against Women Act was focused "on gender-motivated violence wherever it occurs" and that there was no argument it was directed at the channels or instrumentalists of interstate commerce, the Court determined that the petitioners sought to sustain the law as a regulation of activity substantially affecting interstate commerce. *Id*. at 609. As such, *Lopez* provided the appropriate framework for decision. *Id*.

With the *Lopez* four-factor framework underlying the Supreme Court's Commerce Clause analysis, the proper resolution of *Morrison* was clear. *Id*. at 613. First, the Court easily found that the statue, 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 610-11. Thus, *Wickard*'s aggregation principle was unavailing. *Id*. at 611 n.4.

This was critical to the outcome of *Morrison* and *Lopez*. As the *Morrison* Court observed, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Id*. at 610. Moreover, the Court emphasized this factor stating as a matter of historical fact that the Court has only upheld "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." *Id*. at 611; *see id*. 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" (emphasis added)).

Furthermore, the statute contained no jurisdictionally limiting language. *Id*. at 613. Thus, even though the statute was supported, unlike *Lopez*, by congressional findings that gender-motivated violence affects interstate commerce, *id*. at 614, those findings were insufficient to uphold the Act. *Id*. at 615. "Simply because Congress may have concluded that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id*. at 614 (citations omitted). That determination

is "ultimately a judicial rather than a legislative question, and can be settled only by this Court." *Id*.

Finally, the Court rejected the but-for causal chain from original gender-motivated violent act to every remote possible affect upon interstate commerce because Congress's findings relied on the same "method of reasoning that we have already rejected as unworkable [in *Lopez*]" and which would obliterate the distinction between what is national and what is local. *Id*. at 615. The Court, as it was in *Lopez*, was simply 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. Thus the Court found that Congress did not have authority under the Commerce Clause to enact the contested section of the Violence Against Women Act. *Id*. at 619.

### C. *Raich* Affirmed That the Substantial Effects Test Only Applies to *Economic Activity* and Clarified That Noncommercial, but Still Economic, Activities Which Are Essential Parts of a Comprehensive Regulatory Scheme May Be Aggregated According to *Wickard*

Given the Supreme Court's rulings in *Lopez* and *Morrison*, which struck down statutes passed pursuant to the Commerce Clause, many were surprised by the subsequent decision in *Raich*. While some saw the case as a return to a more expansive Commerce Clause jurisprudence, others saw *Raich* as even going beyond and "displacing" *Wickard* as the most far reaching Commerce Cause of all time. *See*

Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, 2004-05 Cato Sup. Ct. Rev. 71, 100 (2005). In actuality, *Raich* merely continued the state of Commerce Clause jurisprudence as defined by *Wickard*, *Lopez*, and *Morrison*.

*Raich* concerned whether Congress' "authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law." 545 U.S. at 5. Two California residents suffering from a variety of serious medical conditions sought to avail themselves of marijuana pursuant to California's Compassionate Use Act. *Id*. at 6-7. After one resident's marijuana plants were destroyed by federal agents, the two residents sought an injunction preventing the enforcement of the federal Controlled Substance Act against their personal medical use. *Id*. at 7-8. Much like the wheat in *Wickard*, the marijuana at issue had been neither bought nor sold and had never crossed state lines. *Id*. at 7.

The analysis in *Raich*, just as in *Lopez* and *Morrison*, began with "first principles." Noting that "none of our *Commerce Clause* cases can be viewed in isolation" the Court cited the history provided by *Lopez* and gave a brief summary of the purpose, historical usage, and evolving jurisprudence of the Commerce Clause up through *Wickard*. *Id*. at 15-17. The Court found *Wickard* to be "striking" in similarity and "of particular relevance" because it had established that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for

sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id*. at 17-18. The Court then found that Congress had a rational basis for concluding that "respondents' activities, taken in the aggregate, substantially affect interstate commerce," partly because "production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." *Id*. at 22, 19.

At least one court has suggested that the distinguishing feature between *Lopez* and *Morrison* on the one hand and *Wickard* and *Raich* on the other, "was the comprehensiveness of the economic component of the regulation." *United States v. Maxwell*, 446 F.3d 1210, 1214 (11th Cir. 2006). Indeed *Lopez* involved a single-subject criminal statute while *Raich* was "at the opposite end of the regulatory spectrum." *Raich*, 545 U.S. at 24. This suggestion, however, does not provide the complete answer. Perhaps not surprisingly, *Raich* itself provides the answer that harmonizes all four cases: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial effect on interstate commerce." *Id*. at 17 (emphasis added). *Raich* teaches that as long as intrastate activity is economic, even where it "is not itself '*commercial*,' in that it is not produced for sale," Congress can regulate it if in the

aggregate it has a substantial effect on interstate commerce. *Id*. at 17-18 (emphasis added).

Thus, the main difference between *Lopez*/*Morrison* and *Wickard*/*Raich* is not the comprehensiveness of the statute but rather that the activities in *Lopez* and *Morrison* were *not economic* while the regulated conduct in *Wickard* and *Raich* were *economic*. According to *Raich* the import of *Lopez* was that "our prior cases had identified a clear pattern of analysis: 'Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" *Id*. at 25 (citation omitted, emphasis added).

Comprehensiveness then, rather than being a factor in determining whether something is *economic*, is a factor in the aggregation analysis. *Lopez* was clear on this point: "Section 922(q) is a criminal act that by its terms has nothing to do with 'commerce' or any sort of economic enterprise" and because of this "[i]t cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. *Raich* was clear as well—the regulated activities were "quintessentially economic" and, as "one of many 'essential part[s] of a larger regulation of economic activity'" that could not be broken out in an attempt to defeat the aggregation analysis, was therefore subject to Congress' commerce authority. *See Raich*, 545 U.S. at 24-27 (citation omitted).

Thus, even noncommercial activities that are economic, like the production and consumption of marijuana and wheat, may be aggregated to determine if they have a substantial affect on interstate commerce.

## CONCLUSION

While the commerce power is broad, it does not "authorize federal interference with social conditions or legal institutions of the states." *H. P. Hood & Sons,* 336 U.S. at 534. To safeguard this first principle, the Supreme Court has always limited the reach of the Commerce Clause to economic activities. *See Morrison,* 529 U.S. at 611 ("in those cases where we have 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"). To prevent misapplication of this principle, Amicus urges this Court to make clear in its opinion that the "substantial effects" test only reaches economic activities.

DATED: June 9, 2011.

Respectfully submitted,

SHARON L. BROWNE
ADAM R. POMEROY

By /s/ Adam R. Pomeroy
ADAM R. POMEROY

Counsel for Amicus Curiae
Pacific Legal Foundation

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/s/ Adam R. Pomeroy
Attorney for Amicus Curiae
Pacific Legal Foundation

## CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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JESSICA B. LEINWAND
U.S. Department of Justice
Federal Programs Branch
P.O. Box 883
Ben Franklin Station
Washington, DC 20044

/s/ Adam R. Pomeroy
ADAM R. POMEROY