No. 25-3259

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

John Ream,
Appellant,

v.

United States Department of the Treasury, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Civil Action No. 2:24-cv-00364-EAS-CMV

Reply Brief of John Ream

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Introduction

The Court should hold that Congress cannot constitutionally prohibit Mr. Ream from distilling small quantities of alcohol in his own home for his and his wife's own personal consumption. The government makes two arguments in hopes that the Court will not reach the merits, but neither is availing.

The government's standing argument fails. Mr. Ream is a prototypical plaintiff with standing. Cases brought by plaintiffs like Mr. Ream seeking declaratory and injunctive relief against laws that directly circumscribe their conduct are a dime a dozen, from *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) (pre-enforcement review of firearms law), to *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (pre-enforcement review of abortion law). Indeed, "the very purpose of the Declaratory Judgment Act" is to "ameliorate" the "dilemma" faced by such plaintiffs, who otherwise would have to choose between "abandoning [their] rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (quotation marks omitted).

The government argues that if the Court reverses on standing, it should remand for the district court to issue an opinion on the constitutionality of the federal home-distilling prohibition. But even the government's cited cases recognize that the Court has discretion to reach the merits, and those cases involved remands of fact-bound issues within the district court's discretion. By contrast, this case involves a purely legal question subject to *de novo* review. In such circumstances, the Court has recognized that a remand is pointless and decided the merits in the first instance.

Argument

I. Mr. Ream Has Standing to Challenge the Prohibition

The standing inquiry in this case is not difficult. Mr. Ream is directly injured by the federal-home distilling prohibition because it prohibits him from home distilling, which he would do but for the prohibition, and it renders him ineligible for a federal distilling permit, which he cannot obtain because of the prohibition. Even if the government were correct that the only way Mr. Ream can establish standing is to demonstrate a credible threat of prosecution, Mr. Ream has also satisfied that standard.

A. Actual Present Harm *or* a Credible Threat of Prosecution Can Constitute a Pre-Enforcement Injury in Fact

As Mr. Ream explained in his opening brief (at 13–16), the law is crystal clear that a plaintiff may "show actual present harm ***or*** a significant possibility of future harm in order to demonstrate the need for pre-enforcement review." *Online Merchants Guild v. Cameron*, 995 F.3d 540, 547 (6th Cir. 2021) (quotation marks omitted and emphasis added); *Clark v. Stone*, 998 F.3d 287, 294 (6th Cir. 2021) (same); *Kanuszewski v. Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 406 (6th Cir. 2019) (same); *Savage v. Gee*, 665 F.3d 732, 740 (6th Cir. 2012) (same); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535 (6th Cir. 2011), abrogated on other grounds by *NFIB v. Sebelius*, 567 U.S. 519 (2012) (same). Establishing a credible threat of prosecution is just *one* way plaintiffs can demonstrate a "significant possibility of future harm," which itself is unneeded

for plaintiffs suffering "present injury." *Thomas More Law Ctr.*, 651 F.3d at 535–36.

The government nevertheless cites (at 15, 30) *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431 (6th Cir. 2024), for the proposition that pre-enforcement review is "only" available if the credible-threat test is satisfied. The government vastly overreads *Mulroy*—an overreading that would put the case in conflict with all of the foregoing decisions. *Mulroy* explicitly addressed only what constitutes a cognizable injury "in this context," which was a plaintiff bringing a First Amendment challenge to a vague prohibition that did not clearly proscribe its conduct. *Id.* at 435.[1] Unlike Mr. Ream, the *Mulroy* plaintiff did not assert an actual present harm from the law, but instead claimed "an imminent, rather than an actual" injury from potential overzealous future prosecution. *Id.* (quotation marks omitted). *Mulroy* accordingly does not speak to what constitutes an actual present harm sufficient to establish an injury in fact.

Crawford v. United States Dep't of Treasury, 868 F.3d 438 (6th Cir. 2017)—which is also cited (at 15, 30) by the government—only confirms Mr. Ream's point. The Court in *Crawford* considered whether the plaintiffs had "***either*** an *actual* injury that is fairly traceable to FATCA ***or*** an *imminent* threat of prosecution from noncompliance with FACTA." *Id.* at 458 (bold emphases added). Actual present harms considered by *Crawford* included a plaintiffs'

[1] Contrary to the government's suggestion (at 30), the plaintiff in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), similarly challenged an Ohio statute prohibiting "false statements" during a campaign "notwithstanding [the plaintiff's] belief in the truth of its allegations." *Id.* at 163.

"decision to separate their own assets" to avoid disclosure, *id.* at 459, and the fact that a plaintiff did not "have a college-savings account placed in her name" because her father feared disclosure, *id.* at 461. If the credible-threat test were the sole means of establishing an injury in fact, the Court's analysis of these "direct harm[s]" would have been unnecessary. *Id.* at 460.

B. The Prohibition Causes Mr. Ream Actual Present Harm

The federal home-distilling prohibition inflicts two actual present harms on Mr. Ream by (1) directly prohibiting him from home distilling and (2) rendering him ineligible for a federal distilling permit. The government has little to say on the former harm and nothing to say on the latter.

1. For all its bluster, the government ultimately appears to agree (at 31–32) that a plaintiff whose conduct is directly regulated by a challenged law has suffered an actual present harm. That position is obviously correct as a matter of precedent, first principles, and basic common sense, as Mr. Ream explained (at 13–18) in his opening brief. No one could reasonably dispute that if, for example, Congress passed a law prohibiting individuals from having children, individuals who intended to have children but for the law would have standing without having to jump through any additional hoops.

The government argues (at 31–32) that Mr. Ream has "not alleged sufficient facts to establish an intent to actually engage in conduct prohibited by the statute." But Mr. Ream's complaint alleges in no uncertain terms that "[h]e would engage in home distilling, but for the federal home distilling prohibition." RE 1, PageID # 6 (¶ 24); *see also id.* (¶ 29) (same). In addition, Mr. Ream has

"extensively researched and studied the process of distilling and has determined that he is prepared to take every step necessary to responsibly distill small quantities of alcohol in his own home for his own personal consumption." *Id.* ¶ 27. If Mr. Ream obtains the relief he seeks, he will begin by distilling the "rye and Bourbon varieties" of whiskey. *Id.* ¶ 27. He has even "identified in particular a 5-gallon copper pot still being sold for approximately $600 that [he] would purchase" and "recipes that [he] would use as a starting point." RE 20-1, PageID # 144–45 (¶¶ 12–13). Mr. Ream also explained that once he has a still, he "could begin home distilling almost immediately." *Id.* ¶ 13. He is a former aerospace engineer who turned a longtime home-brewing hobby into a successful family brewery, so he readily understands what it takes to home distill. *See* RE 1, PageID # 4–5 (¶¶ 13–23). In short, as Mr. Ream declared under penalty of perjury, he is "able and ready to home distill and would home distill if the federal home-distilling prohibition were invalidated." RE 20-1, PageID #145 (¶ 15).

Given Mr. Ream's allegations and sworn declaration, the government is plainly wrong that he "has not shown a serious intent to engage in" home distilling. Gov. Br. 34. Mr. Ream need only "plausibly allege[] that he is able and ready" to home distill should he prevail. *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1034 (6th Cir. 2022) (quotation marks omitted). Mr. Ream has well exceeded that standard. *See id.* (pastor's allegation that "he intends to solemnize future marriages in Hamilton County" established standing); *Hile v. Michigan*, 86 F.4th 269, 275 (6th Cir. 2023) (plaintiffs' allegation that they "would lobby their representatives to change Michigan's law

concerning 529 plans" if the challenged law were declared unconstitutional established standing).

The government contends (at 32–34) that Mr. Ream cannot have a "serious intent" to home distill because he has not previously home distilled. Specifically, the government distinguishes *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998), and *Carman v. Yellen*, 112 F.4th 386 (6th Cir. 2024), because those cases "involved plaintiffs who were already engaged in conduct that had been [affected by] intervening law." Gov. Br. 32–34. That distinction is irrelevant given that declaratory and injunctive relief are "forward-looking equitable remedies." *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1017 (6th Cir. 2022). The forward-looking "Hobson's choice" faced by Mr. Ream and the plaintiffs in *Peoples Rights Organization* and *Carman* is exactly the same—they all have to choose between conforming their conduct to the law or violating the law and risking enforcement action. *Peoples Rts. Org.*, 152 F.3d at 529. The fact that Mr. Ream has not previously home distilled does not alter that calculus. Mr. Ream has never home distilled because home distilling has been illegal his entire life. The government's suggestion that only admitted lawbreakers have standing to challenge the federal home-distilling prohibition is absurd.

The government's distinction of *Thomas More Law Center v. Obama* fares no better. *See* 651 F.3d at 536 (holding that plaintiffs demonstrated an actual present harm because the "impending requirement to buy medical insurance on the private market has changed their present spending and saving habits"). The

government suggests (at 33) that, although plaintiffs have standing to challenge laws that compel them to take action against their will, plaintiffs lack standing to challenge laws that forbid them from taking action against their will. The government offers no support for why this distinction matters. Supreme Court precedent does not distinguish between Article III injuries caused by "action or inaction." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). As the Supreme Court recently explained, plaintiffs challenging "[g]overnment regulations that require *or forbid* some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (emphasis added); *Carman*, 112 F.4th at 408 (same). This is precisely the case here.

2. Mr. Ream's opening brief also explained (at 18–20) that his inability to obtain a federal distilling permit, which he could and would obtain but for the federal-home distilling prohibition, constitutes an additional injury in fact that independently affords him standing. *See League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 528 & n.4 (6th Cir. 2007) (holding that plaintiffs' ineligibility for driver's licenses constituted an injury in fact); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 390 (6th Cir. 2001) ("Because of the civil disabilities provisions, Pendergrass, and consequently the 822 Corporation, was ineligible to receive an operating license. Accordingly, both parties have standing to challenge those provisions."); *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) ("We have no doubt that at least four of the plaintiffs possessed standing to sue the Salt Lake County Clerk based

on their inability to obtain marriage licenses from the Clerk's office.").

The government does not directly respond to this argument. The government at one point does distinguish (at 21) one of Mr. Ream's cited cases, *Carney v. Adams*, 592 U.S. 53 (2020). Mr. Ream cited *Carney* for the proposition that he need not engage in the "futile gesture" of submitting an application for a distilling permit so long as he establishes that he is "able and ready" to apply for one. *Id.* at 66.[2] The government notes that the Supreme Court in *Carney* concluded, on the specific facts of that case, "that the record evidence fails to show … [the plaintiff] was 'able and ready' to apply for a judgeship." *Id.* at 63. But unlike the plaintiff in *Carney*, Mr. Ream does not rely on "a bare statement of intent alone" that is at odds with "the context of the record." *Id.* at 65. Mr. Ream's experience running a brewery and complying with the applicable federal permitting laws in that regard and his extensive research of and planning for home distilling all support the proposition that he is "able and ready" to apply for a federal distilling permit. *Id.* at 63. Accordingly, Mr. Ream's ineligibility for the permit constitutes an additional injury in fact.

[2] The government cites (at 20) *Miller v. City of Wickliffe*, 852 F.3d 497 (6th Cir. 2017), to suggest that Mr. Ream was required to apply for a federal distilling permit. But the Court in *Miller* held that the plaintiffs should have applied for a nightclub license because "it is far from clear that the nightclub ordinance would have necessarily prohibited plaintiffs from opening a nightclub," and thus their application would not have been futile. *Id.* at 505. Where, as here, the challenged law renders an application futile, plaintiffs need only show that they are able and ready to apply if the law is invalidated.

* * *

Contrary to the government's characterization (at 31), Mr. Ream has never claimed that "he is injured by the mere presence of the law." Mr. Ream has a serious intent to home distill and obtain a federal distilling permit but for the challenged prohibition, which sets him apart from the general public and means that the has a "personal stake" in the outcome of this litigation. *All. for Hippocratic Med.*, 602 U.S. at 379 (quotation marks omitted). This case therefore does not present an "abstract" grievance about the limits of federal power devoid of any "concrete factual context." *Id.* at 379–91 (quotation marks omitted). The relief Mr. Ream seeks would have a very real and tangible effect on him in that, if he prevails, he will be able to obtain a federal permit to distill and distill small quantities of rye and Bourbon in his home for his and his wife's own personal consumption. It does not get any more concrete and personal than that.

C. Even if a Credible Threat of Prosecution Were Required, Mr. Ream Demonstrated One

Given standing doctrine's focus on the need to resolve real-world disputes, the government's position that Mr. Ream's standing turns on the hypothetical likelihood that he would be prosecuted in a counter-factual scenario where he violates the federal home-distilling prohibition is passing strange. Mr. Ream is a law-abiding family man and small-business owner who will not break the law, which means he has "eliminated the imminent threat of harm by simply not doing what he claimed the right to do." *MedImmune*, 549 U.S. at 129. But the law is clear that Mr. Ream's compliance with the prohibition does "not preclude

subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *Id.* The government tries to force a square peg into a round hole by claiming that this case nevertheless *must* be analyzed under the credible-threat test. Even assuming *arguendo* that the government's approach to standing is correct, however, Mr. Ream satisfies that test.

1. Mr. Ream has "an intention to engage in a course of conduct … proscribed by statute." *Susan B. Anthony List*, 573 U.S. at 159 (quotation marks omitted). Like the district court, the government criticizes Mr. Ream because, in the government's view, he has not taken every single possible step that he could towards home distilling short of violating the law. Even if that were true, the government cites *no* case holding that taking every possible step is required. The governing standard is simply whether Mr. Ream has "an intention to engage" in home distilling, *id.*, not whether he has taken every single possible step to home distill.

Not a single cited case supports the government's every-possible-step standard. In *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010), for example, the Ninth Circuit simply explained that a plaintiff must "giv[e] details about their future speech such as when, to whom, where, or under what circumstances," that are "specific enough so that a court need not speculate as to the kinds of political activity the plaintiffs desire to engage in," *id.* at 787 (quotation marks omitted). "Without these kinds of details," it would be difficult for a court to determine whether the plaintiff actually intended to engage in conduct that violated the challenged law. *Id.* As discussed above, Mr. Ream has provided

more than enough details regarding his intent to home distill. Who? Mr. Ream will do the distilling, and the spirits will be consumed by him and his wife. Where? In his home. Under what circumstances? Using an approximately $600 5-gallon copper pot still and recipes for rye and Bourbon that Mr. Ream has identified. When? After final declaratory and injunctive relief against the federal home-distilling prohibition as applied to Mr. Ream is issued.

The government's every-possible-step theory also fails on its own terms. The government argues (at 19) that Mr. Ream could purchase his $600 still so long as he has no "intent to use" it, 26 U.S.C. § 5601(a)(6), and the still is not "set up," 26 U.S.C. § 5601(a)(1). But Mr. Ream *would* have an "intent to use" the still if he prevails in this case. And mere possession of a still "give[s] rise to an inference" that a defendant has violated the law. *Rossi v. United States*, 289 U.S. 89, 91 (1933) ("[P]roof of the custody or control of a still for unlawful distillation of alcoholic spirits is enough to give rise to an inference of lack of registration and failure to give bond."); *United States v. Elliott*, 426 F.2d 775, 777 (5th Cir. 1970) ("[C]ustody of a still is enough to give rise to an inference of lack of registration.").[3] Indeed, "[p]urchasing as little as a simple boiling kettle [for home distilling] may well earn you a visit from armed TTB agents." Jacob

[3] The government suggests (at 19) that Mr. Ream should "purchase and possess a still in a non-prohibited location." But Mr. Ream's home is a prohibited location, obviously, and so is his brewery. 26 U.S.C. § 5601(a)(6) (prohibiting possession of a still on "any premises where beer or wine is made or produced").

Sullum, Reason, *Feds Take a Sudden Interest in Busting Home Distillers* (July 14, 2014).[4]

The government also criticizes (at 17) Mr. Ream for not purchasing the "raw materials" he would need. As Mr. Ream explained, "[t]he ingredients necessary for making whiskeys, such as water and grains, are ones that [he] can easily obtain in short order." RE 20-1, PageID # 145 (¶ 13). Mr. Ream's knowledge of the necessary ingredients and ability to readily obtain them are sufficient to satisfy any reasonable standard. The government cannot seriously expect Mr. Ream to stockpile bags of rye malt and gallons of purified water from Walmart in expectation of the day he might finally be able to use them. If Mr. Ream had done so at the time he filed suit, the rye malt already would have exceeded its shelf life and the water would be nearing it, and who knows how much longer this case will take if the government has its way.

The government similarly faults (at 21) Mr. Ream for not providing even more detail than he already has "about his intended premises and operations." But just like its every-possible-step standard, the government's every-possible-detail standard is utterly unsupported by any case. The additional details the government requests are immaterial. For example, Mr. Ream has already explained clear as day that the premises on which he intends to distill are his home, and the federal home-distilling prohibition applies to all homes.[5] The idea

[4] *Available at* https://reason.com/2014/07/15/feds-take-a-sudden-interest-in-busting-h/ (last visited Sept. 15, 2025).

[5] The government states (at 16–17) that the federal home-distilling prohibition "is not a blanket prohibition on distilling on residential property," because it

that Mr. Ream needs to specify whether his home is a craftsman ranch, Cape Cod bungalow, or center-hall colonial is as ridiculous as asking Mr. Ream to specify whether his identified Bourbon recipe is wheated or high-rye.

2. Even the government does not attempt to defend the district court's conclusion that Mr. Ream's conduct is not "arguably affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 159. As Mr. Ream's opening brief explained (at 26–28), that holding conflicts with this Court's decision in *Online Merchants*, 995 F.3d at 549–50.

3. Mr. Ream's fear of prosecution is "reasonable" and far from "imaginary or wholly speculative." *Block v. Canepa*, 74 F.4th 400, 409–10 (6th Cir. 2023) (quotation marks omitted). The government bizarrely places great weight (at 27) on the fact that Mr. Ream "has not been subject to any past enforcement action or received any targeted interest from the government with respect to his interest in distilling." Mr. Ream has not been subject to any past enforcement action because *Mr. Ream has never violated the federal home-distilling prohibition*. But, as explained in Mr. Ream's opening brief (at 29–31), other individuals like Mr. Ream—save for a willingness to violate federal law—have been subject to TTB enforcement activities.

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only criminalizes distilling in any "dwelling house" and any connected yard or shed. In the government's view, apparently a person owning a large rural plot of land could distill in a shed that is located far away from the house. This interesting interpretation of the prohibition is irrelevant here because Mr. Ream intends to distill in his home, which is indisputably a prohibited location.

The government is wrong that Mr. Ream needs to be personally threatened to establish a credible threat. "[P]laintiffs need not allege that the threat of prosecution is directed specifically at them as individuals." *Cayuga Nation v. Tanner*, 824 F.3d 321, 332 n.9 (2d Cir. 2016). The government cites (at 24) *Lopez v. Candaele* for the proposition that a threat of prosecution needs to be "particularized." But *Lopez* merely notes that "general threats by officials to enforce those laws which they are charged to administer"—such as a "sheriff's statement that 'all of the laws of San Diego, State, and Federal and County, will be enforced within our jurisdiction'"—are insufficient. 630 F.3d at 787 (quotation marks omitted). Mr. Ream's analysis of the threat of prosecution is appropriately specific to the federal home-distilling prohibition.[6]

In any event, the government's repeated refusal to disavow enforcement *is* particularized to Mr. Ream. "A threat is considered especially substantial when the administrative agency has not disavowed enforcement." *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). The government has had numerous opportunities in the district court and on appeal to simply state that it will not enforce the federal home-distilling prohibition against Mr. Ream if he distills

[6] The government also notes (at 28) that *McKay v. Federspiel*, 823 F.3d 862 (6th Cir. 2016), held that signs warning of a courthouse electronic-device prohibition that "address[ed] the general public, and not [the plaintiff] specifically" did not establish a credible threat, *id.* at 869. But that was because "the signs also reference[d] the possibility of an exemption by judicial permission," and the plaintiff did "not allege that he has requested or been denied judicial permission." *Id.* at 865, 869–70.

small quantities of spirits in his own home for his and his wife's own personal consumption, but it has consistently refused to do so.

Far from disavowing enforcement against individuals like Mr. Ream, TTB published a rule in 2011 stating that "[a] person may not produce distilled spirits at home for personal use." 27 C.F.R. § 19.51; *see* Revision of Distilled Spirits Plant Regulations, 76 Fed. Reg. 9080 (2011). TTB's current public guidance likewise warns that "[f]ederal law strictly prohibits individuals from producing distilled spirits at home" and that doing so "can expose you to Federal charges for serious offenses and lead to consequences including … criminal penalties" like up to five years in prison and fines up to $10,000.[7] Given that *defendants' own public guidance threatens Mr. Ream that he could go to prison for home distilling*, their suggestion that Mr. Ream unreasonably fears prosecution is preposterous.

Perhaps recognizing that Mr. Ream's fear is patently reasonable, the government suggests (at 23) that Mr. Ream must show that a hypothetical prosecution would be "certainly impending" if he engaged in home distilling. That is not correct. To be sure, the Supreme Court has stated with respect to allegations of future injury generally that "the threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted). But the credible-threat test is one way a plaintiff can satisfy the "certainly impending" requirement. *Davis v. Colerain*

[7] TTB, Home Distilling, https://www.ttb.gov/distilled-spirits/penalties-for-illegal-distilling (last visited Sept. 15, 2025).

Twp., Ohio, 51 F.4th 164, 172 (6th Cir. 2022) ("In the context of the threatened enforcement of a regulation, this 'certainly impending' test generally requires proof that a plaintiff plans to engage in conduct that the regulation arguably proscribes and that there is a credible threat that the defendant will enforce the regulation against the plaintiff.").[8] So the government has it backwards. When a plaintiff "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder," it has satisfied the "certainly impending" requirement. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (quotation marks omitted). Plaintiffs do not need to show that a prosecution is "certainly impending" to satisfy the credible-threat test. *See id.* at 302 (finding standing because plaintiffs were "not without some reason in fearing prosecution").[9]

Significantly, the government does not dispute that it asks the Court to create a circuit split. Other circuits have held that "the existence of a statute implies a threat to prosecute." *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir.

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[8] *See also Kearns v. Cuomo*, 981 F.3d 200, 212 (2d Cir. 2020) ("Unlike the threat of prosecution, which conveys standing if it is not 'imaginary or wholly speculative,' the threat of removal from office is evaluated under *Clapper*'s more restrictive standard, requiring that a prospective injury be 'certainly impending.'" (citation omitted)); *Cayuga Nation*, 824 F.3d at 332 n.9 (rejecting argument that "threat of prosecution" must "meet the higher 'certainly impending' standard").

[9] It is difficult to see how any plaintiff could prove that a prosecution is "certainly impending." The clearance rate even for crimes like murder is just slightly north of 50 percent.

2010); *Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013) (same); *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019) (similar). The government argues (at 28) that the Court should split with these circuits because their holdings "cannot be squared with precedent from the Supreme Court or this Court, which has looked to specific attributes of a statute's enforcement and not merely whether a prohibition exists." The government cites *Susan B. Anthony List* for this proposition, but the Ohio statute challenged in that case did not clearly proscribe the plaintiff's conduct—the statute prohibited "false statements" during a campaign and the plaintiff maintained that its statements were true. *Id.* at 163. Where, as here, "a statute *specifically* proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Tweed-New Haven Airport. Auth.*, 930 F.3d at 71 (quotation marks omitted and emphasis added).

II. The Court Should Hold the Federal Home-Distilling Prohibition Unconstitutional

The government's refusal to brief the merits is astonishing. The government concedes (at 37) that the Court is "capable" of deciding the merits. Indeed, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The government apparently seeks to force the Court's hand by ignoring the merits in its brief, but the Court should not let it dictate the course

of this appeal. The Court should reach the merits and hold that the federal home-distilling prohibition is unconstitutional.

1. Even the government's cited cases recognize that addressing the merits is entirely within the Court's discretion. *See, e.g.*, *United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015) ("We may be capable of deciding the recklessness issue, but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly." (quotation marks omitted)). In those cases, the Court declined to reach the merits because doing so would require addressing fact-bound issues better decided in the first instance by the district court and subject to its discretion. *See, e.g.*, *Christian Healthcare Centers, Inc. v. Nessel*, 117 F.4th 826, 857 (6th Cir. 2024) ("It is appropriate to permit the district court to balance the relevant injunction factors—likelihood of success on the merits, danger of irreparable harm, balance of the equities, and the public interest—in the first instance."); *Barber v. Charter Twp. of Springfield, Michigan*, 31 F.4th 382, 387 & n.2 (6th Cir. 2022) (similar).

In sharp contrast, the merits here involve a purely legal issue—*i.e.*, whether the federal home-distilling prohibition is constitutional—that was raised by a fully-briefed summary judgment motion below and is subject to *de novo* review. In such circumstances, the Court often has "chosen to address" issues that were not decided by the decision below. *See, e.g., Babcock & Wilcox Co. v. Arkwright-Bos. Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767 (6th Cir. 1995) (addressing summary judgment issue subject to "de novo review" that was "fully briefed below"); *Palma v. Johns*, 27 F.4th 419, 442 n.6 (6th Cir. 2022) ("[W]hether the law is clearly

established presents a purely legal question that we need not leave to the district court to resolve.").

"[N]o purpose would be served by remanding this issue" and requiring the district court to issue a decision addressing whether the federal home-distilling prohibition is constitutional. *Gossman v. Allen*, 950 F.2d 338, 342 (6th Cir. 1991) (deciding "clearly established" law issue in the first instance). Any decision by the district court would be entitled to no deference, and there is no need to remand to develop a factual record given the procedural posture of this appeal and the purely legal issues raised. Simply put, a remand would waste the district court's and the parties' time for no reason and therefore is decidedly not "[i]n the interest of judicial economy." *Devine v. Pickering*, 959 F.2d 234 (6th Cir. 1992) (deciding "clearly established" law issue in the first instance).

The government's willful failure to brief the merits should not influence the Court's exercise of its discretion. At most, the Court might afford the government an opportunity to submit a supplemental brief. *See, e.g.*, *George v. Hargett*, 879 F.3d 711, 718 n.4 (6th Cir. 2018) (deciding "purely legal issue" in the first instance because "the issue is not addressed *sua sponte*" and "the court has requested and received supplemental briefing"); *Pemberton v. Bell's Brewery, Inc.*, __ F.4th __, No. 24-1518, 2025 WL 2539015, at *12 (6th Cir. Sept. 4, 2025) (noting request for supplemental briefing on issue not addressed in the parties' briefs).

But even that is unnecessary. Mr. Ream's cross-motion for summary judgment was fully briefed by the parties below. *See* RE 20, 21, 27, 28, 31. The

Court thus already has ready access to the government's defense of the federal home-distilling prohibition. The constitutionality of the prohibition also was briefed by the government in *Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau* (N.D. Tex. Case No. 4:23-cv-1221-P), and again in the Fifth Circuit following the government's appeal of the district court decision holding the prohibition unconstitutional, *see Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau*, 740 F. Supp. 3d 509 (N.D. Tex. 2024); *McNutt v. U.S. Department of Justice* (5th Cir. Case No. 24-10760). Notably, the Fifth Circuit heard oral argument on August 4, 2025, and a decision is forthcoming. Accordingly, the constitutionality of the prohibition has been exhaustively briefed by the government below and in other proceedings, so there is no need to delay matters further with supplemental briefing. This is particularly true given that the government strategically decided to not brief an issue that it acknowledged the Court has discretion to reach.

2. It is no wonder the government seeks to avoid a decision on the merits. In *NFIB v. Sebelius*, the Supreme Court explained that the Commerce Clause, taxing power, and Necessary and Proper Clause all "must be read carefully to avoid creating a general federal authority akin to the police power." 567 U.S. at 536. Yet the federal home-distilling prohibition does everything that *NFIB* says Congress cannot do.

The federal-home distilling prohibition is not "derivative of, and in service to" Congress's exercise of its Commerce Clause authority, as the government has never even tried to identify a federal regulation of interstate commerce that

the prohibition supports. *Id.* at 560. The federal home-distilling prohibition is therefore different in kind from the prohibition on marijuana possession upheld in *Gonzales v. Raich*, 545 U.S. 1 (2005), where "Congress's attempt to regulate the interstate market for marijuana would … have been substantially undercut if it could not also regulate intrastate possession." *NFIB*, 567 U.S. at 561.

The taxing power affords Congress even less "control over individual behavior" because it "is limited to requiring an individual to pay money into the Federal Treasury, no more." *Id.* at 573–74. The federal home-distilling prohibition, however, does not "leave[] an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice"—it *prohibits* Mr. Ream from engaging in taxable activity and paying the resulting tax. The government resists this characterization of the prohibition, referring to it (at 33–34) as a "location restriction" that "merely regulates the manner in which individuals who *choose* to undertake a taxable activity go about doing so"—as if it were trivial for individuals to purchase commercial premises to engage in their hobbies and other daily activities. But the Framers "were practical statesmen, not metaphysical philosophers," and the distinction between a prohibition on home-based conduct and mundane bookkeeping requirements "would not have been lost" upon them. *NFIB*, 567 U.S. at 555 (rejecting the government's economic argument that "there is no difference between activity and inactivity" (quotation marks omitted)).

If accepted, the government's position would "permit[] Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of

its activity and drawing all power into its impetuous vortex.'" *Id.* at 554–55 (quoting The Federalist No. 48, at 309 (J. Madison)). In the government's view, Congress could prohibit self-employment, on the theory that self-employed individuals are more likely to underreport income tax. And it could impose an excise tax on home construction and regulate where or by whom homes may be built, for the convenience of the tax collectors. A constitutional theory that would authorize Congress to prohibit everything from home-sewing to backyard gardens "is in no way an authority that is narrow in scope or incidental to the exercise" of any enumerated power. *Id.* at 560 (cleaned up). "Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority" in contravention of the Constitution's careful limits. *Id.* The Court accordingly should reach the merits and hold that the federal-home distilling prohibition is unconstitutional.

Conclusion

The Court should reverse the judgment below.

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Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with the type-volume limitation set by Fed. R. App. P. 32(a)(7) because it contains 5,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Sixth Cir. R. 32(b)(1).

Dated: September 15, 2025

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Certificate of Service

I certify that on September 15, 2025, I caused the foregoing brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

Dated: September 15, 2025

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