No. _____

IN THE

Supreme Court of the United States

JOHN REAM,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal law prohibits "producing distilled spirits…in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house." 26 U.S.C. § 5601(a)(6); *see also id.* § 5178(a)(1)(B). The Government defends this prohibition as a necessary and proper means of implementing the federal excise tax on distilled spirits, notwithstanding that it prohibits the very activity subject to that tax, and as an exercise of Congress's power to regulate interstate commerce under *Gonzales v. Raich*, 545 U.S. 1 (2005). The Sixth Circuit in this case upheld the prohibition as an appropriate means of preventing evasion of the distilled spirits tax, breaking with a recent decision of the Fifth Circuit holding precisely the opposite.

The questions presented are:

1. Whether the federal prohibition on home distilling exceeds Congress's enumerated powers.

2. Whether the Court should overrule *Raich* or at least clarify that Congress's commerce power does not extend to regulation of local, noncommercial conduct and that its exercise is subject to meaningful judicial scrutiny.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner (plaintiff-appellant below) is John Ream.

Respondents (defendants-appellees below) are the United States Department of the Treasury; Scott Bessent, in his official capacity as Secretary of the Treasury; the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of the Treasury; and Mary G. Ryan, in her official capacity as Administrator of the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of the Treasury.

Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Ream v. U.S. Dep't of Treasury*, No. 25-3259 (6th Cir.), judgment entered on April 21, 2026;
- *Ream v. U.S. Dep't of Treasury*, No. 2:24-cv-364 (S.D. Ohio), judgment entered on March 20, 2025.

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PETITION FOR WRIT OF CERTIORARI

Federal law taxes the production of distilled spirits. Federal law also makes it a crime—punishable by five years' imprisonment, a $10,000 fine, and forfeiture of the offender's home—to produce distilled spirits in that home. Asked which enumerated power authorizes that prohibition, the government answered: the power to tax the very conduct it prohibits. Banning the taxed activity, on this theory, is a "necessary and proper" means of taxing it. The Sixth Circuit accepted that theory and upheld the prohibition. And it did so eleven days after the Fifth Circuit, in a materially identical challenge to the same prohibition, rejected the same theory and held the prohibition unconstitutional. *McNutt v. U.S. Dep't of Justice*, 173 F.4th 204 (5th Cir. 2026). The government acknowledges that the two decisions "directly conflict." Only this Court can resolve that conflict, and this case is the vehicle to do it.

The federal home-distilling prohibition is a relic of Reconstruction-era politics. Congress enacted it as part of 1868 legislation to combat industrial-scale fraud by commercial distillers, who had discovered that bribing revenue officers was cheaper than paying a tax that exceeded the market price of their product. The legislation slashed the tax rate, over the opposition of the burgeoning temperance movement. The home-distilling ban was initially introduced, without explanation, by a representative of Massachusetts, a hotbed of prohibitionist sentiment, and was adopted without recorded debate. There is no evidence even suggesting that the prohibition reflects a considered congressional judgment about protecting the revenue or that it has ever served that purpose.

The government's revenue-protection theory has no stopping point, as the Fifth Circuit recognized. If Congress can ban what happens inside the home because home activity might conceal taxable conduct, it can ban nearly anything—home cooking, home gardening, remote work—for each involves conduct that, pursued out of sight, "has the possibility of concealing taxable activity." *McNutt*, 173 F.4th at 221. This Court rejected similarly attenuated reasoning in *United States v. Dewitt*, 76 U.S. 41 (1870), shortly after the prohibition's enactment, and it has insisted from the beginning that means invoked under the Necessary and Proper Clause be "plainly adapted" to a "legitimate" end and "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). A prohibition of the taxed activity is not adapted to the tax's collection—plainly or otherwise. And a construction of the taxing power that converts it into "a general federal authority akin to the police power," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (*NFIB*), comports with neither the Constitution's letter nor its spirit. The panel below sensed as much, defending its holding as "factbound"—in a decision citing no facts concerning the prohibition—and alcohol as "*sui generis*." That hollow defense only underscores its staggering breadth.

The government has also invoked Congress's commerce power, as construed in *Gonzales v. Raich*, 545 U.S. 1 (2005). *Raich* is the government's theory of last resort for a reason. Its rule of near-total deference to congressional assertions of "necessity," and its dictionary-derived definition of "economics" capacious enough to make mere possession federally regulable economic conduct, would sustain federal regulation of virtually any human activity. This Court's subsequent decisions have not extended *Raich* but quietly confined it, recharacterizing it as a case about regulation of an interstate market that would have been undercut without regulation of intrastate activities, while abandoning the most excessive parts of its reasoning. Only this Court may overrule *Raich* or clarify its holding. And this case presents an ideal opportunity to do so, on facts strikingly similar to those of *Raich* itself—home production, for personal consumption—stripped of the entanglements of federal drug policy.

The conflict, meanwhile, is as square as they come. Two courts of appeals considered the same provisions, against the same constitutional challenge, on materially identical facts, within eleven days of each other—and issued opposite judgments. The result is that federal criminal law on distilling now means one thing in Texas and the opposite in Ohio; that members of the associational plaintiff in *McNutt* may distill at home under the protection of an injunction while their neighbors risk prison for identical conduct; and that this disuniformity in the criminal law of the United States will persist until this Court acts. The questions presented are pure questions of law, pressed and preserved at every stage, on an undisputed record. There is nothing left to percolate.

At bottom, this case asks whether the federal government must still identify an enumerated power before sending Americans to prison for what they do at home. Federalism "protects the liberty of all persons," *Bond v. United States*, 564 U.S. 211, 222 (2011), only if the enumeration of powers means something. Both *Raich* and the decision below hold, in effect, that it does not. The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 174 F.4th 480 and reproduced at App. 1. The opinion of the District Court for the Southern District of Ohio is reported at 771 F. Supp. 3d 998 and reproduced at App. 31.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at App. 55–69.

STATEMENT OF THE CASE

1. "A person may not produce distilled spirits at home for personal use." 27 C.F.R. § 19.51. Specifically, federal law imposes criminal penalties on any person who "uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits…in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house." 26 U.S.C. § 5601(a)(6). It further disallows registration of "any dwelling house [or] any shed, yard, or inclosure connected with any dwelling house" as a "distilled spirits plant," as required to comply with the distilled spirits tax. *Id.* §§ 5171(a), 5178(a)(1)(B). Violation of these provisions, whether through distilling or the mere "possession or custody" of a still, is punishable by criminal fines of up to $10,000, imprisonment of up to five years, or both, per offense. *Id.* § 5601(a). A violator's home, and "all personal property" within it, is also subject to forfeiture. *Id.* § 5615; *see also* Alcohol & Tobacco Tax and Trade Bureau, U.S. Dep't of Treasury, Home Distilling (threatening "Federal charges for serious offenses" and property forfeiture).[1]

The home-distilling prohibition was enacted as part of an 1868 reform of the distilled spirits tax. Act of July 20, 1868, ch. 186, 15 Stat. 125. A report commissioned by Congress the year before determined that tax evasion was rampant, with "at least seven-eighths" of spirits going untaxed, as the result of an excessive tax rate of two dollars per gallon—which exceeded the market price of spirits—that "offer[ed] great temptations for the evasion of its payment." H.R. Rep. No. 39-24, at 1–2 (1867). The 280-page report documents pervasive fraud, corruption, and tax

[1] *Available at* https://www.ttb.gov/regulated-commodities/beverage-alcohol/distilled-spirits/penalties-for-illegal-distilling (last visited July 16, 2026).

evasion by and for the benefit of large commercial distillers. *Id*. at 2–3, 7. To evade the tax, commercial distillers routinely shuttled huge quantities of spirits between tax districts "until a pliant officer is found"—bribery being cheaper than the tax. *Id*. at 3. Meanwhile, two tax inspectors asked whether they had ever discovered illegal stills hidden in dwelling houses denied that they ever had. *Id*. at 159, 194.

Following the report's recommendations, the 1868 Act's principal provisions slashed the tax rate—notwithstanding the opposition of the temperance movement, Cong. Globe, 40th Cong., 2d Sess. 3382, 3397 (1868)—and required tax payment before removal of spirits from distillery warehouses, Act of July 20, 1868, 15 Stat. 125. The home-distilling prohibition was initially introduced, without explanation, by a representative from Massachusetts, then a hotbed of prohibitionist sentiment. Cong. Globe, 39th Cong., 1st Sess. 2841 (1866). It was adopted without reported debate.

2. Petitioner John Ream is a former aerospace engineer who, after years of homebrewing, opened his own brewpub near his home in Newark, Ohio. App. 7. Seeking a new avocation, Mr. Ream turned his attention to distilling, based on his appreciation of Bourbon and rye whiskies and the challenge of perfecting their expressions. To date, he has studied the process of distilling and relevant legal requirements, selected recipes to use as a starting point, and even selected a five-gallon copper pot still being sold for approximately $600 for use in his home. App. 20. But he has not taken the final steps—simply to buy it and begin distilling—because of the federal prohibition and the unacceptable risk its penalties present to him and his family. But for the federal prohibition, Mr. Ream would obtain federal registration, purchase the still, distill whiskey for his and his wife's personal consumption, and pay the federal distilled spirits tax. App. 20.

3. Mr. Ream filed suit in January 2024, alleging that the federal home-distilling prohibition exceeds Congress's enumerated powers. In its motion to dismiss, the government argued that Mr. Ream lacked standing and that the prohibition is supported by Congress's taxing power and also its power to regulate interstate commerce under *Gonzales v. Raich*, 545 U.S. 1 (2005). Mr. Ream cross-moved for summary judgment on the prohibition's validity. The district court granted the government's motion, and denied Mr. Ream's, finding that Mr. Ream lacked standing because he had no "legally protected interest in home distilling" and had yet to purchase a still. App. 43.

4. Mr. Ream appealed, seeking reversal of both the dismissal and the denial of his summary judgment motion. Again, the government defended the prohibition on the merits as a valid exercise of Congress's taxing power and Commerce Clause power under *Raich*. App. 74.

The panel majority reversed on jurisdiction but ruled against Mr. Ream on the merits. App. 19. Its decision concluded that the prohibition was "necessary" to collecting the federal excise tax on distilled spirits, notwithstanding that it directly prohibits the taxable activity of distilling spirits, because home producers might attempt to evade the tax. App. 16. On that view, the prohibition "thus shifts consumption" from home-distilled spirits that might go untaxed to commercially produced spirits less likely to be the object of tax evasion. App. 15.

The panel decision concluded that the prohibition was "proper" because its purpose (the panel surmised) "is actually to collect revenue," and it is "not expressly prohibited by the constitution." App. 16 (quotation marks omitted). The panel recognized that its application of the taxing power and Necessary and Proper Clause could be seen as "expand[ing] Congress's power beyond its proper limits," but declared that concern "misplaced" based on the "factbound" nature of its decision, which cited no facts concerning the prohibition's basis or purpose, and the "*sui generis*" status of alcohol. App. 17.

The panel decision declined to address the decision of the Fifth Circuit in *McNutt v. U.S. Department of Justice*, 173 F.4th 204 (5th Cir. 2026), issued eleven days earlier, which held the home-distilling prohibition to exceed Congress's enumerated powers.[2] Subsequently, the government petitioned for rehearing *en banc* in *McNutt* based on the Sixth Circuit's decision below. Its petition was denied after no judge called for a response.

[2] Only Judge Mathis's dissenting opinion cited *McNutt*, and only on the issue of standing. App. 28.

REASONS FOR GRANTING THE PETITION

This petition presents an ideal and timely opportunity for the Court to resolve a circuit split over the constitutionality of the federal prohibition on home distilling. The Court's precedents have long recognized that "the taxing power does not give Congress the same degree of control over individual behavior" as its power to regulate interstate commerce. *NFIB*, 567 U.S. at 573. Yet the Sixth Circuit upheld an exertion of the taxing power that reaches into the homes of Americans to control their behavior. In so doing, the decision below sweeps away any limitation on Congress's ability to regulate or prohibit any activity—from home cooking to childcare—under the guise of taxing it. The government's alternative rationale for the prohibition, premised on the Court's interpretation of the commerce power in *Raich*, is equally boundless and equally conflicts with the principle that the federal government is "one of enumerated powers," and not plenary power. *McCulloch*, 17 U.S. at 405. This case accordingly presents constitutional questions of the first order that warrant the Court's review.

I. The Circuits Are Squarely Divided Over Whether the Home-Distilling Prohibition Exceeds Congress's Enumerated Powers

This case presents a clear and acknowledged circuit split over the constitutionality of the federal prohibition on home distilling. The Fifth Circuit in *McNutt* held unconstitutional the statutory provisions prohibiting home distilling because they "are neither 'plainly adapted' to Congress's taxing power nor 'consist[ent] with the letter and spirit' of the Constitution." 173 F.4th at 221–22 (quoting *McCulloch*, 17 U.S. at 421). The decision below, however, upheld the prohibition as a "necessary and proper means of collecting the federal excise tax on spirits." App. 11. That decision, as the government acknowledges, "directly conflicts" with *McNutt* by "reach[ing] the opposite conclusion in a parallel challenge to the same provisions." Petition for Rehearing En Banc by Defendants-Appellants at ii–iii, *McNutt v. U.S. Dep't of Justice*, No. 24-10760 (5th Cir. May 22, 2026). It also departs from original meaning and this Court's precedents, whereas *McNutt* follows both faithfully.

The Court's review is necessary to resolve this stark conflict and provide for uniformity in federal law. Not only does the validity of the home-distilling prohibition now vary by the location of an individual's home, but the prohibition is also unenforceable against members of the associational plaintiff in *McNutt*, *see* 173 F.4th at 214 (upholding Hobby Distillers Association's associational standing), meaning that neighbors or even roommates may face radically different consequences for identical conduct. This circuit conflict is untenable, and the Court should resolve it in this case.

A. The decision below directly conflicts with *McNutt*. *McNutt*, like this case, challenges the federal prohibition on home distilling as exceeding Congress's enumerated powers. 173 F.4th at 212. As here, the government "defend[ed] the statutory prohibition…as a 'necessary and proper' exercise of Congress's power to 'tax.'" *Id*. at 214. Unlike in this case, the appeals court "disagree[d]." *Id*.

First, the Fifth Circuit concluded that the prohibition is not "necessary" because "prohibiting at-home distilleries is not 'plainly adapted' to effectuate Congress's taxation of spirits." *Id*. at 218. Rather than "help Congress raise revenue" by preventing evasion of the distilled spirits tax, the prohibition "reduce[s] revenue by preventing individuals from making distilled spirits." *Id*. at 219. It counterproductively excludes home distillers from the generally applicable regulatory regime that requires would-be distillers to "obtain a license," "comply with the regulations," and "pay the spirits tax." *Id*. And to the extent that the prohibition might be said (as the decision below reasoned, App. 15) to shift demand from home-distilled spirits to those produced in commercial facilities, this Court "long ago rejected Congress's attempt to ban one product in order to further taxation of another product." *Id*. at 219–20 (citing *United States v. Dewitt*, 76 U.S. 41 (1870)).

Second, the Fifth Circuit concluded that the prohibition is not "proper" because it "invade[s] the reserved police and regulatory power of the states." *Id*. at 221. Under the logic required to uphold the prohibition, "Congress may criminalize nearly any at-home conduct only because it has the possibility of concealing taxable activity," including "[h]ome-based businesses" and "[r]emote work." *Id*. In short, the government's defense of the prohibition brooks no "limiting principle" and so would improperly "'creat[e] a general federal authority akin to the police power.'" *Id*. (quoting *NFIB*, 567 U.S. at 536).

B. The decision below is wrong and opens the door to plenary federal power, just as *McNutt* warned. The Sixth Circuit assumed the necessity of the prohibition in the face of a complete absence of statutory findings, evidence, or even legislative history connecting it with the prevention of tax evasion. *Contra United States v. Morrison*, 529 U.S. 598, 612 (2000). It waved away the reality that the prohibition bars the very conduct subject to the tax and pushes would-be home distillers outside of the tax regime, which comprehensively regulates compliance and heavily penalizes violations and evasion. And it reasoned that Congress may wield its taxing power to ban one product so as to shift consumption to another subject to tax, which this Court expressly rejected as excessively attenuated in *Dewitt*. *See McNutt*, 173 F.4th at 220. There is no sense in which the home-distilling prohibition is "a necessary…incident to Congress's constitutionally enumerated power" to tax. *Landor v. La. Dep't of Corr. and Pub. Safety*, 609 U.S. --, 2026 WL 1791277, at *9 (June 23, 2026). If a penalty dressed as a tax exceeds the taxing power, *NFIB*, 567 U.S. at 572–73 (citing *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994)), it necessarily follows that a flat criminal prohibition cannot be justified as an *adjunct* to taxation.

There is no limiting principle to the Sixth Circuit's logic, which relies on its finding of necessity to justify propriety, App. 17—an approach at odds with this Court's decision in *NFIB*. 567 U.S. at 560 (Roberts, C.J.) ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective."). The panel majority's defense that its decision is merely a "factbound" one concerning a "*sui generis*" matter, App. 17, only underscores the lack of any principle that would preserve "the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615.

C. The circuit conflict over the constitutionality of the prohibition also implicates Congress's power to regulate interstate commerce, which the government pressed below as an alternative constitutional rationale for the prohibition. The Sixth Circuit did not reach that theory, while the government abandoned it in *McNutt*, 173 F.4th at 214 n.5, such that a decision rejecting the Sixth Circuit's merits reasoning would not definitively resolve the circuit conflict over the prohibition's constitutionality.

This case is an appropriate one for the Court to take up the commerce power theory. The theory's validity is a pure question of law of the sort that the Court has addressed even when not passed upon by a lower court. *E.g., Trump v. Hawaii*, 585 U.S. 667, 682, 697 (2018) (alternative Establishment Clause theory); *NFIB*, 567 U.S. at 542 (application of Anti-Injunction Act); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 (2001) (alternative exception to *Montana* doctrine).

The commerce power theory also substantially overlaps with the taxing-related rationale accepted by the Sixth Circuit, in that both turn on Congress's power under the Necessary and Proper Clause. Distilling spirits within a home is not itself "interstate commerce," U.S. Const., Art. I, § 8, cl. 3, but, at most, conduct that may be necessary and proper to regulate in effectuation of the regulation of interstate commerce. *See Raich*, 545 U.S. at 5 (so addressing prohibition on "the local cultivation and use of marijuana"); *id*. at 34 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). Accordingly, the two theories implicate similar questions of necessity and propriety. No purpose would be served by artificially limiting the Court's consideration of the Necessary and Proper Clause's application to the prohibition.

Especially if the Court accepts the second question presented, on *Raich*'s viability, merits briefing on the commerce power theory would provide the Court the full range of options in deciding the case, from overruling *Raich* and comprehensively resolving the merits itself, to remanding for further proceedings on the commerce power rationale. At this stage, there is no reason to constrain the Court's future decisional process. Likewise, a decision in Petitioner's favor that fails to reach the government's alternative rationale would needlessly prolong the uncertainty over the prohibition's constitutionality, based on a theory that the government abandoned in the parallel *McNutt* litigation.

Whether or not the Court ultimately resolves the merits of commerce power theory itself, it should agree to consider the antecedent question of whether to overrule or clarify *Raich*, which only this Court may do. *See Citizens United v. FEC*, 558 U.S. 310, 330 (2010); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (directing lower courts to "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). If the merits of the government's commerce power rationale are ultimately remanded to the Sixth Circuit, that court should not be left to apply a precedent, *Raich*, that is already past its expiration date.

II. *Raich* Should Be Overruled or Clarified

Raich should be overruled because it "abandon[ed] any attempt to enforce the Constitution's limits on federal power." *Raich*, 545 U.S. at 58 (Thomas, J., dissenting). Breaking with original meaning and precedent, *Raich* propounded a rule of near-complete deference to Congress's judgment that regulating intrastate conduct is both necessary and proper in effectuation of its power to regulate interstate commerce. That rule was wrong the day it was issued and has been undermined by subsequent decisions of this Court, foremost *NFIB*, which recognized the Court's "responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution." 567 U.S. at 559 (Roberts, C.J.). Stare decisis provides no reason to preserve *Raich*'s aberrant reasoning.[3]

A. *Raich* upheld application of the Controlled Substances Act's prohibitions on the production and possession of illegal drugs to intrastate cultivation and use of medical marijuana authorized by California law. 545 U.S. at 5. Conceding the Act's facial validity, the plaintiffs alleged that its application to their conduct exceeded Congress's authority under the Commerce Clause. *Id*. at 15. The Court disagreed. The Necessary and Proper Clause, it stated, empowers Congress to "regulate purely intrastate activity that is not itself 'commercial,'…if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id*. at 18. With the Act, Congress sought "to control the supply and demand of controlled substances" in interstate markets. *Id*. at 19. And so it was sufficient that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would…affect price and market conditions." *Id*. The Court emphasized that there was

[3] The Court need not resolve whether *Raich*'s bottom-line holding on application of the Controlled Substances Act would pass muster under the correct constitutional standard. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron* doctrine without reconsidering viability of regulatory "bubble concept" upheld in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

no need to "determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22. It did not expressly assess whether Congress's asserted power was proper.

The majority then proceeded to distinguish *Lopez* and *Morrison*—which each held regulation of noncommercial intrastate conduct to exceed federal power—on the ground that "the activities regulated by the CSA are quintessentially economic." *Id.* at 25. Quoting a 1966 dictionary, it defined "economics" as "'the production, distribution, and consumption of commodities.'" *Id.* And because those activities, as well as mere "possession…of an article of commerce," were "economic" in nature, they were within Congress's constitutional reach, unlike the possession of a firearm and sexual assault at issue in, respectively, *Lopez* and *Morrison*. *Id.* at 26.

Justice Scalia concurred in the judgment, reasoning that a prohibition on intrastate production and possession was necessary in effectuating Congress's objective "to extinguish the interstate market" in illegal drugs and no "violation of state sovereignty of the sort that would render this regulation 'inappropriate.'" *Id.* at 39, 41.

Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Thomas. Those Justices would have held the intrastate home cultivation and possession of marijuana beyond federal reach, based on its noncommercial nature and the lack of evidence that "homegrown medicinal marijuana users…have a discernable, let alone substantial, impact on the national illicit drug market." *Id.* at 50, 53. In their view, the case was "materially indistinguishable from *Lopez* and *Morrison*" and the majority decision's rule "irreconcilable" with those precedents. *Id.* at 45, 43.

Justice Thomas also dissented. The Court's decision, he explained, authorizes Congress to "regulate virtually anything," such that "the Federal Government is no longer one of limited and enumerated powers." *Id.* at 58. He faulted the Court for permitting Congress to "define the scope of its own power by declaring the necessity of its enactments." *Id.* at 64. Nor was it "proper" for Congress to "use its incidental authority to subvert basic principles of federalism and dual sovereignty" by "encroach[ing] on States' traditional police powers." *Id.* at 65–66. In adopting so broad a view of regulable "economic" conduct, based on a modern definition of a word that does not even appear in the Constitution, the Court's "rewriting of the Commerce Clause…covers the entire web of human activity." *Id.* at 70.

B. *Raich* sharply conflicts with the Framing-era understanding of the scope of federal power. As Justice Thomas has explained, "[i]n the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption" of an item. *Raich*, 545 U.S. at 59 (Thomas, J., dissenting). The Commerce Clause was understood "to regulate the buying and selling of goods and services trafficked across state lines," and nothing more. *Id.* at 58 (citing *Lopez*, 514 U.S. 549, 586–89 (1995) (Thomas, J., concurring)). And the Necessary and Proper Clause was understood only to "authorize[] the enactment of laws that were incidental to the enumerated powers." Randy Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 187 (2003). Thus, "[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself." *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824). And "the supervision of agriculture" and like matters was understood to be "proper to be provided for by local legislation," and not "desirable cares" of the federal government. The Federalist No. 17 (Hamilton). "While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy," *NFIB*, 567 U.S. at 554 (Roberts, C.J.), only in *Raich* was it construed to reach local activity entirely divorced from commerce.

C. *Raich* rested on two fundamental premises, both at odds with the precedents it purported to follow. The first is that federal regulatory power extends to any local activity plausibly defined as "economic" according to *Webster's Third*, including "production" and even "possession" of anything for which there is an interstate market. 545 U.S. at 25–26. The second is that Congress's determination of the necessity of regulating intrastate activity is subject to deferential "rational basis" review, 545 U.S. at 22, which asks only whether "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it," *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955). Taken together, those premises account for *Raich*'s unprecedentedly broad conception of federal power.

1. *Raich* broke with precedent by authorizing the regulation of local, noncommercial activities under *Wickard*'s aggregation principle. The Court's claim to hold that line is belied by its adoption of a constitutional standard drawn from *Webster's Third* (1966)—whether conduct involves "'the production, distribution, and consumption of commodities,'" 545 U.S. at 25—that is broad enough "to sweep all of productive human activity into federal regulatory reach," *id.* at 49 (O'Connor, J., dissenting); *see also id.* at 69 (Thomas, J., dissenting) (stating that "the majority defines economic activity in the broadest possible terms"). Indeed, *Raich* applies that standard to hold mere "intrastate possession…of an article" to be "quintessentially economic" activity subject to federal regulation. *Id.* at 25–26.

Lopez held precisely the opposite, recognizing that possession in itself is not "a commercial activity." 514 U.S. at 551; *see also id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity…."). The "noneconomic" nature of mere possession was "central" to *Lopez*. *Morrison*, 529 U.S. at 610–11. And *Morrison* observed that the Court's "cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. By redefining "economic" to encompass practically anything, *Raich* drew "no line at all," effectively authorizing "a federal police power." *Raich*, 545 U.S. at 50 (O'Connor, J., dissenting).

Wickard provides no support for that approach. *Wickard* upheld a penalty imposed on a farmer for growing wheat for consumption on his own farm, in excess of a federal quota. *Wickard v. Filburn*, 317 U.S. 111, 114–15, 128 (1942). The Court rejected the farmer's argument that Congress lacked authority under the Commerce Clause to regulate growing wheat for home consumption. It reasoned that the production and consumption of homegrown wheat allowed farmers to avoid purchasing wheat in the market, which in the aggregate substantially affected interstate commerce in wheat and frustrated the government's regulation of that market to restrict production and thereby prop up prices. *Id.* at 127–28. Crucially, the federal quota regime applied only to commercial farms, exempting (at different times) production under 200 bushels (about 6 tons) or fifteen planted acres. *Wickard*, 317 U.S. at 130 n.30. Thus, *Wickard* "did not extend Commerce Clause authority to something as modest as the home cook's herb garden." *Raich*, 545 U.S. at 51 (O'Connor, J., dissenting).

Wickard was "long [] regarded as perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *NFIB*, 567 U.S. at 552 (Roberts, C.J.) (quotation marks omitted), but it does not hold a candle to *Raich*.

2. *Raich* also considered it sufficient, to justify regulation of local conduct, that there was "a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." 545 U.S. at 22. Only that deferential standard allowed the Court to look past the absence of "any supporting evidence—descriptive, statistical, or otherwise"—of necessity. *Id*. at 54 (O'Connor, J., dissenting). But this approach conflicts with the very authorities the Court cited for it. *See id*. at 19, 22 (citing *Wickard* and *Lopez*).

Begin with *Wickard*. In determining that consumption of homegrown wheat threatened to frustrate Congress's regulation of the interstate market, the Court did not rely on a hypothetical rationale but the "actual effects of the activity in question upon interstate commerce" as documented in a detailed "stipulated [] summary of the economics of the wheat industry." 317 U.S. at 120, 125. Only that factual record permitted the Court to conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide. *Id*. at 128.

Conversely, the absence of support for an effect on interstate commerce led the Court in *Lopez* to hold that a measure criminalizing possession of firearms near schools exceeded Congress's power. 514 U.S. at 562. Rather than defer to any hypothetical rational basis, the Court conducted its own "independent evaluation of constitutionality." *Id*. at 562; *see also id*. at

557 n.2 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (quotation marks and citation omitted). And it "found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce." *Raich*, 545 U.S. at 44 (O'Connor, J., dissenting). Without that sort of evidence, the Court could not "evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Lopez*, 514 U.S. at 563. Ultimately, the Court refused "to pile inference upon inference" to connect the "possession of a gun in a local school zone" to a substantial effect on interstate commerce, *id*. at 567, whereas its rational basis decisions routinely entertain such attenuated rationales, *see, e.g., Lee Optical*, 348 U.S. at 487–88; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465–70 (1981).

Morrison was even more emphatic about the need for judicial scrutiny of exertions of the commerce power: "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." 529 U.S. at 614 (quotation marks omitted); *see also id*. at 616 ("the limitation of congressional authority is not solely a matter of legislative grace"). And the Court answered that question as to a federal civil remedy for gender-motivated violence by concluding that even express congressional findings were insufficient to sustain its constitutionality, no matter that Congress set forth a "but-for causal chain from the initial occurrence of violent crime…to every attenuated effect upon interstate commerce." *Id*. at 615. It was left to the dissent to argue that Congress had legislated with a "rational basis" to which the Court was bound to defer. *Id*. at 634–35 (Souter, J., dissenting).

In the end, *Raich*'s error on this point was its failure to ground its analysis in *McCulloch v. Maryland*'s interpretation of the Necessary and Proper Clause to require that the means chosen by Congress be "appropriate" and "plainly adapted" to exercising an enumerated power. 17 U.S. at 421. The Court, speaking through Chief Justice Marshall, carried out the "important duty" of concluding for itself that the incorporation of a national bank satisfied that standard. *Id*. at 401, 421–24. Rather than do its duty likewise, the *Raich* Court deferred to Congress's presumptive determination.

D. *Raich*'s logic has been eroded by subsequent decisions of the Court. First is *NFIB*, which held a federal mandate to purchase health insurance to exceed Congress's power under the Commerce Clause and Necessary and Proper Clause. Unlike *Raich*, *NFIB* takes seriously the principle that "the power to regulate commerce…has limits." 567 U.S. at 554 (Roberts, C.J.) (quotation marks omitted); *see also id*. at 653 (joint dissent).

NFIB abandoned the deference that *Raich* counseled. The Court refused to defer to the government's identification of a regulable commercial activity, being "'active in the market for health care,'" when the fact of the matter was that those subject to the mandate were not "engaged in any commercial activity." *Id*. at 556 (Roberts, C.J.); *see also id*. at 655–56 (joint dissent). It also declined to defer to Congress's judgment under the Necessary and Proper Clause. The Chief Justice concluded that the mandate was not "'incidental' to the exercise of the commerce power," but instead "would work a substantial expansion of federal authority," and was therefore not proper. *Id*. at 560. Justices Scalia, Kennedy, Thomas, and Alito rejected the mandate's necessity, because Congress had "many [] other" ways to accomplish its policy ends, *id*. at 654, and determined that its assertion of power was not proper, because it contravened the "principle of enumerated (and hence limited) federal power," *id*. at 653.

Tellingly, both the Chief Justice's opinion and the joint dissent recharacterized *Raich* as merely involving regulation of an "interstate market" that would have been "substantially undercut" without regulation of intrastate activities. *Id*. at 561 (Roberts, C.J.); *see also id*. at 654–55 (joint dissent) (describing intrastate regulation as "the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced"). Neither saw fit to recite *Raich*'s far broader reasoning.

United States v. Comstock, 560 U.S. 126 (2010), departed from *Raich*'s rational basis standard. Instead, the Court conducted a searching five-factor inquiry into a federal civil-commitment statute's history, scope, and accommodation of state interests to conclude that it was constitutional under the Necessary and Proper Clause, *id.* at 133–49—precisely the independent judicial assessment *Raich* refused to perform. Concurring in the judgment, Justice Kennedy explained that the Court's precedents in this area have never applied the "rational basis" test of *Lee Optical*; they "require a tangible link to commerce, not a mere conceivable rational relation." *Id.* at 152; *see also id.* ("a demonstrated link in fact, based on empirical demonstration"). As Justice Kennedy described, the "means-ends rationality" applied by the Court traces back to *McCulloch* and its standard, not the *Lee Optical* line. *Id.* at 152–53. Justice Alito also concurred, stressing the Court's "obligation…to enforce compliance" with the "limitation" of necessity, and that the civil-commitment statute passed muster because of its "substantial link to Congress' constitutional powers." *Id.* at 158.

Most recently, *Landor* clarified that Necessary and Proper analysis asks whether a measure is incidental to the enumerated power itself, not whether it advances the policy of a statute enacted under that power. 2026 WL 1791277, at *9. With the inquiry so framed, the Court had no trouble concluding that that a private cause of action against state employees for unduly burdening religious practice was not necessary, because it would "not safeguard…the federal funds Congress distributes pursuant to its spending power." *Id.* at *10. And recognizing such a cause of action would mean that Congress "could regulate directly…in innumerable spheres, including ones traditionally reserved to the States," which would hardly be proper. *Id*. *Landor*'s logic cannot be reconciled with *Raich*.

Chief Justice Roberts's separate opinion in *United States v. Kebodeaux*, 570 U.S. 387 (2013), also bears mention. The Court upheld application of the Sex Offender Registration and Notification Act's registration requirements to an offender convicted during military service. *Id.* at 395. The Chief Justice concurred in the judgment to stress that, notwithstanding the majority decision's discussion of the registration requirement's public safety benefits, there was no constitutional public safety basis for the law because there is no federal police power. *Id*. at 401–02. "A power of that magnitude vested in the Federal Government is not 'consistent with the letter and spirit of the constitution,' and thus not a 'proper means for carrying into Execution' the enumerated powers of the Federal Government" under the Necessary and Proper Clause. *Id*. at 402–03 (citation and alterations omitted).

The Court reasserted these principles in *Bond v. United States*, starting with the premise that, while "States have broad authority to enact legislation for the public good," the federal government "has no such authority." 572 U.S. 844, 854 (2014).

Yet *Raich*, on its own terms, allows otherwise.[4]

E. Stare decisis is no reason to retain *Raich*. That policy is "not an inexorable command" and is "at its weakest when [the Court] interpret[s] the Constitution," as here. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quotation marks omitted). All the traditional considerations—"the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision," *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248 (2019)—cut hard against preserving *Raich*.

Raich's reasoning is exceptionally poor. It uses a 1966 dictionary[5] to interpret the Constitution and bizarrely settles on the definition of a word, "economics," that does not appear in the constitutional text. 545 U.S. at 25. It departs, without explanation or acknowledgement, from the legal standard the Court applied in Necessary and Proper cases for nearly two centuries. *See McCulloch*, *supra*. Worst of all, it has no response to the dissents' objections that its reasoning obliterates the distinction between the national and local and authorizes a federal "police power of the

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[4] *Taylor v. United States* applied *Raich* to hold that, since "Congress may regulate the purely intrastate possession and sale of illegal drugs, Congress may criminalize the theft or attempted theft of those same drugs." 579 U.S. 301, 309 (2016). The decision simply accepted *Raich*'s bottom-line holding as controlling and did not revisit its reasoning, as the Court had "not been asked to reconsider *Raich*." *Id*.

[5] One that, even where temporally relevant, has been "widely criticized." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 n.3 (1994).

sort reserved to the States," 545 U.S. at 64 (Thomas, J., dissenting)—because those objections are indisputably correct.

Raich's reasoning has been subject to damning scholarly criticism, for its departure from original meaning, sharp break with precedent, and aggrandizement of federal power. *E.g.*, Jonathan Adler, Is *Morrison* Dead? Assessing a Supreme Drug (Law) Overdose, 9 Lewis & Clark L. Rev. 751, 753 (2005) (concluding *Raich* "hollowed out the core of contemporary Commerce Clause jurisprudence"); Douglas Kmiec, *Gonzales v. Raich*: *Wickard v. Filburn* Displaced, 2004–2005 Cato Sup. Ct. Rev. 71, 88–89, 98 (stating that *Raich*'s attempted distinction of *Lopez* and *Morrison* "is hard to take…seriously" and concluding that, after *Raich*, there is "no judicially enforceable limit on the federal commerce power"); Michael Ramsey, American Federalism and the Tragedy of *Gonzales v. Raich*, 31 U. Queensland L.J. 203, 203 (2012) (declaring *Raich* the "Court's worst modern decision" for its poor reasoning and repudiation of "founding principles in matters of federalism"); Glenn Reynolds & Brannon Denning, What Hath *Raich* Wrought? Five Takes, 9 Lewis & Clark L. Rev. 915, 932 (2005) (concluding that *Raich* spelled the end of "judicially-enforceable federalism"); Ilya Somin, *Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs, 15 Cornell J.L. & Pub. Pol'y 507, 508 (2006) (describing how *Raich* erred "on both textual and structural grounds").

As shown, *Raich* clashes with the Court's precedents, including those on which it purported to rely. And the Court's subsequent decisions have silently abandoned the most excessive aspects of its reasoning.

Finally, there is little or no reliance on *Raich*'s constitutional rule. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Those interests are not implicated here.

III. This Case Is an Ideal Vehicle To Resolve Important Issues of Federal Authority Over Quintessentially Local Conduct

The importance of this case and the questions it presents could hardly be overstated. It presents fundamental questions of the extent of federal power and the powers reserved to the states and the people. At stake is nothing less than federalism and its continued ability to "protect[] the liberty of all persons…by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 564 U.S. at 222. It is therefore "of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *NFIB*, 567 U.S. at 560 (Roberts, C.J.) (quotation marks omitted).

The validity of the home-distilling prohibition is also a significant matter. It affects the conduct of a great many Americans, going by the vast numbers who have taken up homebrewing or sampled a friend's or relative's creations. *See* American Homebrewers Association, Homebrewing Rights (estimating that "at least 1.2 million Americans brew beer at home at least once a year").[6] Homebrewing revitalized beer culture in the United States; home distilling could do the same for spirits, but for the prohibition.

This case is an ideal vehicle for the Court to consider the limits of federal authority. It squarely presents the question of whether the home-distilling prohibition exceeds Congress's enumerated powers, Petitioner has preserved the question of *Raich*'s validity from the beginning, and the parties have pressed their respective positions on the prohibition's constitutional basis at all stages. Moreover, the circumstances of this case are materially identical to those in *McNutt*, which presented a parallel challenge to the same statutory provisions on essentially identical facts, and its factual circumstances are strikingly similar to those of *Raich*, which likewise involved home production and consumption. That this case does not implicate the complexities and evolution of federal drug policy makes it a more suitable vehicle than other recent petitions to address the furthest reaches of federal power.

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[6] *Available at* https://homebrewersassociation.org/homebrewing-rights/talking-points/ (last visited July 16, 2026).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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JULY 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN REAM,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF THE TREASURY; SECRETARY SCOTT BESSENT; ALCOHOL AND TOBACCO TAX AND TRADE BUREAU; ADMINISTRATOR MARY G. RYAN,

Defendants-Appellees.

No. 25-3259

Appeal from the United States District Court for the Southern District of Ohio at Columbus.

No. 2:24-cv-00364—Edmund A. Sargus, Jr., District Judge

Argued: December 10, 2025

Decided and Filed: April 21, 2026

Before: SILER, KETHLEDGE, and MATHIS, Circuit Judges.

ARGUED: Andrew M. Grossman, BAKER & HOSTETLER LLP, Washington, D.C., for Appellant. Caroline W. Tan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF**: Andrew M. Grossman, Kristin A. Shapiro, BAKER & HOSTETLER LLP, Washington, D.C., Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, Patrick T. Lewis, BAKER & HOSTETLER LLP, Cleveland, Ohio, for Appellant. Caroline W. Tan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Michael Pepson, AMERICANS FOR PROSPERITY FOUNDATION, Arlington, Virginia, Thomas A. Berry, CATO INSTITUTE, Washington, D.C., Thomas R. McCarthy, Tiffany H. Bates, CONSOVOY MCCARTHY PLLC, Arlington, Virginia, Michael A. Petrino, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C., Reilly Stephens, LIBERTY JUSTICE CENTER, Austin, Texas, for Amici Curiae.

KETHLEDGE, J., delivered the opinion of the court in which SILER, J., concurred. MATHIS, J. (pp. 12—18), delivered a separate dissenting opinion.

OPINION

KETHLEDGE, Circuit Judge. For much of American history, evading excise taxes on liquor has been nearly a national pastime. At the time of the Revolution, one historian has written, "nearly every farmer distilled his own whiskey and deemed it his inalienable right to evade the tax, and resist the collector whenever a favorable opportunity presented itself for doing so." Gallus Thomann, *Liquor Laws of the United States* 58 (1885). Soon after the Constitution's ratification, in western Pennsylvania, this evasion came by force of arms—in the Whiskey Rebellion, which President Washington put down only after assembling "an army larger than any he had commanded during the Revolution." Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 138 (2009). Just after the Civil War, in 1867, a select committee of the House of Representatives heard more than a month of testimony, and concluded: "in the manufacture and sale of tobacco, cigars, and spirits, and especially the latter, the most stupendous frauds are practiced against the government in the collection of its revenue." H.R. Rep. No. 39-24, at 1 (1867).

The following year Congress enacted comprehensive legislation to end those frauds, which among many other provisions included a ban on distilling spirits in one's home. Now, almost 160 years later, John Ream argues that the home-distilling ban has been beyond Congress's enumerated powers all along. We disagree with the district court's conclusion that Ream lacks standing to bring his claims; but we hold that the ban is a necessary and proper means of collecting the federal excise tax on distilled spirits.

I.

A.

The home-distilling ban is among the "ingenious and complicated provisions" of the statutory regime that Congress enacted, in 1868, to "secure the revenue" (as the phrase went) from federal excise taxes on distilled spirits. *United States v. Ulrici*, 111 U.S. 38, 40 (1884). This regime remains largely intact today. In its current form, the excise tax attaches the moment a distilled spirit comes into "existence as such," generally "at the rate of $13.50 on each proof gallon." 26 U.S.C. § 5001(a)(1), (b); *see id.* § 5004(a)(1). A "proof gallon" is one gallon of 100 proof liquor; as the proof increases or decreases, so does the tax. *See id.* §§ 5002(a)(10)-(11), 5006(a)(1); 27 C.F.R. § 30.1.

With certain exceptions not relevant here, "operations as a distiller" may "be conducted only on the bonded premises of a distilled spirits plant." 26 U.S.C. § 5171(a). A person may commence such operations only after registering the "plant" with the Secretary of the Treasury and obtaining a permit to distill spirits. *Id.* § 5171(c)(1), (d)(1). Large-scale distillers (i.e., distillers whose annual tax liability is at least $50,000) must also furnish the Secretary with a bond, which serves as security for all the taxes and penalties owed by the distiller. *Id.* § 5173(a)(1), (e)(1)(B).

Congress has authorized the Secretary to "prescribe such regulations relating to the location, construction, arrangement, and protection of distilled spirits plants as he deems necessary to facilitate inspection and afford adequate security to the revenue." *Id.* § 5178(a)(1)(A); *see also id.* § 5301(a)(1) (authorizing the Secretary to regulate the containers used for distilled spirits whenever "such action is necessary to protect the revenue"). But to that same end—of securing the revenue—Congress has prescribed more than a few rules of its own. As relevant here, "[n]o distilled spirits plant for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or inclosure connected with any dwelling house, or on board any vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed." *Id.* § 5178(a)(1)(B). Moreover, every "person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary immediately on its being set up." *Id.* § 5179(a). And every "person engaged in distilled spirits operations shall place and keep conspicuously on the outside of his place of business a sign showing the name of such person and denoting the business, or businesses, in which engaged." *Id.* § 5180(a).

Further, every "proprietor of a distilled spirits plant shall furnish the Secretary such keys as may be required for internal revenue officers to gain access to the premises and any structures thereon." *Id.* § 5203(a). Those officers may "enter any distilled spirits plant, or any other premises where distilled spirits operations are carried on," at "all times, as well by night as by day." *Id.* § 5203(b). Thus, to paraphrase somewhat: the owner of a still for making liquor must register it; stills may be possessed only on "bonded premises" that are themselves subject to inspection at any time, day or night; and stills must not be possessed in a home, shed, yard, boat, or place where beer or wine is produced.

Violations of these laws trigger harsh penalties. Anyone who possesses an unregistered still, or neglects to furnish the required bond, or distills in a proscribed place, "shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense." *Id.* § 5601(a). The same goes for any person who tries otherwise to defraud the government of taxes owed on distilled spirits. *Id.* § 5602.

B.

This case comes to us on a motion to dismiss, so we take the facts alleged in the complaint as true.

Sturgill v. Am. Red Cross, 114 F.4th 803, 806 (6th Cir. 2024).

John Ream grew up in Ohio, and worked as an aerospace engineer in Seattle, before he started brewing beer at home. He spent nine years refining his skills; eventually, in 2018, he and his wife returned to Ohio and opened their own brewery and taproom. Ream now wants to distill whiskey at home, and has "extensively researched" the process and means for doing so. Yet if he were to distill whiskey at home—or even possess a still there for that purpose—he would face a felony conviction and up to five years in prison, plus a substantial fine. 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6); 27 C.F.R. § 19.51. "But for that prohibition," Ream would distill whiskey at home. Compl. ¶29.

Ream eventually brought this suit, claiming that the 1868 ban on possessing a still in a "dwelling house" was beyond Congress's power to enact. The defendants moved to dismiss, arguing both that Ream lacked standing and that the ban is constitutional; Ream moved for summary judgment in his favor. The district court granted the government's motion to dismiss, holding that Ream lacked standing because he had not yet bought a still or been specifically threatened with prosecution for violating the ban. This appeal followed.

II.

A.

We review de novo whether Ream had standing to bring this suit. *See Price v. Medicaid Dir.*, 838 F.3d 739, 745 (6th Cir. 2016). Ream challenges the home-distilling ban in advance of taking action to violate it. Thus, to have standing, he must have plausibly alleged that (1) he seeks to engage in conduct that is "arguably affected with a constitutional interest," (2) a statute arguably proscribes that conduct, and (3) if he proceeds with that conduct, "there exists a credible threat of prosecution" under that statute. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (cleaned up).

In holding that Ream lacked standing, the district court seemed to think that conduct is "arguably affected with a constitutional interest" only if the Constitution specifically protects that conduct—as the First Amendment does speech, for example. Op. at 8-9. But the Supreme Court has taken a broader view of such conduct. In *Bond v. United States*, for example, a criminal defendant had standing to make the same kind of claim that Ream makes here: that the statute which regulated her conduct was beyond Congress's power to enact. 564 U.S. 211, 222-23 (2011). That Bond's claim concerned a structural principle rather than a specific guarantee was immaterial; an injured "individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States." *Id.* at 222.

Conduct is arguably affected with a constitutional interest, for purposes of standing, when the Constitution arguably invalidates a statute that proscribes that conduct. In that event, the conduct is "affected with" (in the sense of "[b]y the means or agency of[,]" *Am. Heritage Dict.* (3d ed. 1992) at 2050) "a constitutional interest"—for if the claim is meritorious, then the conduct is lawful. Such is the case here: Ream's constitutional interest and its relation to his conduct are identical to the ones that gave Bond standing to assert her claim. So this requirement for standing is met.

Next, the conduct in which Ream seeks to engage is expressly proscribed by federal law. *See* 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6). That leaves only the question whether, if Ream were to distill whiskey at home, he would face a credible threat of prosecution. A credible threat exists when "there is a substantial risk that the harm will occur." *Driehaus*, 573 U.S. at 158 (cleaned up).

By any practical measure, Ream would face such a threat here. The statute specifically bans possession or use of a still in a "dwelling house." 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6). That is exactly the conduct in which Ream seeks to engage. And the government, in this litigation, has conspicuously declined to disavow enforcement of the ban if Ream engages in that conduct—which underscores the threat the statute itself makes. *See Catholic Charities v. Whitmer*, 162 F.4th 686, 691 (6th Cir. 2025). Moreover, in a 2011 rulemaking—which remains on the books today—the Treasury Department reiterated that "[a] person may not produce distilled spirits at home for personal use." 27 C.F.R. § 19.51. In addition, the Department's Alcohol Tax and Trade Bureau states on its website—again to this day—that "Federal law strictly prohibits individuals from producing distilled spirits at home" and that violations "are felonies that are punishable by up to 5 years in prison, a fine of up to $10,000, or both, for each offense." *Home Distilling*, Alcohol and Tobacco Tax and Trade Bureau, https://perma.cc/QSZ9-DZJS (last updated Mar. 17, 2025).

One can hardly expect Ream to regard this triple threat of felony punishment as merely hortatory—and thus to proceed to distill whiskey at home anyway. True, the Treasury has not sent Ream a letter warning him about the same ban and penalties that its regulation and the Bureau's website already warn everyone about. And true, the home-distilling ban apparently has not been enforced in court for a long while. But that could be because all these threats of severe coercion are actually effective. The courts would inhabit a different world than citizens do if we held that a citizen must defy an express statutory ban—twice reiterated by executive organs charged with its enforcement—and potentially subject himself to conviction as a felon, and to a sentence of years in prison, simply to be heard on his claim that the ban violates the federal Constitution. In Ream's case the legislative and executive branches speak with one voice; he may take them at their word.

The only circumstance that prevents Ream from distilling whiskey at home is the express statutory (and now regulatory) ban on doing so. He has standing to proceed with his claims.

B.

Ream's claims themselves present purely questions of law, which have now been fully briefed by the parties. Piecemeal litigation wastes the resources of everyone concerned; and our interest in timely, efficient adjudication favors deciding these questions now. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989). So we proceed to do that.

We begin and end with the question whether the home-distilling ban is a necessary and proper means of collecting the federal excise tax on spirits. The Taxing Clause vests Congress with the "Power to lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8, cl. 1. "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more." *NFIB v. Sebelius*, 567 U.S. 519, 574 (2012). The home-distilling ban exceeds that boundary: rather than require payment to the Federal Treasury, it proscribes conduct. The taxing power itself therefore cannot support the ban; so we consider whether the Necessary and Proper Clause does.

That Clause vests Congress with power "[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. As to the Clause's scope, Chief Justice Marshall's formulation has long been the touchstone: "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." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). Whether a law is "necessary," on the one hand, and "proper," on the other, are separate questions; but Marshall's formulation covers both.

To be necessary, under McCulloch, a means must be "plainly adapted" to a legitimate constitutional end. *Id.* The Court later glossed that formulation in a case concerning "securing the payment of" taxes specifically—holding that, "in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable." *Felsenheld v. United States*, 186 U.S. 126, 132 (1902). This case too concerns a rule "for the manufacture" of a taxable good, namely spirits; and the rule is that spirits cannot be distilled (*i.e.*, manufactured) in a "dwelling house[.]" *Id.*; 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6).

So we turn to whether the home-distilling ban is "necessary" in this constitutional sense. In 1868, evasion of excise taxes on spirits had been rampant for literally all of the nation's history. By all appearances, spirits distilled at home were no exception. The 1868 Act was a monumental effort, running some 109 sections, to bring these "stupendous frauds" to an end. Act of July 20, 1868, ch. 186, 15 Stat. 125; H.R. Rep. No. 39-24, at 1 (1867). Section 12 of the 1868 Act included the home-distilling ban at issue here—verbatim, as the ban appears in § 5601(a)(6) to this day.

Ream's claim brings to mind Holmes's observation about rules based on custom: "The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for." Oliver Wendell Holmes, Jr., *The Common Law* 5 (1881). Yet little ingenuity is required here. The ban's inclusion was apparently uncontroversial, prompting not even a murmur of debate. Cong. Globe, 39th Cong., 1st Sess. 2839, 2841 (1866). Even now its rationale is almost self-evident: stills are more easily hidden in homes than in bonded premises dedicated to distilling spirits; and—as both a legal and practical matter—"dwelling houses" are much harder to search at "all times, as well by night as by day," than bonded premises are. 26 U.S.C. § 5203(b).

During debate on the 1868 Act, then-Representative (and future President) James Garfield of Ohio offered reasoning apposite here. Another member had proposed that "no still, boiler, or other vessel" should be used to distill spirits "in any building or on any premises where beer, lager beer, ale, porter, or other fermented liquors, vinegar, or ether, are manufactured or produced." Cong. Globe, 39th Cong., 1st Sess. 2839, 2841 (1866). (That amendment became law. *See* Act of July 20, 1868, ch. 186, § 12, 15 Stat. at 130.) That provision too was a ban on stills in certain locations; and today we might puzzle over the reason for it. But Garfield explained that "a majority of the cases of fraud during" the previous year had "been in establishments where stills were kept in connection with beer breweries." *Id.* A "little still may be concealed among the machinery of a large lager-beer brewery"—where, he said, it was prohibitively "hard to get at them." *Id.*

That same reasoning applies *a fortiori* to stills in people's homes. Thus—in the sense of both "plainly adapted" and "reasonable"—the home-distilling ban was "necessary" to the collection of taxes on revenue at the time it was enacted; and we have no reason to conclude otherwise now. Indeed, Ream makes no argument that any change in circumstances has rendered unnecessary today what was necessary then. (In his view, rather, the ban has been *ultra vires* all along.) And meanwhile—as to liquor and taxes alike—human nature remains decidedly unchanged. Ream does argue that he would gladly pay the tax on his home-distilled whiskey, and that the ban prevents him from doing so. Thus, he contends, the ban reduces revenue rather than raises it. As a matter of direct causation, that might be so; but Congress can take account of causal chains longer than that. Congress could easily conclude that, for many people, spirits produced at home would serve as a substitute for spirits produced in distilleries, which—as a result of the 1868 Act—are uniformly taxed. And Congress had ample reason to conclude that, for every at-home distiller who pays the tax, many others would not. The ban thus shifts consumption from untaxed spirits to taxed spirits—thereby increasing revenue.

Nor, it bears mention, has Ream volunteered to comply with the statute's other provisions that are applicable to distillers of spirits generally. One provision would require Ream to "furnish the

Secretary such keys as may be required" to enter his home—being the "premises where distilled spirits operations are carried on"—at "all times, as well by night as by day." 26 U.S.C. § 5203(a)-(b). Another would require Ream to "place and keep conspicuously on the outside of" his home "a sign" announcing his distilling operations. *Id.* § 5180(a). (Perhaps Ream thinks those provisions are unconstitutional too—in which case his argument might sound in "substantive due process" rather than in the Constitution's text.) And absent compliance with these provisions Congress could easily conclude that home distillers would evade the tax all the more.

Nor do we see any reason why the ban on home distilling is improper. The ban's purpose is actually to collect revenue. As the Supreme Court said about the 1868 Act not long after it became law: its "well-considered and minute provisions" were "adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits." *Ulrici*, 111 U.S. at 40. Moreover, the home-distilling ban is not expressly "prohibited by the constitution"; nor does it seek to regulate conduct indirectly, or to circumvent some other limit on Congress's power. *See McCulloch*, 17 U.S. at 423; *compare United States v. Butler*, 297 U.S. 1, 74-75 (1936).

Ream's more serious argument is that the Taxing Clause and the Necessary and Proper Clause—taken together, as interpreted in cases after *Butler*—could expand Congress's power beyond its proper limits. We take that concern seriously; but the concern is misplaced here. The determination whether a law is necessary and proper unavoidably involves a degree of means-ends scrutiny. And whether a law is "plainly adapted" to a permissible end depends on an empirical judgment—which is to say the judgment is, by nature, factbound.

What limits the application of a factbound judgment to other cases are the relevant facts themselves. Here, those facts include a history of tax evasion as old as the Republic itself; and Congress concluded—based on that history, and after a month of testimony before a select committee of the House—that the home-distilling ban, along with the 1868 Act's other provisions, were in fact necessary to collect federal excise taxes on spirits. That judgment rested on facts, not speculation; and those facts were peculiar to distilling spirits. Indeed, rules concerning alcohol more generally are unique as to the evasion that often accompanies them— from excise taxes, to Prohibition, to the use of fake IDs to obtain alcohol (itself almost a rite of passage for some generations), to moonshiners even today. The judgment required in this case, again, is an empirical one; and empirically, alcohol is *sui generis*, or very close to it.

Ream is therefore mistaken to say that—under our reasoning here—"the federal government could impose a nominal excise tax on baking bread or making clothing and [then] prohibit home bread-baking or home sewing on the theory that home-sewers or home-bakers are less likely to pay the tax." Br. at 48. Those "theories" are merely that; and they would strip away nearly all the particular facts on which the judgment here is based.

We should also bear in mind that Congress's power is not the only one bounded by constitutional limits. The judicial power is too; and where, as here, the law "is really calculated to effect any of the objects intrusted to the government," to inquire further than we have "into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch*, 17 U.S. at 423. Indeed, for us to conclude that a law of 160 years' vintage, with this kind of empirical pedigree, has all along been both unnecessary and improper, would border on rationalist conceit. One can think that Congress's power has expanded beyond its constitutional limits as originally understood, *see, e.g.*, *United States v. Rife*, 33 F.4th 838, 843 (6th Cir. 2022), and yet conclude that not every novel exercise of Congressional power is unlawful. And here the novelty lies with the challenge to the law, not with the law itself. We should not be so eager to police the limits of Congress's power, that we exceed the limits of our own.

The rule that Ream challenges addressed an actual problem that had confounded the federal government from its earliest days. The home-distilling ban was lawful when enacted, and remains so today.

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The district court's order dismissing Ream's claims for lack of jurisdiction is reversed, and the case is remanded with instructions to enter judgment in favor of the defendants.

DISSENT

MATHIS, Circuit Judge, dissenting. Choose a law at random from the U.S. Code, and you will find someone who objects to it. But to challenge a law in the courts, the federal Constitution requires more than personal grievance. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). A plaintiff needs real stakes otherwise, our decisions cease to be exercises of judicial review over individual disputes. We instead become instruments of policymaking, vindicating the public interest—a function that the Constitution reserves for the legislative and executive branches. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

John Ream's grievance is with the federal ban on distilling spirits in one's home. He believes the ban is unconstitutional. So he sued, seeking to strike it down. But because Ream lacks Article III standing, I would not reach the merits of his claim.

I.

Ream owns a brewery and taproom in central Ohio. An aerospace engineer by trade, Ream began brewing beer at home as a hobby. He now wants to distill small quantities of whiskey at home for personal consumption. But unlike beermaking or winemaking, federal law prohibits individuals from distilling spirits at home. *See* 26 U.S.C. § 5601(a)(6) (imposing criminal penalties on those who distill alcohol "in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house").

Ream has not purchased the equipment or ingredients necessary to begin distilling spirits in his home. Nor has he applied for the permit required to distill spirits. *See id.* § 5171(d)(1). Yet Ream asserts he is "able and ready" to distill whiskey at home. D. 13 at p.13. He claims that he has "extensively researched" home distilling, picked out the rye and Bourbon recipes he would like to use, and identified a copper pot he believes is suitable for home distilling. R. 21-1, PageID 186.

But before taking any additional steps, Ream sued the U.S. Department of the Treasury and related entities and officials (collectively, the "Treasury Department"). He alleged that the federal home-distilling prohibition is unconstitutional, exceeding Congress's authority under the Commerce Clause and Congress's taxing power. The district court dismissed the complaint, agreeing with the Treasury Department that Ream lacked standing.

II.

Under Article III of the Constitution, federal courts may decide only "Cases" and "Controversies." U.S. Const. art. III, § 2. "Article III does not contemplate a system where 330 million citizens can come to federal court whenever they believe that the government is acting contrary to the Constitution or other federal law." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024). "The doctrine of standing gives meaning" to Article III "by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (citation modified). So before we consider a claim's merits, a plaintiff must establish that he has standing to sue. *Kitchen v. Whitmer*, 106 F.4th 525, 533 (6th Cir. 2024).

Standing requires the plaintiff to "have a personal stake in the case." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (citation modified). "[A] citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally." *All. for Hippocratic Med.*, 602 U.S. at 381. On the contrary, to establish standing a plaintiff must show that: (1) he suffered or will likely suffer an injury in fact, (2) the defendant caused or will cause the injury, and (3) the court can redress the injury with a decision in the plaintiff's favor. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citation modified).

Typically, a party challenging the constitutionality of a federal law must wait for the government to enforce the law against him. *See Somberg v. McDonald*, 117 F.4th 375, 378 (6th Cir. 2024). But at times, a person may challenge a law before that occurs. For instance, "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). But to bring such a challenge, the plaintiff must still show an injury in fact. In the context of preenforcement challenges, this means "the threatened enforcement [is] sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 159.

How does a plaintiff meet this burden? The plaintiff must "clearly allege facts," *Spokeo*, 578 U.S. at 338 (citation modified), showing "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," *Susan B. Anthony List*, 573 U.S. at 159 (quotation omitted). To show that a threat of prosecution is credible, a plaintiff generally must establish some combination of the following factors:

> (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action; and (4) the defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.

Christian Healthcare Ctrs. v. Nessel, 117 F.4th 826, 848 (6th Cir. 2024) (citation modified). Of course, a plaintiff need not establish each factor. *Id.* And these factors are not exhaustive. *Id.*

III.

I assume that Ream has pleaded an intention to engage in conduct arguably affected with a constitutional interest, and that the federal home-distilling ban proscribes this conduct. All the same, Ream lacks standing because he has failed to show that his intention to distill spirits at home "generates a *certainly impending* threat of prosecution." *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 435 (6th Cir. 2024) (citation modified). I start with the credible-threat factors.

Past enforcement against Ream or others. There has been no past enforcement of the federal home-distilling ban against Ream. As to others, the government has enforced § 5601(a)(6)'s location prohibition in the past, but the most recent conviction that Ream can point to is over 50 years old. *See United States v. Whitehead*, 424 F.2d 446, 447 (6th Cir. 1970) (en banc). He identifies no precedent suggesting that such outdated examples can satisfy the past-enforcement prong. In fact, a 50-year lapse in criminal convictions is strong evidence *against* a credible threat of prosecution in the present. *See Poe v. Ullman*, 367 U.S. 497, 501 (1961) (plurality opinion) (concluding that the plaintiffs lacked standing to challenge a state statute banning contraceptives because the statute had not been enforced in over 20 years). Nonexistent enforcement against Ream and outdated enforcement against others do not support a credible threat of prosecution.

Ream contends that, despite the lack of § 5601(a)(6) convictions over the past 50 years, there have been numerous indictments in recent years against home distillers. Yet he produces only one federal indictment, while the rest are indictments on state-law charges—which have no bearing on the past enforcement of § 5601(a)(6) or any other federal distilling laws. For example, Ream cites a declaration by Robert Angelo, a director with the Alcohol and Tobacco Tax & Trade Bureau, describing a 2014 joint operation with Florida law enforcement that led to the arrests of eight home distillers. Decl. of Robert M. Angelo at 3, *Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau*, No. 4:23-cv-01221 (N.D. Tex. 2024), Dkt. No. 39-1. What Ream leaves out, however, is that the operation "did not specifically target potential violations of 26 U.S.C. § 5601(a)(6) nor were any federal charges filed." *Id.* at 2.

As for the sole federal indictment that Ream points to, the defendants were not charged with violating § 5601(a)(6)—the home-distilling prohibition. *See* Press Release, *Indictment: Couple Operated Moonshine Still in Newton*, U.S. Dep't of Just. (Dec. 7, 2016), https://perma.cc/RDY7-MD82. They were instead charged with possession of an unregistered still, 26 U.S.C. § 5601(a)(1), unlawful production of distilled spirits, *id.* § 5601(a)(8), and carrying on the business of a distiller without giving bond, *id.* § 5601(a)(4). And those defendants had allegedly sold the illegal spirits to others, whereas Ream intends only to distill spirits for home consumption.

Warning letters. Ream has not alleged that he received any warning letters from the government. He claims that the Treasury Department sent warning letters to 8,136 other home distillers. But unlike the past-enforcement factor, Ream can satisfy the warning-letter factor only if he received a letter. *See McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016). Thus, this factor does not help Ream.

Ease of enforcement. Ream does not argue that the federal home-distilling ban is easier to enforce than other statutes. Indeed, the statute contains no provision allowing members of the public to initiate an enforcement action. *See Friends of George's*, 108 F.4th at 439. By all accounts, only a "prosecutor or an agency" can enforce the ban. *Susan B. Anthony List*, 573 U.S. at 164; *cf. Boone Cnty. Republican Party Exec. Comm. v. Wallace*, 132 F.4th 406, 418 (6th Cir. 2025) (finding a credible threat of enforcement where the challenged statute allowed members of the public to file complaints). So Ream fails to establish the ease-of-enforcement factor.

Refusal to disavow. The Treasury Department has not disavowed enforcement of the federal home-distilling ban against Ream. So this factor weighs in Ream's favor.

*   *   *

Ream has established only one of the four factors that show a credible threat of enforcement. And that factor—disavowal—"is just one data point among many on the question whether a credible threat of enforcement exists." *Davis v. Colerain Township*, 51 F.4th 164, 174 (6th Cir. 2022). Although a plaintiff need not establish all four factors, we require "some combination" of them to show a credible threat of prosecution. *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021) (quotation omitted), *abrogated on other grounds as recognized by Tenn. Conf. of NAACP v. Goins*, 139 F.4th 557, 563 (6th Cir. 2025). One is insufficient.

IV.

Perhaps recognizing that his standing challenge fails under our precedent, Ream makes several more arguments. These fare no better.

Ream points out correctly that our four credible-threat-of-prosecution factors are "not exhaustive." *Id.* The problem is that he does not tell us what other factors we should apply instead—let alone explain how these unidentified factors would help him. He asks us to consider § 5601(a)(6)'s unambiguous language and its lack of exemptions as factors weighing in his favor. But questions of ambiguity and exemptions speak to whether a statute proscribes the plaintiff's intended conduct—not whether a credible threat of prosecution exists. *See Friends of George's*, 108 F.4th at 435–36.

Ream also calls our attention to the Fifth Circuit's recent decision in *McNutt v. U.S. Department of Justice*, __ F.4th __, 2026 WL 971617 (5th Cir. Apr. 10, 2026). In *McNutt*, the Fifth Circuit concluded that the plaintiffs had standing to challenge the federal home-distilling ban. *Id.* at *4–5. But *McNutt* just reinforces that Ream lacks standing. There, the Treasury Department advised the plaintiffs before they filed suit that it would deny them permits to distill in their homes, and it sent at least one plaintiff a warning letter. *Id.* at *4. Ream has not been denied a permit (he has not sought one) nor has he received a warning letter. The Treasury Department knows that Ream wants to engage in home distilling only because he filed a lawsuit.

Ream further asserts that "[t]he mere existence of the federal home-distilling prohibition . . . establishes a credible threat." D. 13 at p.40. But his only support for this proposition comes from out-of-circuit caselaw, which cannot override our binding precedent. And even if those cases were persuasive in the abstract, they are distinguishable and do not help Ream. *See Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013) (holding that employers had standing to challenge an Affordable Care Act provision that "operate[d] directly" on them by requiring them to provide contraceptive coverage in their employee healthcare plans); *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019) (applying a similar analysis and holding that an airport had standing to challenge a statute limiting runway length because the plaintiff was the "object of the action . . . at issue" (quotation omitted)); *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010) (concluding that a judge and a judicial candidate had standing to challenge a code of conduct provision limiting political speech by judges and judicial candidates).

In each case, the plaintiff was the direct "object of the action," *Lujan*, 504 U.S. at 561, which helped convince the court that enforcement was "certainly impending," *Friends of George's*, 108 F.4th at 435 (emphasis omitted). But Ream is unlike the judge challenging a judicial code of conduct rule. Nor is he like the airport contesting state runway restrictions. To the extent § 5601(a)(6) regulates Ream, it does not do so directly because, put simply, he is not an at-home distiller. He brews beer and has "researched" distilling.

V.

For the reasons above, I would affirm the district court's order dismissing Ream's claims for lack of subject-matter jurisdiction and decline to reach the merits questions. I thus respectfully dissent from the majority opinion's contrary conclusion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN REAM,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, *et al.*,

Defendants.

Case No. 2:24-cv-364

JUDGE EDMUND A. SARGUS, JR.

Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

Before the Court is a Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim filed by Defendants the United States Department of the Treasury, Janet Yellen in her official capacity as Secretary of Treasury of the Alcohol Tobacco Tax and Trade Bureau ("TTB"), and Mary G. Ryan, in her official capacity as TTB Administrator. (Defs.' Mot., ECF No. 13.) Plaintiff John Ream opposes that Motion (Resp., ECF No. 21), and Defendants replied in support of the Motion (Defs.' Reply, ECF No. 27). Mr. Ream also cross-moved for summary judgment. (Pl.'s Mot., ECF No. 20.) Defendants opposed (Opp., ECF No. 28), and Mr. Ream replied (Pl.'s Reply, ECF No. 31).

Mr. Ream lacks standing to obtain pre-enforcement review of the challenged statutes. Because Mr. Ream lacks standing, the Court does not have subject matter jurisdiction over this action and must grant Defendants' Motion to Dismiss. Since the Court grants the Motion to Dismiss, it will not reach a decision on the Cross Motion for Summary Judgment. For the reasons below the Court **GRANTS** Defendants' Motion to Dismiss (ECF No. 13) and **DENIES as moot** Mr. Ream's Cross Motion for Summary Judgment (ECF No. 20).

BACKGROUND

Mr. Ream wishes to distill whiskey in his home for his family's personal consumption, but federal law prohibits him from doing so. Mr. Ream seeks an order from this Court declaring that the federal regulations that prohibit home distilling are facially unconstitutional and unconstitutional as applied to those who seek to distill small quantities of alcohol for personal consumption.

I. Factual Background

After experimenting with a home-brewing kit, Mr. Ream, an engineer by trade, found a passion for brewing beer at home. (Compl., ECF No. 1, ¶¶ 15–17.) Eventually, his hobby turned into a small business known as Trek Brewing Company, which opened in 2018 in Granville, Ohio. (*Id.* ¶¶ 18–19.) He now would like to expand his hobby to include distilling small quantities of whiskey. (*Id.* ¶¶ 24–27.) He has never distilled alcohol into spirits before, but would like to master the process, just as he did with brewing. (*Id.* ¶ 26.) Mr. Ream has "extensively researched and studied the process of distilling" and "is prepared to take every step necessary to responsibly distill . . . including obtaining the necessary equipment and raw materials." (*Id.* ¶ 27.) He makes clear that he "would not sell the alcohol he produces from his home distilling or otherwise offer it to the public." (*Id.* ¶ 25.)

Mr. Ream "would act upon his personal desire to try home distilling[,]" if not for the federal laws prohibiting home distilling. (*Id.* ¶ 29.) He would "obtain all necessary state and federal licenses for, and pay all applicable taxes on, his home distilling" and would "comply with all applicable state and federal laws." (*Id.* ¶ 28.) But if he acquired a still and began to distill spirits, he argues that he would face federal criminal prosecution and criminal penalties of up to $10,000 and five years of imprisonment. (*Id.*

¶ 30.) According to Mr. Ream, his fears are not hypothetical because the government has enforced these provisions in the past. (*Id.* ¶ 31.)

II. Legal Background

This case involves two federal statutes that regulate the location of plants that distill alcohol into spirits, or "stills." *See* 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6). The federal government has a long history of taxing and regulating distilled spirits. Distilled spirits can be produced only at a registered distilled spirits plant, *see* 26 U.S.C. § 5171, and cannot be distilled at home for personal consumption.

The first statute challenged by Mr. Ream, 26 U.S.C. § 5178(a)(1)(B), was enacted in 1868 and provides:

> [n]o distilled spirits plants for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or inclosure [sic] connected with any dwelling house, or on board an vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under subsection (b)).

26 U.S.C. § 5178(a)(1)(B); *see also* 73 Fed. Reg. 26200, 26206 (2008) (reiterating that a person may not distill spirits at home for personal use). The second statute

penalizes violations of § 5178(a)(1)(B), and states that:

> [a]ny person who uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists therein, or causes or procures the same to be done, in [any location proscribed by § 5178(a)(1)(B), except as authorized by § 5178(a)(1)(C)], shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

Id. § 5601(a)(6).

The accompanying regulatory framework includes more than just limitations on where spirits may be distilled. To protect public health and safety from unregulated alcohol products, Congress requires certain qualifications to establish and operate a distilled spirits plant. *See id.* §§ 5171–5182 (articulating registration and permit requirements); §§ 5201–5207 (defining how operations will be supervised and regulated). To facilitate the collection of taxes and protect the tax revenue accrued from taxing distilled spirits, Congress also enacted a detailed tax framework. *Id.* §§ 5001–5011 (taxing spirits based on proof of gallon and requiring that operations occur only on bonded premises). Mr. Ream is not accused of violating any of the above statutes or regulations, but challenges Congress's power to enact the statutes and regulations in the first place.

III. Procedural Background

Mr. Ream filed this lawsuit arguing that the federal home distilling prohibition exceeds Congress's constitutional authority. (*See* Compl. ¶¶ 33–38.) He seeks an order declaring the challenged provisions unconstitutional. (*Id.*) Defendants moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim. (Defs.' Mot.) Defendants contend that Mr. Ream lacks standing and that the prohibition is within Congress's taxing authority and power to regulate interstate commerce. (*Id.*)

STANDARD OF REVIEW

"Federal courts are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted). Federal subject matter jurisdiction "can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

A court may dismiss an action under Rule 12(b)(1) when it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3) (permitting courts to dismiss an action "at any time" for lack of subject matter jurisdiction). When a defendant challenges a complaint on its face under this rule, as Defendants do here, the defendant challenges "the sufficiency of the pleading itself." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). "On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *Id.* "When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996).

ANALYSIS

Defendants argue that Mr. Ream lacks standing to sue because he has not adequately alleged a legal injury. (Defs.' Mot., PageID 80–84; Opp., PageID 234–43.) Mr. Ream argues that his inability to home distill is an injury in fact with a causal connection to the challenged statutes, that is likely to be redressed by a favorable decision of this Court. (Pl.'s Mot., PageID 125.) The Court first discusses the applicable law for determining whether a plaintiff has standing to seek pre-enforcement review before applying the law to Mr. Ream's claim.

I. The Court applies the framework set forth in *Susan B. Anthony List v. Driehaus* to determine whether Mr. Ream has standing to seek pre-enforcement review.

Federal courts are not "an open forum for citizens 'to press general complaints about the way in which government goes about its business.'" *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024) (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)). The Constitution only gives federal courts authority to decide "cases" and "controversies." U.S. Const. art. III. § 2. To have a genuine case or controversy, a plaintiff must have "a personal stake in the outcome" of the dispute. *All. for Hippocratic Med.*, 602 U.S. at 379 (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). "In other words, a plaintiff must have standing." *Associated Builders & Contractors of Mich. v. Cowen*, No. 23-1803, 2025 U.S. App. LEXIS 3586, at *7 (6th Cir. Feb. 13, 2025).

A plaintiff lacks standing to assert his claims unless he or she: (1) "suffered an injury in fact" that is actual or imminent, (2) "fairly traceable to the challenged conduct of the defendant," and (3) "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The party invoking federal jurisdiction—here, Mr. Ream—must allege facts establishing each element of standing. *Id.* Defendants focus their attack on the first element: whether he suffered an injury in fact.

The Supreme Court has reiterated the importance that an Article III injury must be "actual or imminent, not speculative." *All. for Hippocratic Med.*, 602 U.S. at 381. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Normally, this means that "the injury must have already occurred," *All. for Hippocratic Med.*, 602 U.S. at 381, for example, when the government enforces an allegedly unconstitutional law against the challenging party. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 435 (6th Cir. 2024).

But in some cases, a future injury can confer standing if it is "certainly impending" or if there is a "substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Standing "can derive from an imminent, rather than an actual, injury, . . . only when the threatened injury is real, immediate, and direct." *Crawford v. United States Dep't of the Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (internal quotation marks omitted). A future injury that is merely "possible" is not enough to constitute an injury in fact. *Id.* (citing *Clapper v.*

Amnesty Int'l USA, 568 U.S. 398, 415–16 (2013)). Although a "somewhat elastic concept," imminence should not be "stretched beyond its purpose" of ensuring that "the alleged injury is not too speculative for Article III." *Clapper*, 568 U.S. at 409.

When a plaintiff brings a claim before an allegedly unconstitutional law is enforced against him, as Mr. Ream does, he raises the "recurring issue of whether threatened enforcement of a law satisfies the injury in fact requirement." *Cowen*, 2025 U.S. App. LEXIS 3586, at *9. In the pre-enforcement context, the Sixth Circuit imposes additional requirements to ensure that an injury is imminent. *Carman v. Yellen*, 112 F.4th 386, 400 (6th Cir. 2024). To have standing a plaintiff must demonstrate (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) that is proscribed by the statute at issue, and (3) the threat of future enforcement is "certainly impending." *Susan B. Anthony List*, 573 U.S. at 160–62; *see also Mulroy*, 108 F.4th at 435.

Mr. Ream argues that the above standard should not apply. (Resp., PageID 167–68; Pl.'s Reply, PageID 263–64.) Instead, he reasons that if a statute directly regulates a plaintiff's conduct, or requires a plaintiff to alter their conduct, the statute inflicts an injury in fact for purposes of standing. (Pl.'s Reply, PageID 263.) The challenged statutes, according to Mr. Ream, cause him to suffer an injury in the form of a "Hobson's choice."[1] (Resp., PageID 167.) He must choose between refraining from home distilling or facing criminal penalties, which is really no choice at all, says Mr. Ream. (*Id.* (citing *Peoples Rts. Org. v. City of Columbus*, 152 F.3d 522, 529 (6th Cir. 1998); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 533 (6th Cir. 2011), *abrogated in part on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 541 (2012).)[2]

The Court disagrees. Adopting Mr. Ream's proposed standard would unlock the courthouse doors

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[1] A Hobson's choice is "an apparently free choice that offers no actual alternative." *Stokes v. Scutt*, 527 F. App'x 358, 370 n.1 (6th Cir. 2013).

[2] Defendants point out that the cases cited by Mr. Ream all involved challenges to laws that required the plaintiffs to take affirmative actions, rather than prohibiting them from doing something. (Defs.' Reply, PageID 206); *e.g.*, *Thomas More Law Ctr.*, 651 F.3d at 533 (requiring individuals to buy health insurance under the Affordable Care Act). Mr. Ream responds that this is a distinction without a difference. "Government regulations that require *or forbid* some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements." *All. for Hippocratic Med.*, 602 U.S. at 382 (*emphasis* added). (Pl.'s Reply, PageID 263.) The Court agrees with Mr. Ream that Defendants' emphasis on whether the challenged regulation requires or prohibits conduct is misplaced. That said, the Court disagrees that the standard proposed by Mr. Ream applies.

to any plaintiff who wishes to use federal courts to adjudicate their general complaints about how the government conducts its business. *See All. for Hippocratic Med.*, 602 U.S. at 378. Federal courts are not open forums to "opine on legal issues in response to citizens who might roam the country in search of governmental wrongdoing." *Id.* at 379 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982)). A plaintiff does not have standing simply because she believes a law is unconstitutional or because she has a policy objection to a particular governmental action. *See All. for Hippocratic Med.*, 602 U.S. at 381. Without satisfying the elements enunciated in *Susan B. Anthony List*, Mr. Ream's challenge does not present a legal question "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial actions." *Id.* at 379.

The Court therefore applies the standard proposed by Defendants and set forth in *Susan B. Anthony List v. Driehaus*, 573 U.S. at 160, beginning with whether Mr. Ream plausibly alleged that his course of conduct is affected with a constitutional interest.

II. Mr. Ream does not have a constitutional interest in home distilling alcohol.

Mr. Ream must show that his alleged intention to violate the challenged statutes and engage in home distilling is "arguably affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 160. To do so he must show he has a legally protected interest in home distilling. The Sixth Circuit recently gave two examples in the First Amendment context for how a plaintiff satisfies this step. If a plaintiff challenges a law prohibiting protests, they must show a constitutional interest in protesting. *Mulroy*, 108 F.4th at 438 (holding that the plaintiff did not have a constitutional interest in exhibiting indecent materials to minors when challenging a Tennessee law prohibiting adult cabaret performances in the presence of minors). Likewise, a newspaper that challenges a censorship law must show a constitutional interest in freely publishing. *Id.*

Following this logic, to show that his alleged intent to violate the challenged statutes is affected by a constitutional interest, Mr. Ream must establish that he has a constitutional interest in home distilling alcohol. Defendants argue that there is no constitutional interest in home distilling alcohol, therefore, Mr. Ream does not seek to engage in conduct affected with a constitutional interest. (Defs.' Mot., PageID 81–83.)

Mr. Ream responds with two arguments. First, that his conduct is affected with a constitutional interest under the Commerce Clause. (Pl.'s Mot., PageID 126.) Second, even if he has no constitutional right to distill alcohol, he has a constitutional interest in ensuring that Congress legislates within the scope of its powers under the Constitution. (*See* Pl.'s Reply, PageID 265 (explaining he seeks to prevent "tyranny and abuse").)

To support his first argument, Mr. Ream relies on *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021). In that case, the plaintiff, an association of online merchants, alleged that the enforcement of Kentucky's price-gouging laws violated the dormant commerce clause, the Due Process Clause, and the First Amendment. *Id.* at 546. The representative plaintiff explained that it engaged in commercial activity through Amazon's interstate marketplace and received a subpoena from the Kentucky Attorney General stating that the Attorney General had reason to believe the plaintiff had engaged in price-gouging activities. *Id.* at 549–50. The Sixth Circuit found that the first requirement for pre-enforcement standing was met because the dormant commerce clause protects commercial actors from unduly burdensome state regulations of interstate commerce. *Id.* Thus, the representative was engaged in conduct (commercial activity) affected with a constitutional interest (freedom from unduly burdensome regulations under the dormant commerce clause) but proscribed by Kentucky state statute. *See id.*

As Defendants point out, the dormant commerce clause protects commercial actors from *state* regulations—not *federal* laws and regulations at issue here. (Defs.' Reply, PageID 208.) Therefore, the dormant commerce clause does not legally protect his interest in home distilling. Mr. Ream seeks to contort this distinction from *Online Merchants* in his favor. He suggests that his constitutional interest is even *greater* than the plaintiff's interest in *Online Merchants* because that case involved the dormant commerce clause—an implicit right under the Constitution—not an explicit protection of the Commerce Clause. (Pl.'s Reply, PageID 264–65 (emphasis in original).) But that distinction does not matter because Mr. Ream fails to develop this argument beyond stating in a conclusory manner that his proscribed conduct "relates" to the Commerce Clause.

Mr. Ream also argues that he has a constitutional interest in ensuring that Congress has not acted outside its enumerated powers. (*Id.*) But his general interest in preventing "tyranny and abuse," is not sufficiently particularized to show he has standing to assert his pre-enforcement challenge.

III. Mr. Ream has not shown a serious intent to engage in conduct proscribed by the challenged statutes.

Next, Mr. Ream must show that he intends to engage in a course of conduct that the challenged statutes proscribe. *Susan B. Anthony List*, 573 U.S. at 160. The statutes at issue prohibit Mr. Ream from locating or operating a distilled spirts plant on residential property. *See* 26 U.S.C. § 5178(a)(1)(B). Mr. Ream says that he "has taken every possible preparatory step up to the one—purchasing a still—that could subject him to criminal prosecution." (Pl.'s Reply, PageID 265.) To support his position, he submits a declaration that states he has "extensively researched and studied the process of distilling" and is prepared to "obtain[] the appropriate equipment and raw materials." (Ream Decl., ECF Nos. 20-1, 21-2, ¶ 12.) He states that he "would like" to distill alcohol but does not intend to do so until he has received the necessary permits and licenses. (*Id.* ¶¶ 11, 14.)

Defendants argue that Mr. Ream has not exhibited a serious intent to operate a still in violation of the challenged statutes. (Mot., PageID 82–83; Defs.' Reply, PageID 209–10.) They reason that Mr. Ream could take several additional steps to begin home distilling, without violating the statutes, that he has not taken. (Mot., PageID 82; Defs.' Reply, PageID 209.) Defendants explain that to apply for a permit or license to operate a still, an applicant must submit a building layout, security plan, detailed list of operations to be performed, and a description of the equipment involved. (*Id.*) Since he offers no evidence that he has put together a building layout, or otherwise gathered the necessary information to apply for a license or permit, Defendants contend that he has shown no more than a desire or wish to one-day home distill. (Mot., PageID 83.)

In *Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau*, a case cited by Mr. Ream, the court in the Northern District of Texas found that one of four individual plaintiffs had standing to challenge the same federal prohibition at issue. 740 F. Supp. 3d 509, 519–20 (N.D. Tex. 2024) (concluding that 26 U.S.C. §§ 5601(a)(6) and 5178(a)(1)(B) are unconstitutional under Congress's taxing and commerce powers). The court explained that each plaintiff was "no more than one overt act away from criminal liability under the challenged statutes[,]" but the plaintiff who had standing also received a warning letter. *Id.* One plaintiff operated a still in a shed on his residential property to distill ethanol for fuel,[3] which could easily be modified to distill spirits for personal consumption. *Id.* Another plaintiff possessed a business permit to re-distill alcohol and could easily transport his still to his residence. *Id.* The district court also highlighted that the plaintiffs possessed the requisite expertise to distill beverage alcohol, demonstrating the seriousness of their intent to engage in the proscribed conduct. *Id.* (noting that one plaintiff had a recipe and an ingredient list, one was already proficient at home-brewing wine and beer, and another was a certified bourbon steward).

Although Mr. Ream aims to draw parallels between himself and the plaintiffs above, his case is distinguishable. Like the plaintiffs above, Mr. Ream is proficient at home brewing, and even owns a brewery. (Compl., ¶¶ 17–20.) But he is not "one overt act away from criminal liability under the challenged statutes." *Hobby Distillers*, 740 F. Supp. 3d at 519. He has not bought a still, and the record does not show that he has a comparable still at his brewery that could easily be transported to his personal residence or modified to distill spirits. *Id.* Even though he states he has a recipe with a list of ingredients that he can "easily obtain," he has not bought the ingredients or taken any added steps to apply for an applicable

[3] 26 U.S.C. § 5181 authorizes an alcohol fuel plant to produce, process, store, use, or distribute non-beverage fuel alcohol exclusively for fuel use.

license or permit. (*See* Ream Decl., ¶¶ 13–14.) His "desire" or "wish to engage in certain possibly prohibited activities" is "not sufficient to create a case or controversy within the meaning of Article III." *NRA of Am. v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997) (internal quotation marks omitted); *see also Lujan*, 504 U.S. at 564 ("some day intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the actual or imminent injury").)

IV. Mr. Ream has not shown a credible threat of prosecution to establish standing.

Mr. Ream must also show a credible threat of prosecution to establish that his future injury is sufficiently imminent to satisfy Article III. "The mere possibility of prosecution,[]—no matter how strong the plaintiff's intent to engage in forbidden conduct may be—does not amount to a credible threat of prosecution." *Crawford*, 868 F.3d. at 454–55. "Instead, the threat of future prosecution, must be certainly impending." *Id.* (citation omitted). Courts analyze whether a threat of prosecution is certainly impending and thus credible, holistically, under the four *McKay* factors:

(1) "a history of past enforcement against the plaintiffs or others"; "(2) enforcement

> warning letters sent to the plaintiffs regarding their specific conduct"; "(3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action"; and (4) the "defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff."

McKay v. Federspiel, 823 F.3d 862, 869 (6th Cir. 2016) (citations omitted). The *McKay* factors "are not exhaustive, nor must each be established." *Online Merchs. Guild*, 995 F.3d at 550 (explaining that the Sixth Circuit has found standing where "some combination of the factors are present").

From the start, two of the four *McKay* factors suggest that Mr. Ream lacks standing. Mr. Ream has not received an enforcement letter and neither statute can be enforced by a private party. *See McKay*, 823 F.3d at 869 (factors (2) and (3)); *Hobby Distillers*, 740 F. Supp. 3d at 519–20 (explaining that a warning letter is "critical for determining the credibility of prosecution"). As explained below, the first factor cuts against standing, while the fourth factor makes Mr. Ream's fear of prosecution more credible. Holistically, because three of the four *McKay* factors indicate Mr. Ream does not have a certainly impending threat of prosecution, Mr. Ream lacks standing.

Defendants try to avoid the import of fourth factor by arguing that the TTB has not had the opportunity to decide whether to enforce the challenged statutes against someone who has not actually distilled alcohol. (*See* Defs.' Reply, PageID 211–12.) But that argument misstates the inquiry. If the TTB made clear that it would not enforce the challenged statutes against Mr. Ream, then his fear of prosecution would be less credible. But because the TTB refuses to say that it would not enforce—i.e., "disavow enforcement of"—the challenged statutes, his fear of prosecution is more credible.

The threat of enforcement becomes more credible when the same conduct has drawn enforcement in the past. *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). That is why the first *McKay* factor analyzes whether the government has a history of enforcing the challenged provisions. In the Complaint, Mr. Ream cites three cases to show that because the government enforced the statutes before, his fear of prosecution is not hypothetical. (Compl., ¶ 31 (citing *United States v. Smith*, 456 F. App'x 200, 202 (4th Cir. 2011) (affirming the defendant's conviction for fraudulent receipt of Social Security Administration funds and illegal liquor operation, but not under § 5601(a)(6)); *United States v. Brookins*, 434 F.2d 41, 45 (5th Cir. 1970) (affirming conviction for possession of an unregistered still under 26 U.S.C. § 5601(a)(1)); *Pinion v. United States*, 397 F.2d 27, 27 (5th Cir.

1968) (affirming conviction of operating a distillery without a bond and without paying taxes)).

Defendants distinguish the above cases by arguing that they either did not involve § 5601(a)(6) and are too outdated to show a certainly impending threat of prosecution. (Defs.' Reply, PageID 212.) Mr. Ream responds by citing additional cases that charged defendants under § 5601(a)(6). (Resp., PageID 169, n.9 (citing *United States v. Whitehead*, 424 F.2d 446, 447 (6th Cir. 1970) (affirming conviction for possessing a still in violation of federal tax laws); *United States v. West*, 328 F.2d 16, 17 (2d Cir. 1964) (upholding conviction for producing distilled spirits in a dwelling house); *Reynolds v. United States*, 289 F.2d 698, 699 (10th Cir. 1961) (affirming conviction under § 5601(a)(1), but noting the still was found in a dwelling in violation of § 5601(a)(6)); *United States v. Dahir*, 275 F. Supp. 83, 85 (D. Minn. 1967) (granting the defendant's motion to dismiss the indictment charging him with violating § 5601(a)(6)); *United States v. Lewis*, 270 F. Supp. 807, 809 (S.D.N.Y. 1967) (denying motion to suppress evidence in a case charging the defendant with violating § 5601(a)(6)); *United States v. Thomas*, 216 F. Supp. 942, 943 (N.D. Cal. 1963) (same)).

Even though the cases cited by Mr. Ream involved § 5601(a)(6), they are too outdated to establish that Mr. Ream faces a credible and imminent threat of prosecution today. At a minimum, the cases show that the TTB has not "vigorously litigated" enforcements of the challenged provisions. *Cf. Online Merchs. Guild*, 995 F.3d at 551 (explaining that because the Kentucky Attorney General vigorously litigated price-gouging cases, it was more likely that he would prosecute the plaintiff for similar conduct). Mr. Ream cites no cases showing the government has enforced § 5601(a)(6) in the past 50 years. Of course, it is *possible* that Mr. Ream could face future prosecution if he places a still in his home, but for a future injury to give rise to Article III standing, it must be more than a mere possibility. *Crawford*, 868 F.3d at 454. The possibility of prosecution here stretches the imminence requirement for a legal injury beyond its purpose. *Lujan*, 504 U.S. at 560–61.

Viewing the *McKay* factors holistically, the Court cannot conclude that Mr. Ream has shown a credible or imminent threat of prosecution. His case is distinguishable from *Hobby Distillers Association*, where the only individual plaintiff the district court found had standing received a notice of criminal liability. 740 F. Supp. 3d at 520 (explaining the notice was one step short of a target letter). Mr. Ream received no such warning letter and has not taken the actions present in Hobby Distillers (for example, possessing a still for business purposes that could easily be transported to his residence) that made the threat of prosecution imminent and credible.

Since Mr. Ream cannot establish that he intends to engage in a course of conduct affected with a constitutional interest and proscribed by the challenged statutes, or that he faces a certainly impending threat of prosecution, he fails to plausibly allege a legal injury for purposes of standing. Without establishing that he suffered an injury in fact, he lacks standing to seek pre-enforcement review of the federal prohibition on home distilling. *See Susan B. Anthony List,* 573 U.S. at 160. Accordingly, Defendants Motion to Dismiss (ECF No. 13) is **GRANTED** for a lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss (ECF No. 13) is **GRANTED**. Mr. Ream's Complaint is **DISMISSED** and his Cross Motion for Summary Judgment (ECF No. 20) is **DENIED as moot**.

The Clerk is **DIRECTED** to enter judgment and close this case.

IT IS SO ORDERED.

3/20/2025	**/s/ Edmund A. Sargus, Jr.**
DATE	**EDMUND A. SARGUS, JR. UNITED STATES DISTRICT JUDGE**

APPENDIX C

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. Art. I, Sec. 8, Cl. 1

The Congress shall have Power To 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, Sec. 8, Cl. 3

[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

U.S. Const. Art. I, Sec. 8, Cl. 18

[The Congress shall have Power . . .] To 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.

26 U.S.C. § 5178 – Premises of distilled spirits plants

(a) Location, Construction, and Arrangement

(1) General

(A) The premises of a distilled spirts plant shall be as described in the application required by section 5171(c). The Secretary shall prescribe such regulations relating to the location, construction, arrangement, and protection of distilled spirts plants as he deems necessary to facilitate inspection and afford adequate security to the revenue.

(B) No distilled spirits plant for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or inclosure connected with any dwelling house, or on board any vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under subsection (b)).

(C) Notwithstanding any other provision of this chapter relating to distilled spirits plants the Secretary may approve the location, construction, arrangement, and method of operation of any establishment which was qualified to operate on the date preceding the effective date of this section if he deems that such location, construction, arrangement, and method of operation will afford adequate security to the revenue.

(2) Production Operations

(A) Any person establishing a distilled spirits plant may, as described in his application for registration, produce distilled spirits from any source or substance.

(B) The distilling system shall be continuous and shall be so designed and constructed and so connected as to prevent the unauthorized removal of distilled spirits before their production gauge.

(C) The Secretary is authorized to order and require—

(i) such identification of, changes of, and additions to, distilling apparatus, connecting pipes, pumps, tanks, and any machinery connected with or used in or on the premises, and

(ii) such fastenings, locks, and seals to be part of any of the stills, tubs, pipes, tanks, and other equipment, as he may deem necessary to facilitate inspection and afford adequate security to the revenue.

(3) Warehousing Operations

(A) Any person establishing a distilled spirits plant for the production of distilled spirits may, as described in the application for registration, warehouse bulk distilled spirits on the bonded premises of such plant.

(B) Distilled spirits plants for the bonded warehousing of bulk distilled spirits elsewhere than as described in subparagraph (A) may be established at the discretion of the Secretary by proprietors referred to in subparagraph (A) or by other persons under such regulations as the Secretary shall prescribe.

(4) Processing Operations

Any person establishing a distilled spirits plant may, as described in the application for registration, process distilled spirits on the bonded premises of such plant.

(b) Use of Premises for Other Businesses

The Secretary may authorize the carrying on of such other businesses (not specifically prohibited by section 5601(a)(6)) on premises of distilled spirits plants, as he finds will not jeopardize the revenue. Such other businesses shall not be carried on until an application to carry on such business has been made to and approved by the Secretary.

(c) Cross References

(1) For provisions authorizing the Secretary to require installation of meters, tanks, and other apparatus, see section 5552.

(2) For penalty for distilling on prohibited premises, see section 5601(a)(6).

(3) For provisions relating to the bottling of distilled spirits labeled as alcohol, see section 5235.

(4) For provisions relating to the unauthorized use of distilled spirits in any manufacturing process, see section 5601(a)(9).

26 U.S.C. § 5601 – Criminal penalties

(a) Offenses

Any person who—

(1) Unregistered Stills
has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or

(2) Failure to File Application
engages in the business of a distiller or processor without having filed application for and received notice of registration, as required by section 5171(c); or

(3) False of Fraudulent Application
engages, or intends to engage, in the business of distiller, warehouseman, or processor of distilled spirits, and files a false or fraudulent application under section 5171; or

(4) Failure or Refusal of Distiller, Warehouseman, or Processor To Give Bond
carries on the business of a distiller, warehouseman, or processor without having given bond as required by law; or

(5) False, Forged, or Fraudulent Bond engages, or intends to engage, in the business of distiller, warehouseman, or processor of distilled spirits, and gives any false, forged, or fraudulent bond, under subchapter B; or

(6) Distilling on Prohibited Premises uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists therein, or causes or procures the same to be done, in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house (except as authorized under section 5178(a)(1)(C)), or on board any vessel or boat, or on any premises where beer or wine is made or produced, or where liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under section 5178(b)); or

(7) Unlawful Production, Removal, or Use of Material Fit For Production of Distilled Spirits except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; or

(8) Unlawful Production of Distilled Spirits

not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material; or

(9) Unauthorized Use of Distilled Spirits in Manufacturing Processes

except as otherwise provided in this chapter, uses distilled spirits in any process of manufacture unless such spirits—

(A) have been produced in the United States by a distiller authorized by law to produce distilled spirits and withdrawn in compliance with law; or

(B) have been imported (or otherwise brought into the United States) and withdrawn in compliance with law; or

(10) Unlawful Processing
engages in or carries on the business of a processor—

(A) with intent to defraud the United States of any tax on the distilled spirits processed by him; or

(B) with intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits; or

(11) Unlawful Purchase, Receipt, or Processing of Distilled Spirits
purchases, receives, or processes any distilled spirits, knowing or having reasonable grounds to believe that any tax due on such spirits has not been paid or determined as required by law; or

(12) Unlawful Removal or Concealment of Distilled Spirits
removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or from any instrument of

transportation, or conceals spirits so removed; or

(13) Creation of Fictitious Proof

adds, or causes to be added, any ingredient or substance (other than ingredients or substances authorized by law to be added) to any distilled spirits before the tax is paid thereon, or determined as provided by law, for the purpose of creating fictitious proof; or

(14) Distilling After Notice of Suspension

after the time fixed in the notice given under section 5221(a) to suspend operations as a distiller, carries on the business of a distiller on the premises covered by the notice of suspension, or has mash, wort, or beer on such premises, or on any premises connected therewith, or has in his possession or under his control any mash, wort, or beer, with intent to distill the same on such premises; or

(15) Unlawful Withdrawal, Use, Sale, or Distribution of Distilled Spirits For Fuel Use

withdraws, uses, sells, or otherwise disposes of distilled spirits produced under section 5181 for other than fuel use;

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) Presumptions

Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or processor was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

27 C.F.R. § 19.51 – Home production of distilled spirits prohibited.

A person may not produce distilled spirits at home for personal use. Except as otherwise provided by law, distilled spirits may only be produced by a distilled spirits plant registered with TTB under the provisions of 26 U.S.C. 5171. All distilled spirits produced in the United States are subject to the tax imposed by 26 U.S.C. 5001.

APPENDIX D

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLEES

No. 25-3259

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN REAM,
Plaintiff-Appellant

v.

U.S. DEPARTMENT OF THE TREASURY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

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SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLEES

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INTRODUCTION AND BACKGROUND

For over 150 years, Congress has imposed an excise tax on distilled spirits and regulated the manner of their production. As part of that comprehensive scheme, Congress placed certain restrictions on where a distilled spirits plant may be located. The restrictions were enacted in response to widespread evasion of the distilled-spirits tax and state, in relevant part, that a distilled spirits plant may not be located "in any dwelling house," "in any shed, yard, or inclosure connected with any dwelling house," or "on board any vessel or boat." 26 U.S.C. § 5178(a)(1)(B). A person who "uses, or possesses with intent to use, any still . . . for the purpose of producing distilled spirits" in a prohibited location is subject to criminal penalties. *Id.* § 5601(a)(6).

Plaintiff contends that the above restrictions exceed Congress's enumerated powers. The district court dismissed for lack of standing and did not reach the merits. That decision is correct for the reasons previously explained. To the extent plaintiff seeks clarity about what he can or cannot do, he may, for example, submit a permit application—which is free and available online—with the Alcohol and Tobacco Tax and Trade Bureau (TTB or Bureau) and, if his application is denied, he can challenge that denial in court. *See* 26 U.S.C. § 5171(c), (d); 27 U.S.C. § 204(h); 27 C.F.R. §§ 19.96 & 71.118; *see also* TTB, *Permits*

Online Help Center, https://perma.cc/GD95-AP4U; *Miller v. City of Wickliffe*, 852 F.3d 497, 506 (6th Cir. 2017) (a permit application carries "no risk" of enforcement).

Plaintiff's constitutional arguments are, in any event, meritless. Congress has broad authority to enact laws pursuant to and in service of its taxing and commerce powers. The location restriction is necessary and proper to Congress's taxing authority because it facilitates federal efforts to inspect distilling operations and collect the appropriate tax. The law is also within Congress's commerce authority in light of the legislature's comprehensive scheme governing the production, distribution, and consumption of distilled spirits and the manner in which individuals may engage in this quintessentially economic activity.

ARGUMENT

THE STATUTORY PROVISIONS ARE A VALID EXERCISE OF CONGRESS'S ENUMERATED POWERS.

The Constitution grants Congress the power to "lay and collect Taxes" and to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cls. 1, 3. Under the Necessary and Proper Clause, Congress is further empowered to "make all Laws which shall be necessary and proper for carrying into Execution" an enumerated power. *Id.* cl. 18.

While the federal government is one of enumerated powers, a "'government[] entrusted with such' powers 'must also be entrusted with ample means for their execution.'" *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819)). The Necessary and Proper Clause has thus long been read to give Congress "great latitude" to "enact provisions 'incidental to [an] [enumerated] power, and conducive to its beneficial exercise.'" *National Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 537, 559 (2012) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 418). A law is necessary and proper if it is "convenient" or "useful" for carrying an enumerated power into execution, and a court asks only whether the "means [chosen] . . . [are] rationally related to the implementation" of an enumerated power. *Comstock*, 560 U.S. at 133–34. Because Congress may enact legislation pursuant to any of its enumerated powers, a court need only find that a law is within one of Congress's powers in order to uphold it. *Accord NFIB*, 567 U.S. at 575.

A. The Challenged Law Is a Necessary and Proper Exercise of Congress's Taxing Authority.

[Omitted]

B. The Challenged Law Is Valid Under the Commerce and Necessary and Proper Clauses.

It is well-established that Congress has "broad" authority under the Commerce Clause. *NFIB*, 567 U.S. at 549. Under that authority, Congress may regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce, and persons or things in interstate commerce," and "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). When Congress acts in this third category, it has the power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17. And "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* Moreover, as discussed above, Congress acts under its necessary-and-proper authority when a law is "convenient" for carrying the enumerated power into execution. *Comstock*, 560 U.S. at 133–34.

In reviewing such a determination, a court's task is "modest." *Raich*, 545 U.S. at 22. A court "need not determine whether [the regulated] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding," and Congress is also not required to make "particularized findings." *Id.* at 21.

In assessing the breadth of Congress's commerce authority, the Supreme Court has distinguished between laws with an "apparent commercial character," *United States v. Morrison*, 529 U.S. 598, 611 & n.4 (2000)—such as regulations addressing the intrastate farming of wheat, *see Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942), and the intrastate manufacture and possession of marijuana for personal use, *see Raich*, 545 U.S. at 15—and laws that have "nothing to do with 'commerce' or any sort of economic enterprise," such as prohibitions on possessing firearms in school zones and on gender-motivated violence, *see United States v. Lopez*, 514 U.S. 549, 561 (1995); *Morrison*, 529 U.S. at 613. The Court has also drawn a distinction between regulations of commercial activity and regulations that would address inactivity by requiring individuals to engage in commercial transactions in which they would prefer not to engage. *See NFIB*, 567 U.S. at 553 (opinion of Roberts, C.J.); *id.* at 652 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

The production of distilled spirits is a "quintessentially economic" activity that falls within Congress's commerce power and is convenient to the exercise thereof. *Raich*, 545 U.S. at 25. Plaintiff does not dispute that there is an "established" and "lucrative, interstate market" for distilled spirits. *Id.* at 26. Distilled spirits are a multibillion-dollar industry, generating over $6 billion in excise tax revenue in fiscal year 2024. *See* TTB, *Statistical Release, Tax Collections Fiscal Year 2024* (Oct. 28, 2024), https://perma.cc/6YEN-S6FF. Congress regulates the distilled-spirits industry through a carefully reticulated scheme that imposes extensive requirements on individuals who seek to operate a distilled spirits plant. Under the Internal Revenue Code and Federal Alcohol Administration Act, would-be distillers must meet strict registration, permitting, and background-check requirements, *see* 26 U.S.C. §§ 5171, 5271; 27 U.S.C. §§ 203, 204; abide by various labeling and advertising specifications to ensure fair competition, 27 U.S.C. § 205; and adhere to provisions restricting bulk sales and disposals, *id.* § 206. Indeed, the Federal Alcohol Administration Act expressly links the regulation of distilled spirits to the need to "regulate interstate and foreign commerce in distilled spirits" and to "protect the revenue . . . with respect to distilled spirits." *Id.* § 203.

The location restriction is a piece of Congress's broader framework governing the production of distilled spirits and the manner in which individuals engage in this quintessentially economic activity. Congress's choice to limit the placement of distilled spirits plants in, for example, a "dwelling house" or on "any vessel" or "boat," 26 U.S.C. § 5178(a)(1)(B), reflects the "great latitude" afforded to Congress to dictate the terms in which individuals participate in the national market for this particular type of commodity, *NFIB*, 567 U.S. at 537. Congress can just as validly dictate *how* such activity takes place (for example, only after passing a background check and submitting a permit application, 27 U.S.C. §§ 203, 204), as it can prescribe where and when such activity may occur. Moreover, for the same reasons that the location restriction facilitates the government's ability to collect taxes, it also facilitates the ability to ensure compliance with a host of other requirements governing the distilled-spirits industry— including, for example, the requirement that distilled-spirits bottles generally contain a label with certain mandatory information. *Id.* § 205(e); 27 C.F.R. § 5.63. All of these requirements are pursuant to, and in service of, Congress's broader regulation of the distilled-spirits industry and interest in ensuring that such products are not manufactured without paying the appropriate tax.

Plaintiff does not challenge Congress's authority to regulate distilled spirits in interstate commerce, nor does he challenge Congress's authority to regulate distilled spirits generally. Plaintiff's contention, instead, rests on the mistaken belief that Congress has not provided for the interstate regulation of distilled spirits, *see* Opening Br. 35–36, but as noted above, Congress has done precisely that. Plaintiff's argument rests further on his assertion that he would distill spirits only for personal consumption and not for commercial sale. That argument again rests on the misconception that the location restriction is a categorical ban on "home distilling." As previously discussed, the restriction does not sweep that broadly, and to the extent plaintiff seeks clarity as to what he may do, he need only submit a (free) permit application to the Bureau. *See* Gov't Br. 16, 20–21.

In any event, plaintiff's assertion that he would distill spirits only for personal use does not alter the constitutional analysis. In *Raich*, the Supreme Court upheld Congress's authority to criminalize the possession, obtaining, or manufacturing of marijuana as applied to individuals using marijuana solely for personal (and, in that case, medicinal) purposes. 545 U.S. at 6–7, 9; *see id.* at 37, 40 (Scalia, J., concurring in judgment) ("Congress may regulate even noneconomic local activity," such as the possession of marijuana, "if that regulation is a necessary part of a more general regulation of interstate commerce"). The Court explained that it was "of no moment" that the governing framework "ensnare[d] some purely intrastate activity" or that the commodity in question had not been "produced for sale." *Id.* at 18, 22 (majority op.). Nor, the Court explained, was a person's purportedly "trivial" "impact on the market" a sufficient reason for "removing him from the scope of federal regulation." *Id.* at 20 (quoting *Wickard*, 317

U.S. at 127); *see Bowers*, 594 F.3d at 529 (a person's individual effect on interstate commerce is "irrelevant"). What mattered was that there was a "rational basis" to conclude that failing to regulate the intrastate activity would undermine Congress's interstate efforts, particularly in the context of a broader scheme to regulate the "production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 22, 26. That logic applies here: the wholly intrastate production of distilled spirits has an obvious effect on national "price and market conditions" for distilled spirits and presents the same "enforcement difficulties" in distinguishing between locally produced spirits and those manufactured elsewhere. *Id.* at 19, 22; *see Wickard*, 317 U.S. at 129; *Bowers*, 594 F.3d at 529.

Plaintiff's reliance on *Morrison*, 529 U.S. 598, and *Lopez*, 514 U.S. 549, only underscores the point that Congress's regulation of the distilled-spirits industry is a regulation of "economic activity," for which the failure to address intrastate activity would undercut the regulatory scheme writ large. *Raich*, 545 U.S. at 23–25. Indeed, the *Raich* Court explained that the "central" part of the Supreme Court's decisions striking down the laws in *Lopez* and *Morrison* was the "noneconomic" nature of the conduct at issue. *Id.* at 25 (quoting *Morrison*, 529 U.S. at 610). In *Lopez*, the Supreme Court held that a federal law prohibiting gun possession in a school zone exceeded Congress's commerce authority because the law had "nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561; *see Raich*, 545 U.S. at 23. Similarly, the Supreme Court in *Morrison* struck down a law creating a civil remedy for victims of gender-motivated crime because, much "like the statute in *Lopez*, it did not regulate economic activity." *Raich*, 545 U.S. at 25; *see Morrison*, 529 U.S. at 610.

Those features of *Morrison* and *Lopez* are not at issue here. As discussed, the distilled-spirits law plainly regulates economic activity and the manner in which these "fungible commodit[ies]" are produced. *Raich*, 545 U.S. at 18; *see id.* at 37, 40 (Scalia, J., concurring in judgment) ("manufactur[ing]" is an "economic activity" whose regulation "may be essential to a comprehensive regulation of interstate commerce"). Indeed, this Court has rejected commerce-clause challenges where there existed a rational link between the underlying statute and economic activity. *See, e.g.*, *United States v. Rose*, 522 F.3d 710, 717–18 (6th Cir. 2008) (upholding law criminalizing certain firearm sales given the "established interstate market" for guns); *Bowers*, 594 F.3d at 529 (same for possession of child pornography); *United States v. McHenry*, 97 F.3d 125, 127–29 (6th Cir. 1996) (carjacking). To the extent plaintiff relies on *NFIB*, plaintiff fails to grapple with the fact that the distilled-spirits law does not *compel* participation by anyone who is otherwise unwilling to enter this particular market, unlike the individual-mandate requirement at issue in *NFIB*. 567 U.S. at 549–50; *see id.* at 551–52 (the commerce clause applies to "activity," including "economic activity" (quoting *Lopez*, 514 U.S. at 560)). Instead, the distilled-spirits law applies only to those who have *chosen* to enter a particular—and highly regulated—industry. And, as explained, Congress can validly articulate the manner in which individuals engage in this multibillion-dollar industry, including the how, where, and when they can so operate, as plaintiff at times appears to concede. *See* Opening Br. 38–39.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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January 2026