MEMORANDUM

TO: Professor Louis D. Bilionis
FROM: Patrick Mirzakhanian
DATE: October 1, 2021
RE: Constitutional Challenge to New Federal Extortion Statute

In your memorandum of September 4, 2021, you asked for a memorandum developing the basics of the constitutional argument we might make against the new federal extortion statute.

The statute makes it a federal crime to "gain property of money by the use or threat of violence, harm to reputation, or damage to property." The strongest challenge to the statute's constitutionality is a claim that Congress has only *enumerated* powers and not a "police power," as supported by *McCulloch v. Maryland*. Congress cannot act without being able to point to a power stemming from the Constitution (here, it seems they will be citing the authorities under the Commerce Clause). This includes Congress acting generally to promote the public's safety, welfare, and morals, which is what this extortion statute aims to accomplish. Per the Tenth Amendment, it is the role of the states to deal with matters outside the enumerated powers of the federal government and, in this case, extortion does not fall within the federal government's purview.

In *Gonzales v. Raich*, the Supreme Court stated that for such a law to be constitutional, it must rationally be viewed to have a "substantial economic effect on interstate commerce." This statute fails to meet those standards. First, the act of extortion is not a sellable good with an established interstate market like marijuana. Rather, it is an illegal action that more closely relates to state-controlled penal codes regulating matters like violence or theft. Because there is no market for the buying and selling of extortion (as it is not a commodity) and it being limited to local activity, there is no proven threat of it affecting interstate commerce, thus leaving its regulation in the hands of the states.

The extortion statute is thus like the law which the Supreme Court struck down in *Lopez v. United States*. There, the Court held that the government's argument to uphold the Gun-Free School Zones Act would essentially imply that the Commerce Clause has no limits. Like the extortion statute, this law and its subsequent affirmation would have wrongly extended Congress' limited power to a general "police power" as previously cited in *McCulloch v. Maryland*.

The United States Attorney may contend that, citing *Perez v. United States*, the federal government may criminalize certain solely intrastate activities if those activities adversely affect

interstate commerce. The Supreme Court, in this case, held that loansharking had extensive harmful effects on interstate commerce, particularly among the poorer members of the country, and the federal government was right to prosecute. Those points, even if true, cannot sustain the extortion statute's constitutionality because, the collection of loans involves a financial agreement by multiple parties that includes terms for repayment and late penalties. Contrary to this, the extortion statute is not limited to the repayment of debts. Extortion could broadly be applied to a wide array of actions, such as acts of pure theft in which the extorter coerces an individual to pay them under threat of releasing negative information or violence to oneself, loved ones, or property. The case of *Perez v. United States* points to a very specific illegal act of coercive debt collection, whereas this statute would undesirably expand the federal government's authority to prosecute on a much broader scale.

We also might anticipate that the government will rely on *Garcia v. San Antonio Metropolitan Transit Authority* in support of the legislation's constitutionality. That case, however, is distinguishable. Its opinion claims that systems to protect state sovereignty are already ingrained in the foundation of the federal government, like electing representatives to both the legislative and executive branches to uphold the interests of the states. There, unlike here, the law does not sidestep state sovereignty, as the Fair Labor Standards Act constituted "traditional government functions." This is contrary to the extortion statute, which is comprised of measures more related to the "police power" discussed in *McColloch v. Maryland* in that the federal government is regulating the public's morals, which is outside the federal government's enumerated powers.