No. 26-93

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

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

Ilya Shapiro
Counsel of Record
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

August 20, 2026

QUESTION PRESENTED

This brief addresses the second of the petition's questions presented:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit policy research foundation that works to keep America and its great cities prosperous, safe, and free. MI develops and disseminates ideas that foster individual freedom and economic choice across multiple dimensions. To that end, it produces scholarship and files briefs opposing the extension of congressional power beyond constitutionally proscribed limits.

This case concerns MI because the Constitution's carefully designed structure is the most important bulwark for our individual liberties. The Framers gave Congress powers that are "few and defined," and the courts have an obligation to ensure that Congress does not transgress those boundaries and assert control over nearly every aspect of Americans' lives.

SUMMARY OF ARGUMENT

John Ream wants to make a small quantity of distilled spirits in his home for personal and family consumption. He does not propose to sell the spirits, distribute them, transport them across state lines, or otherwise enter a commercial market. Yet federal law prohibits that conduct, and the government has defended the prohibition not only as an incident of Congress's taxing power, but also as part of a valid regulation of interstate commerce under *Gonzales v. Raich*, 545 U.S. 1 (2005). Pet. App. 76–83.

That alternative defense presents a basic question about the limits of Congress's enumerated powers:

---

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel; no person or entity other than *amicus* funded its preparation or submission.

whether purely local household production becomes federally regulable merely because it is economically significant, concerns a commodity traded elsewhere, or substitutes for a possible market purchase. *Raich* answered that question too broadly. It treated local production and possession as "economic activity," permitted Congress to aggregate that conduct with a broader class, and required only a rational basis for concluding that the class substantially affected interstate commerce. *Raich*, 545 U.S. at 19, 22, 25–26.

The consequences of that reasoning are especially apparent here. The Fifth and Sixth Circuits have reached opposite constitutional conclusions on the federal home-distilling ban. *Compare McNutt v. U.S. Dep't of Justice*, 173 F.4th 204, 218–22 (5th Cir. 2026), *with Ream v. U.S. Dep't of the Treasury*, 174 F.4th 480, 486–89 (6th Cir. 2026). And because the government preserved *Raich* as an independent ground for sustaining the prohibition, resolving only the taxing-power issue may not durably settle its validity. Lower courts must follow *Raich* unless and until this Court reconsiders it. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Reconsideration of *Raich* is warranted because the decision substituted the broader concept of "economic activity" for the constitutional category of "Commerce . . . among the several States." Founding-era usage distinguished commerce from production, agriculture, and manufacturing. *Raich*, however, treated production and consumption as "quintessentially economic." 545 U.S. at 25–26. That category supplies no meaningful constitutional boundary. Household production routinely affects markets by displacing purchases, but a foregone transaction is not itself interstate commerce. Otherwise, the same reasoning extends federal power to gardening, home repair, family caregiving, homeschooling, and other ordinary household activities simply because each may substitute for a market transaction.

Raich also went beyond *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* involved production within a commercial farming enterprise and a national program designed to control wheat supply and market prices. More importantly, the Court examined a developed economic record and the "actual effects" of farm-consumed wheat on interstate commerce. *Id.* at 120, 125–29. *Raich* instead held that courts "need not determine" whether the asserted substantial effects exist "in fact," so long as Congress had a rational basis for concluding that they did. 545 U.S. at 22. That approach is difficult to reconcile with *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), which independently examined the asserted connection to interstate commerce and refused to sustain federal power through attenuated chains of economic effects.

Justice Scalia correctly recognized that authority over intrastate conduct not itself interstate commerce must arise, if at all, through the Necessary and Proper Clause. *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment). But incidental authority must remain tied to the enumerated power it carries into execution. Congress cannot create constitutional necessity just by enacting a broad regulatory program and then characterizing every local exception as a threat to that program. *McCulloch v. Maryland* required incidental means to be "plainly adapted" to a constitutional end and "consist with the letter and spirit of the constitution." 17 U.S. (4 Wheat.) 316, 421 (1819). This Court's latest on-point decisions confirm that a measure may advance a federal statutory objective yet still exceed Congress's incidental authority. *See, e.g.*, *Landor v. La. Dep't of Corrections & Pub. Safety*, 146 S. Ct. 1931, 1946–48 (2026); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559–60 (2012) (opinion of Roberts, C.J.) (*NFIB*).

Mr. Ream squarely presents that constitutional boundary. His proposed conduct is household production for personal and family consumption, without sale, distribution, interstate transportation, or intended market participation. The Court should grant review and overrule or narrow *Raich*. Economic significance is not interstate commerce, and the breadth of Congress's statutory program cannot itself supply the incidental power necessary to complete it.

ARGUMENT

I. THE GOVERNMENT'S *RAICH* DEFENSE PREVENTS A DURABLE RESOLUTION OF THE EXISTING CONFLICT

The courts of appeals are divided over the constitutional validity of the federal home-distilling prohibition. *McNutt*, 173 F.4th at 218–22; *Ream*, 174 F.4th at 486–89. But the government also defended the prohibition under *Gonzales v. Raich*. Pet. App. at 76–83. It argued that distilled-spirits production is "quintessentially economic" and that Congress could rationally regulate home production as part of the broader class of distilled-spirits production. *Id.* at 77. It thus invoked *Raich*'s rational-basis framework as an independent source of federal authority.

That argument does not depend on the taxing-power rationale adopted by the Sixth Circuit. Under the government's *Raich* theory, it is immaterial that Ream proposes no sale, distribution, interstate movement, or intended market participation. The relevant class may instead be defined as distilled-spirits production generally—and Congress may regulate that class if it could rationally conclude that exempting local production would affect the broader interstate market or regulatory regime.

A decision rejecting only the Sixth Circuit's taxing-power reasoning thus may not settle the prohibition's validity. The government could continue to defend the law under *Raich*, which lower courts cannot simply disregard even if they conclude that its reasoning sits uneasily with later federalism decisions.

In other words, reconsideration of *Raich* cannot occur through ordinary lower-court percolation. "[I]f a precedent of this Court has direct application in a case," lower courts must follow it, "leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484. Lower courts may distinguish *Raich* where its facts permit. They may identify tension between *Raich* and later decisions. But they cannot decide that *Raich* adopted the wrong understanding of federal power.

The need to address *Raich* is therefore part of the certiorari question, not merely an issue that might arise after review is granted. The government preserved *Raich* as an alternative basis for sustaining the prohibition and lower courts lack authority to reconsider that precedent, so the existing conflict may remain unresolved unless this Court addresses the broader enumerated-powers question.

II. *RAICH* ERASED THE DISTINCTION BETWEEN INTERSTATE COMMERCE AND HOUSEHOLD "ECONOMIC" ACTIVITY

A. "Commerce" Originally Meant Trade or Exchange, Not All Production or Gainful Activity

The Constitution's text does not grant Congress power to regulate "economic activity." It grants Congress power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. That textual difference matters because "commerce" and "economics" are not coextensive categories.

Chief Justice Marshall's canonical formulation in *Gibbons v. Ogden* reflects the narrower constitutional concept. Commerce, he explained, includes "traffic" and "commercial intercourse." 22 U.S. (9 Wheat.) 1, 189–90 (1824). But even under that broad conception of intercourse, Marshall emphasized that "[t]he completely internal commerce of a State" remained outside Congress's interstate-commerce power and "may be considered as reserved for the State itself." *Id.* at 195.

Founding-era usage reinforces that understanding. Professor Randy Barnett's examination of reported uses of "commerce" in the Constitutional Convention, the ratification debates, and the Federalist Papers found "not a single example" in which the term was unambiguously used to encompass all gainful activity. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112 (2001). Instead, the Founding generation routinely distinguished commerce from the productive activities that generated objects of commerce.

Madison, for example, proposed congressional authority to promote "agriculture, commerce, trades and manufactures." J. Madison, *Notes of Debates in the Federal Convention of 1787*, 478 (W.W. Norton 1987). That formulation would be redundant if "commerce" itself already encompassed agriculture and manufacturing. Hamilton similarly spoke of interstate commerce as the "interchange of [the States'] respective productions," distinguishing production from the later exchange of what had been produced. The Federalist No. 11 at 89 (Hamilton) (Clinton Rossiter, ed., 1961).

Justice Thomas made the same point in *Raich*. Founding-era "commerce" did not encompass mere production and possession simply because the resulting article might later become an object of trade. 545 U.S. at 58–59, 69–70 (Thomas, J., dissenting). Production and commerce could be constitutionally connected, but they were not identical. Justice Thomas warned that the majority's contrary approach "covers the entire web of human activity" and reflects a failure to appreciate that "[t]here is a danger to concentrating too much, as well as too little, power in the Federal Government." *Id.* at 69–70.

That historical understanding identifies the problem here. Ream proposes to produce spirits; he does not propose to trade them. Congress may in appropriate circumstances regulate production incidental to its authority over interstate commerce. But local production does not itself become "[c]ommerce . . . among the several States" merely because the product is commercially valuable or capable of later exchange.

The contrary view would substantially collapse the enumeration of federal powers. If every activity bearing an economic relationship to interstate markets were itself interstate commerce, Congress would not need the Necessary and Proper Clause to reach production, manufacturing, agriculture, or other local conduct as incidental means. Those activities would already fall directly within the commerce power. The Constitution's structure presupposes separate roles for an enumerated end, and the incidental means sometimes needed to regulate toward that end.

B. *Raich* Illegitimately Substituted "Economic Activity" for Interstate Commerce

Raich departed from a straightforward textual inquiry. Rather than ask whether the cultivation and possession before it constituted "commerce" among the several States, the Court emphasized that those activities were "economic." 545 U.S. at 25–26. Quoting Webster's Dictionary, the *Raich* majority defined "economics" to include "the production, distribution, and consumption of commodities" and described the production of marijuana as "quintessentially economic." 545 U.S. at 25–26. The application of the term "economics" changed the constitutional category presented in Article I because the phrase "economic activity" does not appear in the Commerce Clause. And that application matters because, as Justice Thomas noted, the subject matter of economics extends much further than trade or commercial intercourse.

Economists themselves have recognized that breadth of the term. James Buchanan proposed "extend[ing] the system of human relationships brought within the economist's scope widely enough to include collective as well as private organization." James M. Buchanan, *What Should Economists Do?*, in 1 *The Collected Works of James M. Buchanan: The Logical Foundations of Constitutional Liberty* 28, 40–41

(1999). Yet Buchanan also distinguished among the kinds of relationships economists examine, describing the paradigmatically economic relationship as one in which individuals meet as "trading partners in exchange relationships." *Id.* That distinction underscores the problem with *Raich*'s terminology. Conduct does not become constitutional "Commerce" merely because economists can analyze it as "economic." The former is a capacious category of social-scientific inquiry; the latter is an enumerated constitutional power.

Economic analysis encompasses not just completed market exchanges, but also production, consumption, household labor, substitution, opportunity cost, and decisions not to transact. Adam Smith distinguished the "propensity to truck, barter, and exchange one thing for another" as a particular form of interaction. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* bk. I, ch. II, ¶ 1, at 25 (Edwin Cannan ed., Methuen & Co. 1904). Frédéric Bastiat's distinction between what is seen and unseen demonstrates that economic analysis includes transactions that are foregone as well as transactions that occur. Frédéric Bastiat, *What Is Seen and What Is Not Seen*, in *Selected Essays on Political Economy* 1, 1–4 (Seymour Cain trans., George B. de Huszar ed., Found. for Econ. Educ. 1964). Economic reasoning therefore extends naturally to decisions to produce, consume, purchase, exchange, or refrain from exchange.

That breadth of what economics is explains why "economic activity" cannot itself define the limit of an enumerated federal power. *Raich*'s category may accurately identify objects of possible economic analysis, but the Constitution does not assign Congress plenary authority over everything economists can analyze or that can fairly be called "economic."

The problem becomes especially clear when the theory turns to substitution. Household production may reduce the producer's need to purchase a corresponding product in the market. Ream's production could therefore be described as displacing a commercial purchase and affecting aggregate demand. But that foregone purchase is economically significant precisely because it did not occur. Economic analysis can account for that absence, but the Commerce Clause does not convert the absence into interstate commerce.

Otherwise, the same reasoning reaches virtually every household activity. A family that grows vegetables may purchase fewer vegetables. A person who repairs his own property may purchase fewer repair services. Sewing clothing may reduce apparel purchases. Family caregiving may substitute for paid childcare or eldercare. Homeschooling may replace purchased educational services. Each decision has economic consequences because market transactions that otherwise might occur do not occur.

If those substitution effects were sufficient, the federal commerce power would extend not merely to commerce but to all ordinary household life. It would be a police power. Justice O'Connor identified the problem in dissent. The Court's definition of economic activity, she warned, threatened "to sweep all of productive human activity into federal regulatory reach." *Raich*, 545 U.S. at 49 (O'Connor, J., dissenting). Justice Thomas likewise warned that the majority's reasoning left little meaningful boundary between Congress's enumerated commerce power and a general federal police power. *Id.* at 69–70 (Thomas, J., dissenting).

Commentators have reached similar conclusions. Professor Jonathan Adler argued that *Raich* "hollowed out the core of contemporary Commerce Clause jurisprudence" and substantially undermined the limits recognized in *United States v. Lopez* and *United States v. Morrison*. Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 Lewis & Clark L. Rev. 751, 753–54, 770–76 (2005). Glenn Reynolds and Brannon Denning questioned the survival of "judicially enforceable federalism" after *Raich*. Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 Lewis & Clark L. Rev. 915, 930–32 (2005). Michael Ramsey has criticized *Raich* as inconsistent with Founding-era federalism and as failing to preserve a meaningful boundary between national and local authority. Michael D. Ramsey, *American Federalism and the Tragedy of Gonzales v. Raich*, 31 U. Queensland L.J. 203, 203–04, 218–23 (2012). And Ilya Somin describes *Raich* as embracing an "almost limitless" conception of economic activity and as a "major—possibly even terminal—setback" for judicially enforced federalism. Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 Cornell J.L. & Pub. Pol'y 507, 508–10, 515–21 (2006).

This case pushes these questions to the limit and raises the valid concern of whether this Court will continue to ratify congressional authority over any "economic" activity. Here there is production but no exchange; consumption but no sale; economic choice but no interstate commercial nexus. If Commerce Clause authority extends to the conduct at the heart of this case merely because it is "economic," then "among the several States" no longer meaningfully limits Congress's power to regulate commerce.

III. *RAICH* EVEN MISREADS *WICKARD*

A. *Wickard* Involved a Commercial Farming Enterprise and Interference with a Specific National Market Regulatory Regime

Raich relied heavily on *Wickard v. Filburn*, 317 U.S. 111 (1942). *Amicus* believes *Wickard* was wrong too, but overturning *Raich* need not affect *Wickard*, which involved a different factual setting and a different method of constitutional analysis. Roscoe Filburn operated a commercial farm. Although some of his wheat was consumed on the farm, Filburn also sold wheat and other agricultural products, and used some of it to feed livestock raised for sale. *Id.* at 114–18. The challenged federal regime was likewise directed toward a specific economic problem: controlling the national supply of wheat and supporting market prices through acreage allotments and marketing quotas. *Id.*

Wickard was thus not a case about an isolated household activity merely because the household could otherwise have purchased the same good. It concerned production embedded within a commercial farming enterprise and regulated as part of a national commodity-control program. Justice O'Connor accordingly observed that *Wickard* did not reach something "as modest as the home cook's herb garden." *Raich*, 545 U.S. at 51 (O'Connor, J., dissenting). Prof. Somin likewise notes that *Wickard* involved commercial activity "to a far greater extent" than *Raich*. Somin, *supra*, at 537.

More importantly, *Wickard* did not simply assume an effect on interstate commerce. The parties supplied a stipulated economic record, and the Court expressly considered the "actual effects of the activity in question upon interstate commerce." 317 U.S. at 120. The record addressed national and international wheat conditions, farm-consumed wheat, production levels, market demand, and the operation of the federal quota program. *Id.* at 125–29.

The Court concluded that farm-consumed wheat supplied a need that otherwise would be satisfied by market purchases and that the volume and variability of such wheat could materially affect national supply and price. *Id.* at 127–28. Its conclusion followed from the demonstrated operation of a specific commodity market and regulatory program: "This record leaves us in no doubt" that excluding farm-consumed wheat would substantially interfere with Congress's effort to regulate that market. *Id.* at 128–29.

Aggregation in *Wickard* thus performed a particular evidentiary function. It allowed the Court to measure the demonstrated collective effect of conduct that might be trivial when viewed one instance at a time. *Raich* transformed that principle. Aggregation ceased to be a means of measuring demonstrated interference and became part of the reason why interference need not be demonstrated at all.

B. *Raich* Replaced *Wickard*'s Demonstrated Effects with Rational-Basis Review

Raich stated the change from *Wickard* directly: "We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." 545 U.S. at 22. That proposition is difficult to reconcile with the analytical method used in *Lopez* and *Morrison*.

Lopez cautioned that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 n.2 (quotation omitted). The Court independently examined the government's asserted connections between gun possession near schools and interstate commerce and refused "to pile inference upon inference" to sustain the statute. *Id.* at 563–67.

Morrison was even clearer that the existence of a sufficient connection to interstate commerce is a question for the courts, not Congress. Whether conduct bears a sufficient relationship to interstate commerce "is ultimately a judicial rather than a legislative question." *Morrison*, 529 U.S. at 614 (quotation omitted). Congress had compiled extensive findings tying gender-motivated violence to medical costs, lost work, reduced productivity, and diminished interstate activity. *Id.* at 614–15. Yet the Court rejected those "costs of crime" and "national productivity" rationales because their logic would leave no meaningful limit on federal power. *Id.* at 612–13. As the Court explained, accepting such reasoning would make it "difficult to perceive any limitation on federal power," including in areas such as family law, criminal law, and education. *Id.* at 613 (quoting *Lopez*, 514 U.S. at 564). The extensive congressional findings therefore could not cure the attenuation between the regulated conduct and interstate commerce. *Id.* at 615–19.

The contrast with *Raich* is striking. *Morrison* rejected federal power notwithstanding an extensive record of aggregate economic consequences. *Raich* declined to determine even whether the claimed substantial effects existed "in fact." 545 U.S. at 22. The doctrinal hinge was *Raich*'s classification of marijuana production and possession as "economic." *Id.* at 25–26.

Once conduct gets that label, aggregation and rational-basis review largely displace the independent judicial scrutiny evident in *Lopez* and *Morrison*.

That approach produces two related problems: First, it confuses deference within an established federal power with deference concerning whether the power exists at all. Once Congress possesses constitutional authority over a subject, courts appropriately afford substantial latitude concerning how Congress exercises that authority. But the antecedent question—whether the asserted authority belongs to Congress—is a constitutional one for courts to resolve. A rational-basis test applied to the existence of power allows Congress to define a regulated class, hypothesize aggregate effects, and thereby help establish the scope of its own constitutional authority.

Second, the rule makes the level of generality at which conduct is described as dispositive. Ream's activity can be characterized narrowly as producing a small quantity of spirits at home for personal consumption without sale or distribution. Or it can be characterized broadly as "production of distilled spirits," a class that indisputably includes large commercial enterprises participating in interstate markets.

If the government may select the broader class, declare it economic, aggregate all conduct within it, and receive rational-basis deference concerning effects on interstate commerce, then the choice of descriptive category largely decides the constitutional question before the inquiry begins. That cannot be the limit imposed by an enumerated power. The scope of the Commerce Clause should not turn on the government's ability to redescribe noncommercial household activity at a sufficiently high level of generality.

A narrow correction would preserve *Wickard*. Congress could continue regulating commercial production, goods intended for sale, interstate transactions and distribution, and local conduct demonstrated substantially to obstruct its regulation of interstate commerce. What Congress could not do is treat personal household production as federally regulable merely because it substitutes for a hypothetical purchase. That would preserve *Wickard*'s actual principle: demonstrated interference with a federal regulation of interstate commerce may justify incidental regulation. It would reject only *Raich*'s substitution of hypothetical rationality for that constitutional showing.

Moreover, nothing in this argument requires the Court to disavow aggregation categorically. Nor would it disable Congress from addressing genuinely local conduct that threatens effective regulation of interstate commerce. The distinction is between aggregation as proof and aggregation as presumption. Where Congress identifies interstate commerce within its constitutional authority and demonstrates that a class of local conduct substantially obstructs regulation of that commerce, aggregation may help establish the requisite relationship. *Wickard* illustrates that use.

But local household conduct does not become subject to federal jurisdiction merely because Congress can aggregate it with similar conduct and imagine an economic consequence. The government must still establish the constitutional connection. The Court can thus preserve *Wickard* while holding that personal household production does not become federally regulable merely because it replaces a possible purchase. That narrow clarification would restore the judicial inquiry that *Lopez* and *Morrison* require without destabilizing ordinary regulation of commercial activity.

IV. JUSTICE SCALIA'S NECESSARY AND PROPER CLAUSE ANALYSIS AND THE COURT'S LATER CASES EXPOSE *RAICH*'S DOCTRINAL INSTABILITY

A. Justice Scalia Correctly Located *Raich*'s Asserted Power in the Necessary and Proper Clause, But His Application Risks Congress Manufacturing the "Necessity"

Justice Scalia agreed with the judgment in *Raich* but identified a critical difference in the source of congressional authority. Federal authority over intrastate activity that is not itself interstate commerce does not come directly from the Commerce Clause. Instead, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause." 545 U.S. at 34 (Scalia, J., concurring in the judgment).

That is the correct starting point. If Ream's proposed household production is not itself commerce among the several states, Congress must identify some enumerated power that it is carrying into execution and demonstrate why direct regulation of Ream's conduct is a permissible incident of that power. The analysis cannot end by labeling the conduct "economic." Justice Scalia accordingly described the incidental authority at issue as limited. Congress's power "extends only to those measures necessary to make the interstate regulation effective." *Id.* at 38. That formulation properly distinguishes the enumerated power from the means used to execute it.

The difficulty arises from the way *Raich* considered "necessity" for constitutional purposes. Justice Scalia reasoned that Congress may regulate intrastate conduct when doing so is "necessary to make the interstate regulation effective." *Id.* at 38. He concluded that the Controlled Substances Act's prohibition on local cultivation and possession satisfied that standard because Congress sought to extinguish the interstate market in controlled substances and could not effectively do so while leaving locally produced marijuana outside federal control. *Id.* at 38–40.

That analysis contains a limiting principle in theory: the local regulation must be necessary to make interstate regulation effective. But if the breadth of Congress's chosen statutory program itself establishes necessity, the inquiry becomes circular. Congress first defines a broad regulatory class. An exception for purely local conduct then becomes a "gap" in that scheme. The gap is characterized as threatening the scheme's effectiveness. The existence of that threat then becomes the reason Congress possesses authority to regulate the local conduct.

Taken too far, that logic allows statutory comprehensiveness to manufacture a constitutional necessity. The broader Congress legislates, the more exceptions can be characterized as threats to the program; the more threats the program contains, the more incidental authority Congress claims. Congress cannot enlarge its constitutional power merely by enlarging a statute. As Professor Barnett recounts, Madison warned during the debate over the first bank that if sufficiently remote implications could be "linked together," Congress could construct "a chain" reaching "every object of legislation, every object within the whole compass of political economy." Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 191 (2003).

The relevant inquiry must thus remain tied to the enumerated power itself. The question is not merely whether regulating Ream would make Congress's chosen regulatory program more convenient or complete. It is instead whether federal prohibition of his purely household activity is genuinely incidental to Congress's execution of an enumerated power.

B. "Proper" Independently Limits Incidental Powers, as the Court Recently Confirmed

The Necessary and Proper Clause does not authorize every measure that bears some useful relationship to a federal statutory objective. An implied power must be not only necessary in the constitutional sense but also "proper."

McCulloch, supplies the doctrinal foundation for both necessity and propriety. Chief Justice Marshall described permissible incidental means as those that are "plainly adapted" to a legitimate constitutional end and "consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). At the same time, he distinguished incidental powers from "great substantive and independent power[s]" that cannot simply be implied as means of executing another authority. *Id.* at 411.

Barnett's historical account reinforces those limits on incidental power. He concludes that "necessary" was neither limited to absolute indispensability nor reducible to mere convenience; rather, the original meaning required a meaningful degree of means-end fit. Barnett, *The Original Meaning of the Necessary* *and Proper Clause*, *supra*, at 206–09. He further explains that Founding-era discussions treated that limitation as judicially enforceable rather than committed solely to Congress's own judgment. *Id.* at 209–14. The original meaning of "proper" imposed an additional structural limitation. It operated as a jurisdictional constraint: incidental laws had to remain within the proper scope of federal authority, including the boundaries imposed by federalism and the powers retained by the states. *Id.* at 215–17.

The Court's later decisions increasingly insist upon that structural limitation. In *NFIB*, Chief Justice Roberts explained that even a measure useful to accomplishing Congress's objectives may still fail the requirement of propriety. 567 U.S. at 559–60 (op. of Roberts, C.J.). The Court has upheld measures that are "'convenient, or useful' or 'conducive'" to the beneficial exercise of an enumerated power. *Id.* at 559 (citations omitted). But the Necessary and Proper Clause does not permit Congress to treat a "great substantive and independent power" as merely incidental. *Id.* at 559–60. "Even if the individual mandate [was] 'necessary' to the Act's insurance reforms," the asserted expansion of federal authority was not a "proper" means of making those reforms effective. *Id.* at 560.

NFIB's joint dissent likewise described *Raich* narrowly. *Raich*'s prohibition on growing and possessing marijuana "did not represent the expansion of the federal power to direct into a broad new field." *Id.* at 654 (joint dissent). By contrast, a power "so limitless that it converts the Commerce Clause into a general authority to direct the economy" was not "'consist[ent] with the letter and spirit of the constitution.'" *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at

421). Thus, the joint dissent concluded, "*Raich* is no precedent for what Congress has done here." *Id.*

United States v. Comstock also required more than a merely conceivable connection to an enumerated power. 560 U.S. 126, 133–49 (2010). The Court examined the historical background of federal custodial authority, the relationship between the challenged measure and an established federal responsibility, attenuation, and state interests. Justice Kennedy emphasized that the Court's precedents require "a tangible link to commerce, not a mere conceivable rational relation." *Id.* at 152 (Kennedy, J., concurring in the judgment). Justice Alito likewise relied on the subject law's "substantial link" to an enumerated power. *Id.* at 158 (Alito, J., concurring in the judgment).

Chief Justice Roberts made the same structural point in *United States v. Kebodeaux*, finding that a general federal public-safety power cannot be implied merely because such authority would facilitate federal objectives. 570 U.S. 387, 402–03 (2013) (Roberts, C.J., concurring in the judgment). A power of that sort is not merely an incidental means; it approaches the general police authority that the Constitution leaves to the states. *Siegel v. Fitzgerald* likewise confirms that Congress cannot invoke the Necessary and Proper Clause to evade limitations built into the enumerated power supposedly being executed. 596 U.S. 464, 474 (2022). Incidental authority cannot "circumvent the limitations set by" the constitutional grant itself. *Id.*

Most significantly, the Court's decision last term in *Landor v. La. Dep't of Corrections & Pub. Safety* sharply distinguishes between executing an enumerated power and merely advancing the policy of a federal statute. 146 S. Ct. 1931, 1946–48 (2026).

There, the Court considered whether the Necessary and Proper Clause could support personal liability under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The relevant question, the Court explained, was not whether the remedy furthered RLUIPA's policy of protecting religious exercise. It was whether the remedy constituted "a necessary and proper incident to Congress's constitutionally enumerated power to spend money." *Id.* at 1946.

The same principle exposes the difficulty with *Raich*. Congress cannot justify regulation of otherwise nonenumerated conduct merely by showing that it advances the policy of a federal statutory scheme. The asserted means must carry the underlying enumerated power into execution. *Landor* also confirms the structural dimension of "proper." The Court warned that Congress could otherwise "regulate directly . . . in innumerable spheres, including ones traditionally reserved to the States," a result "inconsistent" with "principles of state sovereignty and a federal government of limited and enumerated regulatory powers." *Id.* at 1947–48.

These decisions are not easily reconciled with an understanding of *Raich* under which rational speculation about the usefulness of regulating a broadly defined class suffices. They require an inquiry into the actual connection between the asserted means and the enumerated power, the degree of attenuation between them, whether the asserted authority remains genuinely incidental, and whether the resulting power is consistent with the Constitution's federal structure.

C. The Court Should Require a Demonstrated and Genuinely Incidental Connection to an Enumerated Power

When Congress seeks to regulate local conduct not itself encompassed by an enumerated power, the government should first identify the actual exercise of enumerated authority to which the challenged regulation is said to be incidental. It should then demonstrate a direct and substantial connection between the local conduct and execution of that power. Finally, the asserted means must remain genuinely incidental rather than amounting to an independent exercise of substantive police authority.

Congress would not be required to prove that its chosen measure is indispensable or that no conceivable alternative could achieve its objective. *McCulloch* expressly rejected an understanding of "necessary" limited to measures without which an enumerated power could not be exercised. 17 U.S. (4 Wheat.) at 413–15. Nor would the proposed standard invite courts to second-guess ordinary judgments of regulatory policy once Congress is operating within its constitutional sphere.

But it would require the government to establish the constitutional predicate before receiving that latitude. Fungibility, substitution, possible diversion, and enforcement convenience may be relevant evidence in that inquiry. Those considerations cannot substitute for the required constitutional connection to an enumerated power. Otherwise, every exception to a comprehensive statute becomes a regulatory gap; every gap creates constitutional necessity; and every sufficiently broad federal program generates the incidental authority needed to complete itself.

Correcting *Raich* would not require destabilizing the ordinary operation of federal commercial regulation. The Court may hold that purely local household production for personal or family consumption—without sale, distribution, interstate transportation, or intended market participation—does not become federally regulable merely because similar goods are traded in interstate commerce or because household production may substitute for a possible purchase.

Congress would then retain authority over interstate transactions and distribution. It could continue regulating commercial production connected to interstate markets. It could address tax evasion, illicit sales, interstate diversion, and goods entering or intended to enter channels of commerce. And the Necessary and Proper Clause would continue to permit regulation of local conduct where the government demonstrates that the conduct materially obstructs an actual exercise of an enumerated power and that the challenged means remain genuinely incidental and proper. Such a decision would leave *Wickard* intact on its actual facts and preserve federal authority over ordinary commercial and market-connected conduct.

CONCLUSION

Raich compromised our federal structure by substituting "economic activity" for interstate commerce, treating hypothetical aggregate effects as sufficient to establish federal power and allowing the scope of a federal regulatory scheme to perform too much Necessary and Proper Clause analysis. The Court should grant review and restore the constitutional boundary between activity that may matter to an interstate market and activity that is itself within—or genuinely incidental to—an enumerated federal power.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

August 20, 2026