No. 26-93

In the

Supreme Court of the United States

JOHN REAM,

Petitioner,

v.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights (CIR) is a nonprofit, public interest law firm dedicated to defending individual rights essential to a free and flourishing society. CIR recognizes that protecting individual rights requires maintaining the constitutionally defined roles of state and federal governments. Through its Project to Restore Competitive Federalism, CIR identifies and develops significant cases aimed at strengthening the Framers' intended federal structure, in which competition between state and national governments, and between different states, serves as a vital safeguard for individual rights.

In keeping with that philosophy, CIR has a strong interest in preventing federal overreach and has been at the forefront of efforts to provide meaningful limits to congressional power under the Commerce Clause. CIR represents plaintiffs challenging the Corporate Transparency Act. *Tex. Top Cop Shop, Inc. v. Garland*, 758 F. Supp. 3d 607, 619 (E.D. Tex. 2024), *stay granted sub nom. McHenry v. Tex. Top Cop Shop, Inc.*, 145 S. Ct. 1 (2025). It also represented one of the defendants, and its General Counsel argued for both defendants, in *United States v. Morrison*, 529 U.S. 598 (2000). CIR has also submitted amicus briefs in

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel made a monetary contribution to the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for the Petitioner and Respondents were provided with timely notice of this brief.

several federalism cases at the Supreme Court, including *United States Department of Health and Human Services v. Florida*, the companion case to *NFIB v. Sebelius*, 567 U.S. 519 (2012), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

Two decades ago, this Court took a wrong turn. Instead of continuing to restore the Commerce Clause to its original public meaning—a path set out in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000)—in *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court embraced the broadest understanding of "interstate commerce" in its history. Relying on a 1966 dictionary definition of a word nowhere in the constitutional text, *Raich* embraced a "breathtaking" definition of "economic activity" that "threatens to sweep all of productive human activity into federal regulatory reach." *Raich*, 545 U.S. at 49 (O'Connor, J., dissenting). This Court's repeated unwillingness to embrace *Raich*'s reasoning since then is itself an indictment of the decision's reasoning. *Raich* was wrong when it was decided, and this case presents an appropriate vehicle for correcting that constitutional misstep.

As this Court has recognized from its earliest days, the Constitution's structural limitations on the federal government's powers are central to its design. The Court's early cases, including *Gibbons v. Ogden*, 22 U.S. 1 (1824) and *Cohens v. Virginia*, 19 U.S. 264 (1821), underscored those limits. Modern scholarship, including from Professors Randy Barnett, Richard

Epstein, and Robert Pushaw, Jr., shows that post-New Deal Commerce Clause jurisprudence is irreconcilable with the Clause's original meaning. This Court should return to the task Justice Thomas outlined in his *Lopez* concurrence: reconsidering the "substantial effects" test "with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

Constructing that standard today would require the Court to limit or overrule *Raich*. *Raich*'s emphasis on a "class of activities" erases the distinction between commerce and production, leaving virtually no limit to what Congress could regulate. *See* 545 U.S. at 17–18. Recognizing that this analysis threatened to swallow federalism wholesale, in *NFIB*, this Court moved away from *Raich*'s framing: five justices reaffirmed that "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave." 567 U.S. at 557. Neither the Chief Justice's controlling opinion nor the joint dissent endorsed *Raich*'s broader reasoning, the Webster's Dictionary definition of "economics," the rational basis standard, or the proposition that mere possession of a commodity is "quintessentially economic" activity subject to federal regulation.

To the extent *Raich* is not overruled, it should be cabined to contraband markets, not converted into a general home-production rule. The strongest argument for *Raich*'s result, articulated in Justice Scalia's concurrence, was that prohibiting intrastate cultivation and possession of marijuana was necessary to effectuate Congress's objective of extinguishing an illegal interstate market, since the intrastate loophole would otherwise be filled by local supply. 545 U.S. at 39–40 (Scalia, J., concurring). None of those conditions are present in the interstate market in spirits, which Congress has sought to tax and regulate, not extinguish. And the Twenty-First Amendment unambiguously leaves a substantial role in regulating spirits to the States.

ARGUMENT

I. The Constitution Created a Federal Government of Limited Powers.

"In our federal system, the National Government possesses only limited powers; the States and the People retain the remainder." *NFIB*, 567 U.S. at 533. That is so because the "Constitution create[d] a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. That "enumeration presupposes something not enumerated." *Gibbons*, 22 U.S. at 195. The Federal Government "can exercise only the powers granted to it." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). Those powers "delegated . . . to the federal government are few and defined." *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution," and if none authorizes a law, it may not be enacted, even absent an express constitutional prohibition. *See Morrison*, 529 U.S. at 607; *NFIB*, 567 U.S. at 535.

The original Constitution did not include the Bill of Rights "partly because the Framers felt the enumeration of powers sufficed to restrain the government." *NFIB*, 567 U.S. at 535. "When the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: 'The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.'" *Id.* (quoting U.S. Const. Amend. X). Although the Federal Government has expanded dramatically since the Founding, "it still must show that a constitutional grant of power authorizes each of its actions." *Id.*

By limiting the Federal Government's authority, the Framers ensured that many aspects of government and American life would be reserved to the States, so that "the facets of governing that touch on citizens' daily lives" would come from "smaller governments closer to the governed." *Id.* at 536. "[G]overnments more local and more accountable than a distant federal bureaucracy," *id.*, should wield the powers that, "in the ordinary course of affairs, concern the lives, liberties, and properties of the people." *Id.* (quoting THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961)).

That system is more democratic and better preserves freedom. It is "for the protection of individuals" that the "Constitution divides authority between federal and state governments." *New York v. United States*, 505 U.S. 144, 181 (1992). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (quotation marks omitted); *see also* THE FEDERALIST NO. 51 (James Madison), at 323 (Clinton Rossiter ed., 1961). "By denying any one government complete jurisdiction over all the concerns of public life," the Constitution "protects the liberty of the individual." *Bond v. United States* (*Bond I*), 564 U.S. 211, 222 (2011). Any interpretation of the Commerce Clause should respect these background principles.

II. Under the Original Meaning of the Interstate Commerce Clause, Congress May Regulate Only Trade, Exchange, or Commercial Traffic Concerning Multiple States.

"At the time the original Constitution was ratified, commerce consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). Congress could regulate only trade or exchange concerning more states than one. *Raich*, 545 U.S. at 58 (Thomas, J., dissenting). This Court's early case law, historical evidence, and structural principles confirm that original understanding.

A. The Court's First Major Interpretation of the Clause Held that Congress May Regulate Only Commerce Itself, and Only if It Concerned Multiple States.

This Court's early decisions were consistent with the Commerce Clause's original public meaning. *Gibbons v. Ogden* established two key points: Congress cannot regulate an activity unless the activity itself is commercial, *see* 22 U.S. at 189, and

Congress cannot regulate wholly intrastate commercial activity, *see id.* at 194–95. But subsequent caselaw has, given short shrift to these principles.

In *Gibbons*, the Court examined whether a federal law licensing ships to engage in "coasting trade" preempted a state law granting a 30-year monopoly to navigate the State's waterways by steamship. The Court held it did, determining that "commerce" included navigation: Congress could not exercise its power "to regulate commerce with foreign nations" without reaching navigation, since the word commerce "must carry the same meaning throughout the sentence." *Id.* at 189, 194. Other constitutional provisions necessarily assumed Congress had power under the Commerce Clause to regulate commercial navigation, because they limited the exercise of that power. *See* U.S. Const. art. I, § 9; *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 125 (2001). Although *Gibbons* laid down no exhaustive test for "commerce," it made clear the regulated activity must be, at minimum, commercial. 22 U.S. at 189–90. Justice Johnson's concurrence agreed that navigation was encompassed within "the thing [i.e., commerce] itself." *Id.* at 229 (Johnson, J., concurring).

Gibbons also held that Congress cannot regulate commercial activity confined to one state, because that would not be commerce "among the States." *Id.* at 194. The "completely interior traffic of a State" falls outside Congress's authority, and commerce "completely internal . . . which does not extend to or affect other States," is simply not commerce "among the States." *Id.* The "internal commerce of a State" is "reserved for the State itself," and thus its regulation was not surrendered to the general government. *Id.* at 195, 203.

B. Historical Sources Show That "Commerce" Means Trade, Exchange, or Commercial Traffic.

Founding-era documents consistently use commerce to mean trade, exchange, and commercial traffic. Contemporaneous dictionaries offer an appropriate starting point: the 1785 edition of Samuel Johnson's *Dictionary of the English Language* defines commerce as "[i]ntercourse; exchange of one thing for another; interchange of any thing; trade; traffic," and the 1796 edition of Thomas Sheridan's *Complete Dictionary of the English Language* likewise defines commerce as "[e]xchange of one thing for another; trade, traffick." Those definitions find support in the word's etymology, which literally means with merchandise. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). The members of the Constitutional Convention understood the term the same way. In Madison's notes, "commerce" appears thirty-four times in the delegates' speeches; eight unambiguously reference commerce with foreign nations, which can only consist of trade, and in every other instance "trade" or "exchange" could be substituted with the apparent meaning preserved. Barnett, *Original Meaning* at 114. "In no instance is the term 'commerce' clearly used to refer to . . . anything broader than trade." *Id.* at 115.

The term was explicitly used in "contradistinction to productive activities such as manufacturing and agriculture." *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). During the Convention, Madison proposed to give Congress the "[p]ower to establish public institutions, rewards, and immunities for the promotion of *agriculture, commerce, trades and manufactures*." Barnett, *Original Meaning* at 115. This strongly suggests the delegates understood "commerce" to mean trade or exchange, distinct from the productive processes that made the things to be traded; if commerce itself covered agriculture and manufacturing, Madison would have had no reason to specify all three.

Usage during the ratification debates bolsters that view. The Federalist Papers "repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors." *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). Even "ardent nationalist Alexander Hamilton repeatedly made clear the commonplace distinction between commerce or trade and production." Barnett, *Original Meaning* at 115. In FEDERALIST NO. 17, he distinguished the power to regulate national matters like commerce from "the supervision of agriculture and of other concerns of a similar nature," properly the subject of "local legislation." Barnett, *Original Meaning* at 115 (quoting The FEDERALIST NO. 17 (Alexander Hamilton), at 118 (Clinton Rossiter ed., 1961)). The state ratification conventions made the same distinctions, and "[i]n none of the sixty-three appearances of the term 'commerce' in The Federalist Papers is it ever used to unambiguously refer to any activity beyond trade or exchange." Barnett, *Original Meaning* at 116. When Federalists and Anti-Federalists discussed the Commerce Clause during ratification, they routinely used "trade" and "commerce" interchangeably. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring); *see also* Barnett, *Original Meaning* at 116.

Prominent Founding-era newspapers confirm this usage. The *Pennsylvania Gazette*, which "from 1729 to 1766 was published by Benjamin Franklin," used the term commerce 1,594 times between 1728 and 1800. Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–57 (2001). As in other Founding-era sources, the newspaper "routinely used [commerce] to refer to trade or exchange" and "routinely distinguished [it] from agriculture and manufacturing." *Id.* at 858. "[T]he normal, conventional, and commonplace public meaning of commerce from 1728–1800 was 'trade and exchange,' as well as transportation for this purpose." *Id.* at 862.

"[T]his view of commerce as trade is consistent with the other prominent mention of the word commerce in the Constitution." Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395 (1987). Article I, § 9, states that "[n]o preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another[.]" "Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports." *Lopez*, 514 U.S. at 587 (Thomas, J., concurring).

III. The "Substantial Effects" Test Plainly Conflicts with the Text and Original Meaning of the Interstate Commerce Clause.

This Court's interpretation of Congress's power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, "has drifted far from the original understanding." *Lopez*, 514 U.S. at 584 (Thomas, J., concurring). The current doctrine allows Congress "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (quotations omitted).

The "New Deal Court invented" the substantial effects test and "manipulated *Gibbons* and its progeny to disguise the innovation." Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 91 (2000); *see also* Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702 (1996). The substantial effects test is unmoored from the Constitution's text and history and upends the entire concept of a Federal Government "of limited and enumerated powers." *Raich*, 545 U.S. at 58 (Thomas, J., dissenting).

Start with the text. Congress is authorized "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. As Chief Justice Marshall put it, the "subject to be regulated is commerce." *Gibbons*, 22 U.S. at 189. "If a subject is not commerce, Congress cannot regulate it, regardless of its impact on interstate commerce." Nelson & Pushaw, *Rethinking the Commerce Clause* at 71. Yet activities that substantially affect interstate commerce often do not qualify as "commerce" under any definition. *Raich*, 545 U.S. at 69 (Thomas, J., dissenting). "[T]he Framers could have drafted a 'substantially affects interstate commerce' Clause," but they did not. *Lopez*, 514 U.S. at 588 (Thomas, J., concurring). That is because the Framers understood that most areas of life, even with substantial effects on commerce, would remain outside federal reach. *Id.* at 590.

The substantial effects test also makes "many of Congress' other enumerated powers under Art. 1, § 8, . . . wholly superfluous." *Id.* at 588. If Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, coin money, punish counterfeiters, establish post offices, or grant patents and copyrights. *Id.* "Put simply, much if not all of Art. 1, § 8, (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce." *Id.* at 589. An interpretation that "makes the rest of § 8 superfluous simply cannot be correct," but that is precisely what the substantial effects test does. *Id.*

Worse still, "the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation." *Id.* at 599–600. That alone is reason to scrap it. *See Cohens v. Virginia*, 19 U.S. at 426, 428 (Congress has "no general right to punish murder" and "cannot punish felonies generally"). Whatever effect crime might have on interstate commerce was regarded as "irrelevant to the question of congressional power." *Lopez*, 514 U.S. at 597 (Thomas, J., concurring).

The test subjects nearly the entirety of American life to federal regulation. The Federal Government has taken over regulation of entire areas of traditional state concern, including areas having nothing to do with commercial activities. Because the Court has declined to enforce the "outer limits of Congress' Commerce Clause authority," even "historic spheres of state sovereignty" have given way to "excessive federal encroachment," upending "our federalist system of government." *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting). The substantial effects test thus "subvert[s] basic principles of federalism" and "makes a mockery of Madison's assurance . . . that the 'powers delegated' to the Federal Government are 'few and defined,' while those of the States are 'numerous and indefinite.'" *Id.* at 65, 69 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 45 (James Madison), at 313).

The "very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring). By continuing to apply this "rootless and malleable standard," the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. *Id.* The Court ought to temper its Commerce Clause jurisprudence and make it more consistent with the original understanding. *Id.* At the very least, overruling *Raich*—the only case in which this Court construed the Commerce Clause to reach local activity entirely divorced from commerce—is a good place to start.

IV. Raich Was Wrongly Decided and Should Be Limited or Overruled.

Raich is the Government's Commerce Clause theory of last resort in this case, and for good reason. *Raich* propounds near-total deference to congressional assertions of regulatory necessity over intrastate conduct and sweeps so broadly that it is difficult to identify any human activity Congress could not reach under its logic. That rule was wrong the day it was issued, has been undermined by this Court's subsequent decisions, and should not be extended to home distilling of spirits. At minimum, *Raich* must be confined to the context from which it arose: suppression of an illegal interstate market in contraband. Applied beyond that context, *Raich*'s aggregation principle leaves no meaningful limit on Congress's commerce power and cannot be reconciled with *Lopez*, *Morrison*, or *NFIB*.

A. *Raich*'s "Class of Activities" Reasoning Obliterates the Distinction Between Commerce and Production.

Raich authorized Congress to regulate "purely intrastate activity that is not itself 'commercial'" whenever Congress concludes that failure to regulate "that class of activity would undercut the regulation of the interstate market in that commodity." 545 U.S. at 18. The central flaw is not merely the breadth of this formulation but the mechanism it employs: aggregation of a "class of activities" defined by reference to whether a national market for the underlying commodity exists.

By that logic, home distilling of spirits might be regulable, or prohibitable, as market-substituting economic activity; so is home brewing, gardening, baking, sewing, repair, and cooking. Each involves local production of a commodity or service for which an interstate market exists, and each could, in the aggregate, substitute for commercial purchases and thereby affect the commercial market. If a broad reading of *Raich*'s "class of activities" framework is the applicable test without some further limiting principle, none of these quintessentially domestic pursuits remains beyond Congress's reach. Yet the Framers understood that "the supervision of agriculture" and kindred local activities were "proper to be provided for by local legislation," not the Federal Government. THE FEDERALIST NO. 17 (Alexander Hamilton). The Commerce Clause was not intended to authorize federal regulation of the household economy.

Raich's error begins with its definition of "economic" activity. Rather than drawing that line from the Constitution's text or the original understanding of commerce—long recognized to concern "the buying and selling of goods and services trafficked across state lines," *Raich*, 545 U.S. at 58 (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. 549, 586–89 (1995) (Thomas, J., concurring))—the majority reached for Webster's Third New International Dictionary (1966) and its definition of "economics" as "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25–26. On this foundation it concluded that even mere "possession or manufacture of an article of commerce" was "quintessentially economic" activity within federal reach. *Id*. *Lopez* had said precisely the opposite. 514 U.S. at 551, 567. The majority's recourse to a 1966 dictionary to interpret an eighteenth-century provision, using a word that does not even appear in the constitutional text, shows how far *Raich* strayed from the Constitution's proper moorings.

The result is a rule that draws "no line at all." *Raich*, 545 U.S. at 50 (O'Connor, J., dissenting). If production of a commodity for which a national market exists is enough, the class of activities Congress may aggregate and regulate or prohibit is coextensive with productive human activity itself. Congress could ban home cooking on the theory that home cooks substitute for restaurant meals subject to excise taxes or reach home sewing because hobby tailoring substitutes for the garment industry. No one seriously contends the Commerce Clause was designed to authorize federal regulation of these activities, but an expansive interpretation of *Raich* would provide no principled basis for excluding them.

Finally, *Raich*'s attempt to differentiate that case from *Lopez* and *Morrison* because it involved a "comprehensive statute," *Raich*, 545 U.S. at 10, unlike the narrower statutes in the other two cases, does not withstand scrutiny. This Court has repeatedly, and recently, emphasized the need to police the outer boundaries of comprehensive statutory schemes, lest they undermine the structural Constitution. *See, e.g.,* *West Virginia v. EPA,* 597 U.S. 697 (2022) (applying the major questions doctrine to the Clean Air Act); *Sackett v. EPA*, 598 U.S. 651, 680 (2023) (an overly broad interpretation of the Clean Water Act's reach would impinge on traditional state authority); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (holding that "the sheer scope of the CDC's claimed authority under § 361(a) [of the Public Health Service Act] would counsel against the Government's interpretation").

B. The "Class of Activities" Framework Has No Limiting Principle.

Raich bypassed this inquiry by redefining "economic" to encompass anything involving the production or consumption of commodities. But that redefinition does not limit, it expands. The constitutional requirement that regulated activity be "economic in nature" retains content only if it excludes something: only if some activities, though perhaps affecting markets in the aggregate, fall outside Congress's reach because they are not themselves commercial, does the commerce power have boundaries. The farmer in *Wickard v. Filburn*, 317 U.S. 111 (1942) was already a commercial participant in the wheat market: he grew wheat for sale as well as for his own use and operated under a federal acreage quota designed to control that market. A homeowner distilling spirits for personal enjoyment, a cook preparing dinner, or a tailor making clothes for his family are not participants in any market at all because they operate no commercial enterprise for a regulatory scheme to reach. *Wickard* stretched the

Commerce Clause as far as it had ever been stretched; *Raich* functionally abolished its outer boundary.

Lopez and *Morrison* arrested this tendency by insisting that courts examine the nature of the regulated conduct itself. *Lopez* held the regulated activity must "substantially affect[] interstate commerce," 514 U.S. at 559–60, and *Morrison* confirmed the Court's cases upholding Commerce Clause regulation of intrastate activity had done so "only where that activity is economic in nature." 529 U.S. at 613. These decisions demanded a genuine nexus between the regulated conduct and commerce, not merely a nexus between the regulated class and some notional national market.

This Court should restore that boundary. Regulated activity must be genuinely economic—involving buying, selling, or substantially affecting commerce—not merely connected to an industry others engage in commercially. Without that requirement, the "class of activities" framework becomes an unlimited license to aggregate all local activities.

C. *NFIB* Reiterated That the Commerce Clause Must Have Limits.

In *NFIB*, this Court reaffirmed what *Lopez* and *Morrison* had established: "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave." 567 U.S. at 557. Whatever *Raich* may have allowed in the drug-prohibition context, *NFIB* reaffirmed that Congress's commerce power "has limits," *id.* at 554, that must preserve "the

Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615.

Both the Chief Justice's controlling opinion and the joint dissent in *NFIB* recharacterized *Raich* in terms far narrower than *Raich* itself employed. The Chief Justice described *Raich* as involving regulation of an existing interstate market that would have been "substantially undercut" had intrastate activities been excluded. 567 U.S. at 561. The joint dissent characterized the intrastate regulation in *Raich* as "the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced." *Id.* at 654 (joint dissent). Neither opinion endorsed *Raich*'s broader reasoning, the Webster's Dictionary definition of "economics," the rational basis standard of review, or the proposition that mere possession of a commodity is "quintessentially economic" activity subject to federal regulation. The Court thus quietly abandoned the most expansive elements of *Raich*'s analysis while purporting to distinguish the case.

The implications for this case are significant. *NFIB*'s recharacterization of *Raich* as an "interstate market" case cannot plausibly support the Government's theory here. The federal prohibition on home distilling does not prevent intrastate home production from undermining an otherwise effective federal prohibition on an interstate market; there is no prohibition on the interstate sale of spirits, only an excise tax. The statutory regime contemplates and facilitates commercial distilling. The home-distilling ban does not "fill a hole" in a comprehensive federal scheme to suppress interstate commerce in spirits; it excludes a class of persons entirely from the taxable activity, reducing rather than protecting revenue. The "interstate market" rationale that *NFIB* imputed to *Raich* does not fit this case.

More fundamentally, extending *Raich*'s aggregation theory to home production of lawful goods—spirits, beer, bread, vegetables—*cannot* be reconciled with *NFIB*'s insistence that some domain of individual activity must remain beyond Congress's commerce power. If the mere fact that a home producer substitutes for a commercial producer suffices, there is no such domain, because every act of home production, in the aggregate, substitutes for commercial production. *NFIB*'s constitutional commitment would be rendered academic.

D. If *Raich* Is Not Overruled, It Should Be Confined to Suppression of Contraband Markets.

Even if this Court declines to overrule *Raich* outright, it should make clear that *Raich*'s aggregation principle does not apply outside the context in which it arose: the comprehensive federal prohibition of an illegal interstate market in contraband. That limiting principle is compelled by the logic of *Raich*'s own reasoning and the demands of constitutional coherence.

The strongest argument for the result in *Raich*, though not for the breadth of its reasoning, was the one Justice Scalia articulated in concurrence. As Justice Scalia explained, prohibiting intrastate cultivation and possession of marijuana was necessary to effectuate Congress's objective "to extinguish the interstate market" in illegal drugs, since without closing the intrastate loophole the federal prohibition would be undermined by substitution of local supply. *Raich*, 545 U.S. at 39–40 (Scalia, J., concurring).

Congress has ***not*** sought to extinguish the interstate market in spirits; it taxes and regulates that market through a robust, lawful, federally supervised commercial distilling industry. The premise of *Raich*—that Congress must reach intrastate production because a contraband interstate market cannot otherwise be suppressed—has no analog when the regulated commodity is legal, taxed, and commercially produced under federal supervision. Confining *Raich* to contraband markets would restore coherence to the Court's Commerce Clause jurisprudence. *Lopez* and *Morrison* would remain good law for the proposition that Congress may not reach genuinely noncommercial local conduct. *Wickard* would stand for the modest proposition that commercial-scale farmers may be subject to federal production quotas affecting market prices. And *Raich* would stand only for the proposition that Congress may close intrastate loopholes in a comprehensive prohibition of an illegal interstate market.

That limiting construction is faithful to the Court's precedents and would spare it from confronting, case after case, the logical endpoint of *Raich*'s reasoning: a federal government of effectively plenary domestic authority, constrained by nothing more than Congress's "underdeveloped capacity for self-restraint." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

E. The Court's Post-*Raich* Citations to That Case Are Narrow and Do Not Endorse Unlimited Aggregation.

In the twenty years since *Raich* was decided, this Court has cited it frequently but never to extend its aggregation principle to new domains. That record confirms *Raich* has been treated by subsequent majorities as a case about a specific context—the suppression of an illegal drug market—not a general warrant for regulating local productive activity.

In *United States v. Comstock*, 560 U.S. 126 (2010), the Court upheld a federal civil commitment statute under the Necessary and Proper Clause using a demanding five-factor inquiry that categorically diverged from *Raich*'s deferential rational basis review. The majority cited *Raich* only for the narrow proposition that "a longstanding history of related federal action . . . can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme.'" *Id.* at 137 (quoting *Raich*, 545 U.S. at 21). The rest of *Comstock*'s analysis—examining the statute's history, its modest scope, its accommodation of state interests, and the strength of the link between means and enumerated powers—reads far more like *McCulloch*'s independent judicial assessment than *Raich*'s deference. Justice Kennedy's concurrence was explicit that the Necessary and Proper cases require "a tangible link to commerce, not a mere conceivable rational relation." *Id.* at 152 (Kennedy, J., concurring). That standard is incompatible with *Raich*'s invitation to defer to any rational congressional judgment. In *NFIB*, as discussed above, the Court characterized *Raich* as an "interstate market" case and declined to extend the Commerce Clause to authorize laws compelling market entry through an individual mandate. 567 U.S. at 560–61; *id.* at 654–55 (joint dissent).

United States v. Kebodeaux, 570 U.S. 387 (2013), likewise shows the Court's reluctance to embrace a broad reading of *Raich*. The Court upheld sex-offender registration requirements under the Necessary and Proper Clause, but the Chief Justice concurred separately to insist that no federal "police power" underlies such a result. *Id.* at 401–03 (Roberts, C.J., concurring). "A power of that magnitude . . . is not 'consist[ent] 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." *Id.* at 402–03 (citation omitted). That principle, which *Raich*'s majority never seriously engaged, forecloses the Government's theory here: if there is no federal police power to regulate conduct for public safety, there is equally none to prohibit local home production of lawful goods for revenue-protection reasons.

Bond v. United States (*Bond II*), 572 U.S. 844 (2014), reinforced the point from a different angle. Construing the federal chemical-weapons statute narrowly to avoid constitutional doubt, the Court started from the "background principle that Congress does not normally intrude upon the police power of the States." *Id*. at 863. Although *Bond II* did not cite *Raich* by name, its warning that a broad reading "would transfer the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults" mirrors the structural objection to *Raich*'s logic. *Id.* An aggregation principle with no limits converts the Commerce Clause into a general domestic-regulation power of precisely the kind the Constitution withheld from the federal government.

Taylor v. United States, 579 U.S. 301 (2016), is the clearest evidence that *Raich* is limited to the contraband context. *Taylor* applied *Raich* to hold that, because Congress may regulate the intrastate possession and sale of illegal drugs, it may also criminalize the robbery of those drugs. *Id.* at 309. But the majority was careful to note the Court had "not been asked to reconsider *Raich*," and did not expand "*Raich*'s interpretation of the scope of Congress's power under the Commerce Clause." *Id.* *Taylor* thus signals that *Raich* is a case about contraband, not a general warrant for aggregating home productive activity.

Finally, this Court's majority opinion in *Landor v. Louisiana Department of Corrections & Public Safety*, 146 S. Ct. 1931 (2026), its more recent foray into the Necessary and Proper Clause, ignored *Raich* altogether. Instead, *Landor* analyzed the issue under *McCulloch*, emphasizing that while the Clause may allow Congress to enact provisions incidental to its spending power, it does not tolerate outcomes that would "undermine the structure of [the federal] government established by the Constitution," *NFIB*, 567 U.S. at 559, or "violate[ ] the principle of state sovereignty," *Printz v. United States*, 521 U.S. 898, 924 (1997). *Landor*, 146 S. Ct. at 1946–48. The Court accordingly declined to expand Congress's Spending

Power because doing so would leave it "hard pressed to posit any activity that Congress would be without power to regulate." *Id.* at 1947 (quoting *Lopez*, 514 U.S. at 564) (citation modified).

Taken together, this line of post-*Raich* authority tells a consistent story: the Court has progressively narrowed *Raich*'s practical scope without overruling it—recharacterizing it as a drug-market case, declining to extend its rational basis standard, and repeatedly reaffirming that no federal police power exists. *Taylor* confines *Raich* to contraband. *Kebodeaux* and *Bond* confirm there is no general federal power to regulate local conduct under the guise of necessity. *Comstock* and *NFIB* demonstrate that the Court requires a genuine, demonstrated link between means and enumerated power, not the mere rational basis *Raich* provided. And *Landor* confirms that while *Raich* continues to wither, *Lopez* remains alive and well. That *sub silentio* erosion has costs: it leaves lower courts without guidance, as the circuit split before this Court demonstrates. This Court should now make explicit what its recent decisions have implied: *Raich* does not license unlimited congressional aggregation of home productive activities, and its application must be confined to its proper context.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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