No. 03-44

IN THE

Supreme Court of the United States

BASIM O. SABRI,

Petitioner,

v.

UNITED STATES,

Respondent.

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

---

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GARY LAWSON *
765 Commonwealth Avenue
Boston, MA 02215
(617) 353-3812

CATO INSTITUTE
ROBERT A. LEVY
TIMOTHY LYNCH
1000 Massachusetts Ave., NW
Washington, D.C. 20001
(202) 842-0200

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTION

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 03-44

BASIM O. SABRI,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [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 help restore the principles of limited constitutional government, especially the idea that the United States Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the

[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Clerk. No counsel for any of the parties authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and thus is of central concern to Cato and the Center.

SUMMARY OF ARGUMENT

Section 666(a)(2) of Title 18 asserts federal criminal jurisdiction over bribery or attempted bribery based solely on the target's status as an agent of a federally-assisted entity. Such a statute is not an appropriation law or a condition on an appropriation. It must be justified, if at all, as a law "necessary and proper for carrying into Execution" some federal power, such as the appropriation power. Section 666(a)(2), however, is neither "necessary" nor "proper" for executing any federal power.

For a law under the Necessary and Proper Clause to be "necessary," it must possess, as James Madison explained more than two centuries ago, a direct, obvious, and precise connection to permissible governmental ends. The Eighth Circuit wrongly concluded that Section 666(a)(2) need only be rationally related to a permissible end. That conclusion is manifestly inconsistent with the Constitution's text and history.

Textually, the word "necessary," as defined by dictionaries from the eighteenth century to the present, cannot linguistically support a rational basis test. Intratextually, interpreting "necessary" as "rationally related" makes nonsense of the Imposts Clause of Article I, section 10; and a study of the Constitution's uses of the synonyms "necessary" and "needful" demonstrates that "necessary" is used when a more rather than a less demanding standard for matching means to ends is intended. Furthermore, this Court has recently held that an administrative agency's broad construction of the

word "necessary" in a statute was unreasonable under the second step of the *Chevron* doctrine; it is similarly unreasonable to read the word "necessary" in the Necessary and Proper Clause to embody merely a rational basis standard.

Historically, the Necessary and Proper Clause was represented to the ratifying public as a clarification of powers that would otherwise exist by implication. One could not imply, in a Constitution that enumerates governmental powers, a legislative power to pass any implementing laws that are "rationally related" to permissible ends.

The Eighth Circuit's rational basis standard for necessity is inconsistent with the test articulated and applied by the Court in *McCulloch v. Maryland*, which emphasized that necessary laws must be at least "plainly adapted" to permissible governmental ends. Subsequent cases have on occasion misrepresented this standard as a rational basis test, though other cases have hewed closer to the correct constitutional standard. To the extent that any statements in this Court's opinions support the idea that "necessary" means "rationally related," they depart so dramatically from the meaning of the Constitution that they should be qualified or disavowed.

The correct constitutional rule for necessity under the Necessary and Proper Clause was articulated by James Madison: laws executing federal powers must have a "definite connection" to and "some obvious and precise affinity" with permissible governmental ends. This standard makes sense textually, structurally, and historically, and to the extent that statements in prior opinions are deemed to foreclose its application, those statements should be qualified or disavowed.

Section 666(a)(2) plainly fails this test. If the statute is construed to contain no requirement that the attempted bribe concern the administration of a federally funded program, the

statute simply polices the honesty of people who happen to deal with agents of recipients of federal financial assistance. There is no direct, obvious, or precise connection to the execution of any federal power. This falls far short of the constitutional requirements of the Necessary and Proper Clause.

Even if Section 666(a)(2) were somehow deemed "necessary," it would not be "proper" for carrying into execution federal powers. A law pursuant to the Necessary and Proper Clause can fail to be "proper" if it violates constitutional principles of federalism, separation of powers, or individual rights. The Eighth Circuit was wrong to limit the reach of the word "proper" only to laws that directly regulate the States as States; that is one form of constitutional impropriety, but hardly the only one. Section 666(a)(2) extends federal criminal jurisdiction far beyond the "proper" sphere of federal authority and is accordingly unconstitutional.

ARGUMENT

I. SECTION 666(a)(2) IS A PURPORTED EXERCISE OF POWER UNDER THE NECESSARY AND PROPER CLAUSE

Section 666(a)(2) of Title 18 seeks to punish criminally anyone who

> corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

18 U.S.C. § 666(a)(2) (2000), provided that "the organization, government, or agency receives, in any one year period, [federal] benefits in excess of $10,000 . . . ." *Id.* § 666(b). Section 666(a)(2) is not an appropriation law. It does not

direct the payment of federal funds or other federal benefits to any person or entity. Nor is it a condition on an appropriation. It does not direct recipients of federal benefits to take or refrain from any action. No agreement, tacit or express, by entities that receive federal benefits can explain or justify the extension of federal criminal liability to nonrecipients who merely transact with those entities. On this point, the decision below was entirely correct. See *United States v. Sabri*, 326 F.3d 937, 945-48 (8th Cir. 2003).

Accordingly, Section 666(a)(2) cannot be constitutionally justified as an exercise of Congress's appropriations power. It must instead be defended as a means "necessary and proper for carrying into Execution" some enumerated federal power. U.S. Const. art. I, § 8, cl. 18. This case thus turns on the scope of Congress's power under the Necessary and Proper Clause.

A careful focus on the scope and limits of the Necessary and Proper Clause is especially crucial in this case, because the decision below, and other similar decisions, see, e.g., *United States v. Edgar*, 304 F.3d 1320, 1325 (11th Cir. 2002), identify the federal spending power as the power carried into execution by Section 666(a)(2). And while the reach of the spending power is not presently at issue, it is worth noting in this context that the source and scope of the federal spending power have strayed far from their constitutional roots. Since the mid-1930s, Congress's spending power has generally been attributed to the first clause in article I, section 8, which grants Congress power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. See *United States v. Butler*, 297 U.S. 1, 64-66, 78 (1936); *Helvering v. Davis*, 301 U.S. 619, 640 (1937). That attribu-

tion is clearly wrong; Congress's authority to appropriate money comes from the Necessary and Proper Clause.[2] The

[2] The Taxing Clause of Article I grants Congress the power to lay and collect taxes, duties, imposts, and excises. That is the only power granted by the clause; everything else in the clause explains, clarifies, or qualifies that grant of the taxing power. It is obvious how the uniformity provision at the end of the clause qualifies the taxing power. The language "to pay the Debts and provide for the common Defence and general Welfare of the United States" that immediately follows the grant of the taxing power serves two basic functions (other than assuring a populace suspicious of taxes that federal taxes will only be levied for good cause). First the reference to the "general Welfare" as a permissible purpose of taxation makes clear that taxes may be levied for appropriate regulatory purposes and not merely to raise revenue—a subject that was of special importance to the founding generation. See Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 John Marshall L Rev 81, 87 (1999) Second, the qualifying language may guard against inappropriate regulatory uses of the taxing power, such as imposition of a formally "uniform" excise tax on goods that are produced or used only in one disfavored region or state. In no event does any of this language in the Taxing Clause grant any power to Congress—to spend for the general welfare or otherwise.

Nor can one *infer* a power to spend for the general welfare (or for any other purpose) from the Taxing Clause. Taxes are not the federal government's only source of revenue. Money can also be raised by borrowing or by selling land or other property. See U.S. Const. art. I, § 8, cl. 2 (granting power "[t]o borrow Money on the credit of the United States"); *id*. art. IV, § 3, cl. 2 (granting power "to dispose of . . . the Territory or other Property belonging to the United States"). The Borrowing Clause and Territories Clause contain no language referring to debts, the common defense, or the general welfare. Does that mean that borrowed funds or proceeds from land sales cannot be spent—or can only be spent for different purposes than funds raised through taxation? If the language in the Taxing Clause truly generates spending authority, these absurd conclusions are difficult to avoid. See Charles Warren, *Congress As Santa Claus: or National Donations and the General Welfare Clause of the Constitution* 28-29 (1932). Such a strained inference is not necessary

constitutional location of the spending power has important consequences: if appropriations laws can be authorized only by the Necessary and Proper Clause, then such laws must be "necessary and proper for carrying into Execution" federal powers, and the federal government may spend only in furtherance of enumerated constitutional powers rather than for the "general Welfare of the United States."

Modern law, of course, is to the contrary; Congress is presently permitted to spend without tying that spending to any enumerated power. It is therefore crucial to respect the limits on Congress's authority under the Necessary and Proper Clause, especially when that power is invoked in aid of the spending power. An overbroad construction of the Necessary and Proper Clause superimposed upon the modern spending power poses grave constitutional danger.

II. SECTION 666(a)(2) IS NOT "NECESSARY . . . FOR CARRYING INTO EXECUTION" ANY FEDERAL POWER

The Eighth Circuit determined that Section 666(a)(2) was "necessary" for carrying into execution the federal power to spend money because the statute's anti-bribery provisions were "rationally related . . . to achieving Congress's end" of effectuating its spending programs. 326 F.2d at 949. See also *id*. at 950, 951. That conclusion reflects a profound misunderstanding of the constitutional standard for evaluating laws under the Necessary and Proper Clause. As James Madison explained more than two centuries ago, a "necessary" law must have a definite, obvious, and precise

---

to provide Congress with a spending power; the Necessary and Proper Clause does the job nicely.

As an eighteenth-century Freudian might have said: sometimes a power to lay and collect taxes really is just a power to lay and collect taxes.

connection to permissible governmental ends. Section 666(a)(2) plainly fails this test.

A. The Word "Necessary" Requires More than a Rational Relationship Between Means and Ends

The Necessary and Proper Clause authorizes Congress "[t]o make . . . all Laws which shall be necessary and proper for carrying into Execution 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. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the State of Maryland argued that a law could only be "necessary" within the meaning of this clause if it was "indispensably requisite," *id.* at 367 (argument of Mr. Jones), to the effectuation of some enumerated power—or, in the words of Thomas Jefferson, if it represented "means without which the grant of the power would be nugatory." Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *in* 19 *The Papers of Thomas Jefferson* 275, 278 (Julian P. Boyd ed., 1974). This definition of the word "necessary" was echoed by other members of the founding generation, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Penn. J. Const. L. 183, 188-96 (2003) (forthcoming); and it conforms elegantly to the meanings reported in Samuel Johnson's then-contemporary *Dictionary of the English Language*, which in both the 1755 and 1785 editions defined "necessary" as "1. Needful; indispensably requisite. 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence." That linguistic understanding of "necessary" has continued into modern times. See 7 *Oxford English Dictionary* 60-61 (1933) (defining "necessary" as "Indispensable, requisite, essential, needful; that cannot be done without" and "closely related or connected; intimate").

Nonetheless, the Court's opinion by Chief Justice Marshall in *McCulloch* famously rejected such a strict view of "necessary." The Court relied on several considerations to reach this conclusion, but the most powerful argument was the intratextual comparison of the Necessary and Proper Clause with the Imposts Clause of Article I, section 10. The Imposts Clause forbids a State from laying import or export duties without congressional consent "except what may be *absolutely necessary* for executing its inspection laws," U.S. Const. art. I, § 10, cl. 2 (emphasis added). The pairing of "necessary" with the qualifier "absolutely" supports the view that the unqualified word "necessary" in the Necessary and Proper Clause means something less restrictive than "those single means, without which the end would be entirely unattainable." 17 U.S. (4 Wheat.), at 414.

But even if a law can be "necessary . . . for carrying into Execution" a federal power without being absolutely indispensable for effectuating that power, that does not entail, or even point toward, the Eighth Circuit's view that a law is constitutional under the Necessary and Proper Clause if it is "rationally related . . . to achieving Congress's ends." It is evident that the Eighth Circuit meant by "rationally related" the kind of minimal means-ends connection required by this Court's decisions applying rational basis scrutiny under the Equal Protection Clause. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). That understanding of the Necessary and Proper Clause is simply indefensible as a matter of text and history and misreads the test set forth in *McCulloch*.

1. *The Eighth Circuit's "Rationally Related" Standard for Determining Necessity Has No Basis in the Constitution's Text*

Textually, while the word "necessary" in the Necessary and Proper Clause might mean something less than "indispensable," it surely means more than "rationally related." Each of the definitions of "necessary" found in Samuel

Johnson's eighteenth-century dictionary reflects a far stricter understanding of the term than a mere rational relationship between means and ends. That may not be enough to establish that the State of Maryland's interpretation of the Necessary and Proper Clause was correct, but it is more than enough to show that the Eighth Circuit's "rationally related" interpretation is wrong.

This conclusion is strongly reinforced by several intratextual comparisons within the Constitution. First, consider what happens if one plugs the Eighth Circuit's understanding of "necessary" into the Imposts Clause: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely [rationally related to] executing its inspection Laws." The qualifier "absolutely" is nonsensical on such an interpretation. In order for the Imposts Clause to make sense, the word "necessary" must describe a direct and substantial connection between means and ends, with the word "absolutely" *amplifying* but not changing the basic character of that connection.

Second, the Constitution's uses of the words "necessary" and "needful" are also instructive. Samuel Johnson cross-defined "necessary" and "needful" as synonyms: one of Johnson's definitions of "necessary" was "needful," and Johnson's entire definition of "needful" was simply "necessary; indispensably requisite." On two separate occasions, including the clause immediately preceding the Necessary and Proper Clause, the Constitution uses the term "needful" to define Congress's powers. See U.S. Const. art. I, § 8, cl. 17 (giving Congress power of exclusive legislation over all land acquired from States "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"); *id.* art. IV, § 3, cl. 2 (authorizing Congress to make "all needful Rules and Regulations respecting" federal territory or property). Both usages of "needful" involve

contexts—federal enclaves and federal territory—in which Congress acts with the powers of a general government. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (Congress has "general and plenary" power over federal territories). If there was ever going to be occasion for giving terms such as "needful" or "necessary" a relatively loose construction, would it be when defining the legislative powers of a general government or the legislative powers of a limited government? The answer is obviously the former, which indicates that the Constitution uses "needful" when describing a less demanding means-ends requirement and "necessary" when describing a stricter one. Again, this may not be enough to sustain the view that "necessary" means "indispensable," but it certainly defeats the claim that "necessary" means "rationally related."

Finally, this Court recently acknowledged in another context that the ordinary meaning of the word "necessary" entails more than a rational basis standard. Under the Telecommunications Act of 1996, when market entrants request access to network elements owned by local exchange carriers, the Federal Communications Commission must "consider, at a minimum, whether . . . access to such network elements as are proprietary in nature is *necessary*." 47 U.S.C. § 251(d)(2) (2000) (emphasis added). The Commission ruled that it would consider access to those elements "necessary" even if it could be obtained by entrants from other sources, because "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15642 (1996). The Commission's reasoning surely would have survived scrutiny if the statute required only a rational connection between the

means of access to the local exchange carrier's network elements and the end of successful competition. In *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), however, the Court applied step 2 of the *Chevron* doctrine[3] to hold that the Commission's interpretation of the term "necessary" was unreasonable because it was "simply not in accord with the [term's] ordinary and fair meaning." 525 U.S. at 390.[4] The Eighth Circuit's interpretation of the term "necessary" in the Necessary and Proper Clause is equally unreasonable as a matter of plain linguistic usage.

2. *The Eighth Circuit's "Rationally Related" Standard for Determining Necessity Ignores the Constitution's Ratification History*

The Eighth Circuit's rational basis standard is inconsistent with the understanding of the Necessary and Proper Clause that was presented to the ratifying public at the founding. During the ratification debates, the Necessary and Proper Clause, which the Antifederalists dubbed the "Sweeping Clause," was a frequent target of attack as a threat to liberty. The Constitution's advocates consistently responded that the Necessary and Proper Clause simply made explicit what would have been implicit in the absence of such a clause. See, e.g., *The Federalist* No. 33, at 202 (Clinton Rossiter ed., 1961) (Alexander Hamilton); *The Federalist* No. 44, at 285 (James Madison); 1 *Annals of Cong.* 1951 (Joseph Gales ed., 1791) (statement of James Madison). The Court has previ-

---

[3] The *Chevron* doctrine provides that "[i]f the intent of Congress is clear, that is the end of the matter," but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[4] It is no mean feat for an agency to lose at step 2 of *Chevron*. Indeed, *Iowa Utilities Board* appears to be the first time in the then-fifteen year history of *Chevron* that an agency lost in this Court at step 2.

ously recognized this ratification history and explicitly endorsed the founding view that the Necessary and Proper Clause clarified rather than expanded Congress's executory powers. See *Kinsella v. United States*, 361 U.S. 234, 247 (1960) (holding that the Necessary and Proper Clause is merely "a caveat").

It is therefore instructive to consider what implementing powers Congress could plausibly have claimed in the absence of the Necessary and Proper Clause. Any such implication of power, in a Constitution that is based on the principle of enumerated powers, could only extend as far as (for want of a better word) necessity requires. One could hardly imply a congressional power to pass all laws "rationally related" to the enumerated powers in the absence of the Necessary and Proper Clause. Given the way in which the enumerated Necessary and Proper Clause was presented to the public, one similarly cannot derive such a power from the actual clause. The words "necessary and proper" limit rather than expand Congress's power.

3. *The Eighth Circuit's "Rationally Related" Standard for Determining Necessity Misreads* McCulloch v. Maryland

It is received wisdom among both lower courts and commentators that the Necessary and Proper Clause requires only rational basis scrutiny of Congress's choice of means. See, e.g., *United States v. Edgar*, 304 F.3d 1320, 1325-26 (11th Cir. 2002); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998); Laurence H. Tribe, *American Constitutional Law* § 5-3, at 805 (3d ed. 2000). Evidence for that position, however, is not readily found in *McCulloch v. Maryland*.

The Court in *McCulloch* considered whether Congress had power to incorporate a bank as a means "necessary and proper for carrying into Execution" various enumerated fiscal powers of the federal government. In upholding the

constitutionality of the bank statute, Chief Justice Marshall rejected the idea that "necessary" laws must be indispensable and instead articulated the now-standard formulation of the meaning of the Necessary and Proper Clause:

> 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.

17 U.S. (4 Wheat.) at 421. A requirement that a law be "appropriate" and "plainly adapted" to a permissible end and "consist with the letter and spirit of the constitution" is hardly an endorsement of a rational basis test. To the contrary, a law that is "plainly adapted" to an end is a law that has more than a remote, hypothetical relationship to the desired end. Otherwise, the adaptation would not be "plain[]."

The Court's application of that standard to the question before it in *McCulloch* demonstrates that more than a rational basis test was at work in 1819:

> If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, *if required for its fiscal operations*. To use one, must be within the discretion of congress, *if it be an appropriate mode of executing the powers of government*. That it is a convenient, a useful, *and essential* instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its *importance and necessity*; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the

> measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the *universal conviction of the utility* of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the *importance* of this instrument, as a means to effect the legitimate objects of the government.

17 U.S. (4 Wheat.) at 422-23 (emphasis added). The emphasized language demonstrates that the Court perceived significantly more than a rational connection between the bank and governmental ends. One can perhaps fault the Court for taking judicial notice of contested facts about the importance of a national bank, but given the thirty-year history of the bank struggle up to that point, the Court's shorthand reference to that history is perhaps understandable. In no event do either the Court's formulation of the appropriate test for necessity or its application of that test point to a rational basis standard.

There is, of course, some other language in *McCulloch* that may suggest a looser means-ends standard. See, e.g., *id*. at 413-14 ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable"); *id.* at 415 (stating that federal powers could not be beneficially executed "by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end . . . . To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."). All of these statements, however, were offered in direct contrast to the position advanced by the State of Maryland; the primary point in each case was that a strict

view of necessity as indispensability is wrong, not that any asserted relationship will suffice. And any such expressions are swamped by the Court's more careful articulation and application of the governing standard.

Fairly considered, *McCulloch* represents a generous view of congressional power to determine which laws are "necessary" for executing federal powers, but not the rational basis standard with which it is often (mis)credited.

Subsequent decisions present a mixed picture. Some modern decisions involving economic regulations, for example, endorse a rational basis test, see, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *United States v. Darby*, 341 U.S. 100, 121 (1941), but those decisions are so closely tied to broad views of the commerce power that it is difficult to read them as precedents for the scope of the Necessary and Proper Clause; the Commerce Clause, rather than the Necessary and Proper Clause, appears to have been doing most of the hard work in those cases. Recent decisions have warned against overgeneralizing the implications of these decisions for Commerce Clause jurisprudence, see *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995), and the same caution is appropriate for the Necessary and Proper Clause. Decisions applying the enforcement provisions of the Civil War Amendments, which authorize Congress to enforce the substantive provisions of those amendments through "appropriate legislation," U.S. Const. amend. XIII, § 2; *id*. amend. XIV, § 5; *id*. amend. XV, § 2, have sometimes articulated a standard resembling a rational basis test while linking those enforcement provisions to the Necessary and Proper Clause, see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), but it is doubtful whether "rational basis" accurately describes the connection between congressional means and ends required under current

law for enforcement of those amendments. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997). Cases concerning Congress's power to regulate court procedures under the Necessary and Proper Clause hold that Congress may "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). On the other hand, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955), the Court held that Congress could not use the Necessary and Proper Clause to extend court martial jurisdiction (which is constitutionally authorized for active servicepersons, see U.S. Const. art. I, § 8, cl. 14) to ex-servicepersons for crimes committed during military service. The Court carefully scrutinized *and rejected* the assertion of a connection between military discipline and extended court martial jurisdiction, applying a test of necessity far stricter than "rationally related." See *id*. at 22-23.

The Court's most recent application of the Necessary and Proper Clause in *Jinks v. Richland County, South Carolina*, 123 S.Ct. 1667 (2003), counsels against assumption of a rational basis test. Section 1367(d) of Title 28 tolls state statutes of limitations while claims over which federal courts have supplemental jurisdiction are pending in federal court (and for at least 30 days after such claims have been dismissed by the federal courts). The South Carolina Supreme Court held that this statute, to the extent that it extends limitations periods against a State's political subdivisions, exceeded Congress's enumerated powers. This Court reversed, finding the statute authorized by the Necessary and Proper Clause. It reached that conclusion, however, only after a very careful analysis of the statute's relation to Congress's powers over the federal courts, which belies any notion that a rational basis test suffices to establish necessity under the Necessary and Proper Clause. See 123 S.Ct. at 1671-72.

In sum, the Court's earliest and most recent explications of the standard for determining when a law is "necessary" under the Necessary and Proper Clause are inconsistent with the Eighth Circuit's "rationally related" standard. In view of the overwhelming textual, structural, and historical case against the Eighth Circuit's reading of the Necessary and Proper Clause, we urge the Court to clarify that a rational basis standard for necessity has no grounding in the Constitution. To the extent that statements in decisions subsequent to *McCulloch* support the rational basis standard, they should be qualified or disavowed.

B. The Word "Necessary" Requires a "Definite Connection" and an "Obvious and Precise Affinity" Between Means and Ends

If the constitutional standard for necessity under the Necessary and Proper Clause is neither indispensability nor a rational relationship, then what is the appropriate standard? For the answer to that question, we turn to James Madison.

Madison shared the concerns of the Court in *McCulloch* about taking too stringent a view of necessity. In his 1791 remarks in Congress opposing the first Bank of the United States, he explained, as described by the reporter:

> Those two words ["necessary" and "proper"] had been, by some, taken in a very limited sense, and were thought only to extend to the passing of such laws as were indispensably necessary to the very existence of the government. He [Madison] was disposed to think that a more liberal construction should be put on them . . . for very few acts of the legislature could be proved essentially necessary to the absolute existence of government.

4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 417 (Jonathan Elliot ed.,

1836). At the same time, he warned against too generous a reading of the means-ends requirement for executory laws:

> 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 [constituting the bank], "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."

1 *Annals of Cong.* 1947-48 (emphasis added).

Nearly three decades after the first debate on the bank bill, Madison succinctly explained how to navigate between the Scylla of indispensability and the Charybdis of rational basis review. "There is," he said in a letter to Spencer Roane in the aftermath of *McCulloch*, "certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character . . . ." Letter of Sept. 2, 1819 to Spencer Roane, *in* 8 *The Writings of James Madison* 447, 451-52 (Gaillard Hunt ed., 1908). That reasonable medium, in the context of the Necessary and Proper Clause, is to require of executory laws "a definite connection between means and ends," *id*. at 448, in which the executory law and the executed power are linked "by some obvious and precise affinity." *Id*.

This standard captures, as well as words can capture it, the nature of the causal connection between legislative means and ends prescribed by the Necessary and Proper Clause. Perhaps the State of Maryland, Thomas Jefferson, et al. overstated their case, as both Madison and Marshall believed, but it is difficult to escape the conclusion that the word "necessary" as used in the Necessary and Proper Clause requires a very substantial means-ends connection, even if that connection does not rise to the level of indispensability. Such a con-

clusion is justified by the Constitution's text, structure, and history.

Textually, Madison's formulation conforms to the ordinary meaning (then and now) of the word "necessary," which is not a term that one would likely use to describe remote and attentuated connections. Structurally, it makes sense of the other uses of the word "necessary" in the Constitution. Under a Madisonian view of "necessary," the phrase "absolutely necessary" in the Imposts Clause of Article I, section 10 means that without congressional consent, States can only tax imports or exports if their inspection laws would otherwise be unenforceable. That is a sensible, and even obvious, interpretation of the Imposts Clause. The word "necessary" also appears in the Recommendation Clause of Article II, which says that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration, such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 2, cl. 3. Given the secondary role of the President in the Constitution's legislative process, and the fact that any laws ultimately enacted under the Necessary and Proper Clause must be "necessary," the Madisonian understanding of "necessary" is an excellent fit with this clause as well. And historically, if there were no Necessary and Proper Clause, one would likely infer something very much like Madison's standard as an implication from the grant of enumerated powers.

The terms used by Madison to describe the means-ends connection required by the Necessary and Proper Clause are, of course, highly abstract and general. That is always true of standards of review, in constitutional law or elsewhere. Standards of review do not dictate outcomes. Instead, they provide frameworks, focus and direct inquiries, and, as Justice Frankfurter put it in one of the Court's most famous decisions on standards of review, "express[] a mood." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

Those functions are not any less crucial to the legal process for being difficult to define precisely. Lawyers and judges understand that it makes a difference whether the standard of review for factfinding is the "clearly erroneous" standard or the "substantial evidence" standard, even if the exact contours of either standard are impossible to describe. See *Dickinson v. Zurko*, 527 U.S. 150, 161-63 (1999). It makes a difference whether exactions imposed as conditions of development must exhibit a rational relationship or a "rough proportionality" to the local harms generated by the development. See *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994). It means something to require governmental classifications to be, not merely rational, but "substantially related to achievement" of important governmental objectives. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). And there is real content to a requirement that laws under the Necessary and Proper Clause exhibit "a definite connection between means and ends" that shows "some obvious and precise affinity" between the enacted law and an underlying governmental power.

The Court's decision last term in *Jinks v. Richland County* exemplifies the proper application of this standard. The Court in *Jinks* carefully identified the relevant means (tolling of the statute of limitations for pending federal claims) and ends (fair and efficient disposition of disputes, which is the essence of the federal courts' case-deciding power under Article III) and found a direct and obvious connection between them. See 123 S.Ct. at 1671-72. Had the Court expressly adopted Madison's understanding of the Necessary and Proper Clause in *Jinks*, it is doubtful whether the Court's discussion of the tolling law's necessity would have differed in the slightest from the actual opinion.

To be sure, as we have shown, there is language in some of this Court's decisions that is hard to square with Madison's view of the Necessary and Proper Clause (though, ironically,

very little of that language comes from *McCulloch*, which prompted some of Madison's most articulate statements about the clause). We urge the Court to take this occasion to clarify that the proper standard for necessity under the Necessary and Proper Clause, as exemplified by the analysis in *Jinks*, is a direct, obvious, and precise relationship between legislative means and constitutionally permissible ends.

C. Section 666(a)(2) Does Not Have a "Definite Connection" to or "Obvious and Precise Affinity" with Any Underlying Governmental Power

Just as one cannot specify in advance all of the means that Congress might try to employ to effectuate federal powers, one cannot specify in advance exactly which fits between means and ends will be unconstitutional. Madison, for instance, may well have been wrong about the application of his own standard to the Bank of the United States.

With respect to Section 666(a)(2), however, the case is easy. The statute criminalizes bribery attempts in connection with any transaction involving $5,000 or more as long as the bribe's intended target is "an agent of an organization or of a State, local or Indian tribal government, or any agency thereof" that receives at least $10,000 in federal assistance within one year of the alleged crime. There is no requirement that the attempted bribe have anything to do with any particular federally funded program. The statute simply polices the honesty of everyone who deals with any recipient of the statutorily-required amount of federal financial assistance. This falls far short of the constitutional requirements of the Necessary and Proper Clause.

Congress could surely penalize misappropriation of federal funds by their recipients. Such a statute would plainly have a "definite connection" to and "obvious and precise affinity" with the underlying federal program. For similar reasons,

Congress could also penalize the acceptance of bribes by recipients of federal funds when the bribes concern the operation of federally-funded programs. Indeed, Congress may be able to penalize such bribes even if they are not shown specifically to affect the disposition of federal funds. See *Salinas v. United States*, 522 U.S. 52 (1997); cf. *Westfall v. United States*, 274 U.S. 256 (1927) (Congress may prohibit bank fraud perpetrated on State banks in the Federal Reserve System without showing that any of the Federal Reserve Banks suffered a specific loss). In this circumstance, the connection between the penal statute and the execution of an underlying federal power is not as definite, obvious, and precise as in the case of the misappropriation of federal funds, but to require the narrowest possible tailoring of implementing statutes would move too far toward the view that "necessary" means "indispensable." Congress can insure the integrity of the programs that it funds through general laws, even if those laws sometimes sweep beyond their central concerns. It is more doubtful whether Congress could prohibit persons who do not themselves receive federal benefits from offering bribes to persons who do receive such benefits, even when the bribes concern the operation of a federally-funded program: it is unclear how a federal program is definitely or obviously affected simply because temptation is placed in the path of federal funding recipients, given that those recipients can always be punished if they yield to the temptation. But Section 666(a)(2) goes far beyond any remotely plausible connection to the execution of federal powers.

Section 666(a)(2), as interpreted by the government and the Eighth Circuit, does not require any showing that the alleged bribery have any connection to any federally funded program. All that must be shown is that the target of the bribe received federal assistance of some kind in the amount of $10,000 and that the attempted bribe concerned a transaction involving at least $5,000. The only possible rationale for reaching this

kind of conduct is that Congress has an interest in ensuring that recipients of federal benefits not face undue temptation in areas of their lives other than the administration of federal benefits, for fear that they might yield in those other areas and subsequently yield with respect to federal funds as well. If that is "necessary . . . for carrying into Execution" federal powers, so would be a statute prohibiting, for example, solicitation of adultery in connection with recipients of federal funds. Section 666(a)(2) does not represent a "definite," "obvious" and "precise" means for carrying federal powers into execution. It is unconstitutional on its face.

III. SECTION 666(a)(2) IS NOT "PROPER FOR CARRYING INTO EXECUTION" ANY FEDERAL POWER

As this Court has repeatedly recognized, even if a statute is "necessary . . . for carrying into Execution" federal powers, it is still beyond Congress's powers under the Necessary and Proper Clause if it is not "proper" for that purpose. See *Jinks v. Richland County*, 123 S.Ct. at 1672; *Alden v. Maine*, 527 U.S. 706, 732-33 (1999); *Printz v. United States*, 521 U.S. 898, 923-24 (1997). On two recent occasions, the Court has held that congressional statutes that violated constitutional principles of federalism were not "proper" means for executing federal powers. See *Alden*; *Printz*. Judge Bye, dissenting below, developed at some length the argument that Section 666(a)(2) is not "proper for carrying into Execution" federal powers. 326 F.3d at 954-57 (Bye, J., dissenting). The panel majority dismissed this argument on the ground that a law can only fail to be "proper" when Congress directly regulates States in violation of constitutional principles of federalism. *Id*. at 949 n.6. Judge Bye was right and the panel majority was wrong: the direct infringement of state sovereignty is not the only way in which a law can be improper under the Necessary and Proper Clause.

A. A Law Can Fail to Be "Proper" If It Contravenes Constitutional Principles of Federalism, Separation of Powers, or Individual Rights

The word "necessary" in the Necessary and Proper Clause regulates the "fit" between means and ends that must be exhibited by executory legislation. The word "proper" serves a different function. A "proper" law, reflecting the principal meaning of the word "proper" identified by Samuel Johnson in 1785,[5] must respect the *peculiar and distinctive jurisdictional arrangements set forth in the Constitution*. More specifically:

> [T]he authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights.

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297 (1993). Limits imposed by the character of the States as States are one application of this principle, but they hardly exhaust the circumstances under which executory laws can be improper.

---

[5] See 2 Samuel Johnson, *Dictionary of the English Language* (1785) ("proper" means "1. Peculiar; not belonging to more; not common").

If Congress sought to direct the outcome of a specific court case, such a statute would not be "proper for carrying into Execution" the federal judicial power. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). If Congress sought to give itself power to remove executive officers by means other than impeachment, such a statute would not be "proper for carrying into Execution" any federal powers. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). In 1790, before ratification of the Fourth Amendment, if Congress had sought to authorize the use of general warrants to enforce the tariff laws, such a statute would not have been "proper for carrying into Execution" the taxing power. See 1 *Annals of Cong.* 438 (1791) (statement of James Madison) (suggesting that in the absence of a bill of rights, Congress might misconstrue its powers under the Necessary and Proper Clause and wrongly enact laws, such as laws providing for general warrants, "which laws in themselves are neither necessary nor proper"). Laws can be improper under the Necessary and Proper Clause without directly regulating the States.

Even if we confine ourselves to considerations of federalism, the Constitution's most basic federal feature is the principle of enumerated power. A statute enacted pursuant to the Necessary and Proper Clause that threatens to unravel that principle is not "proper for carrying into Execution" federal powers. This point was acknowledged by Alexander Hamilton, writing as Publius in *The Federalist*:

> But it may be again asked, Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union? . . . The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in

> making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?

The Federalist No. 33, at 203-04 (Alexander Hamilton) (emphasis in original). Cf. *Jinks*, 123 S.Ct. at 1672 (expressing concern about connections between means and ends "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8"). One must accordingly ask whether Section 666(a)(2) is consistent with the Constitution's overall distribution of governmental authority.

B. Section 666(a)(2) Is Not "Proper" Because It Extends Congress's Power Beyond Its Proper Sphere

The Necessary and Proper Clause is a vehicle for executing federal powers. It is not a vehicle for circumventing the Constitution's enumeration of Congress's legislative jurisdiction. The Necessary and Proper Clause, of course, is part of that enumerated legislative jurisdiction, and there are accordingly many subjects that Congress can reach by virtue of that clause that otherwise would not be within its power. The power to create federal offices, the power to regulate court procedures, the power to condemn property, and the power to punish offenses other than counterfeiting, maritime offenses, or violations of the law of nations are all powers beyond those enumerated elsewhere in the Constitution that Congress possesses under the Necessary and Proper Clause.

That does not mean, however, that Congress can employ such means in a limitless fashion, even when such means are "necessary" within the meaning of the Necessary and Proper Clause. Congress's regulatory authority is carefully defined by the enumerations of subjects over which Congress is competent. Those enumerations define what might be termed Congress's "subject matter jurisdiction," which can be effectuated by means of laws pursuant to the Necessary and Proper Clause. But a law that is presented as a means for carrying

into execution federal powers that in fact regulates an area beyond the specific enumerations of Congress's regulatory authority is not "proper." It is not a law that is distinctively and peculiarly within the jurisdiction of Congress.

For example, Congress has power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, which includes the power to establish court martial jurisdiction over offenses by military personnel. Historically, there are many circumstances in which Congress has believed it useful to employ the Necessary and Proper Clause to extend court martial jurisdiction to servicepersons who have left the service or to dependents of servicepersons who live on overseas military bases. The Court has consistently rejected use of the Necessary and Proper Clause to expand court martial jurisdiction beyond active servicepersons. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-23 (1955) (no court martial jurisdiction over ex-servicepersons even for crimes committed while in the service); *Reid v. Covert*, 354 U.S. 1, 20-22 (1957) (plurality opinion) (no court martial jurisdiction over civilian dependents for capital crimes); *Kinsella v. United States*, 361 U.S. 234, 247-48 (1960) (unanimous decision) (no court martial jurisdiction over civilian dependents for non-capital crimes). The basic rationale of at least the latter two decisions is that the extension of court martial jurisdiction beyond active servicepersons pursuant to the Necessary and Proper Clause is "inconsistent with both the 'letter and spirit of the constitution,' " *Reid*, 354 U.S. at 22 (quoting *McCulloch*)—that is, the extension is not "proper for carrying into Execution" federal powers. (The Court in *Quarles* focused more on necessity than propriety.) In all of these cases, of course, the Court noted that the consequence of allowing use of the Necessary and Proper Clause to extend court martial jurisdiction would be to authorize prosecution of crimes without the safeguards of Article III and the Fifth and Sixth Amendments. See *Quarles*, 350 U.S. at 15-20; *Reid*,

354 U.S. at 20-21; *Kinsella*, 361 U.S., at 246-47. But anytime the Necessary and Proper Clause is used to expand enumerated federal powers, there are, at a minimum, implications for federalism. Once federalism is acknowledged as a genuine constitutional principle, the concerns that animated the court martial cases are entirely generalizable.

In this vein, Section 666(a)(2) disrupts a "proper" allocation of authority between state and federal authority. Section 666(a)(2) criminalizes the conduct of persons who simply come into contact with recipients of federal funds. That is precisely the kind of general legislative authority that Congress is denied by the enumerations of legislative competence in Article I, section 8. It is precisely the kind of authority that it is not "proper" for Congress to exercise when executing federal powers.

CONCLUSION

Section 666(a)(2) is neither necessary nor proper for carrying into execution any federal power. Accordingly, *amicus curiae* Cato Institute requests that this Court declare Section 666(a)(2) invalid and reverse the decision of the court below.

Respectfully submitted,

GARY LAWSON *
765 Commonwealth Avenue
Boston, MA 02215
(617) 353-3812

CATO INSTITUTE
ROBERT A. LEVY
TIMOTHY LYNCH
1000 Massachusetts Ave., NW
Washington, D.C. 20001
(202) 842-0200

*Counsel of Record