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 PROFESSOR RANDY E. BARNETT AS A*MICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

Professor Randy E. Barnett is the Patrick Hotung Professor of Constitutional Law at the Georgetown University Law Center and the Founder and Faculty Director of the Georgetown Center for the Constitution. He is a leading scholar of originalism, constitutional structure, and the original public meaning of the Commerce and Necessary and Proper Clauses. He argued *Gonzales* v. *Raich*, 545 U.S. 1 (2005), on behalf of Angel Raich and Diane Monson.

Professor Barnett has a substantial interest in ensuring that this Court's jurisprudence on the Commerce and Necessary and Proper Clauses remains faithful to the Constitution's original public meaning and to the structural limits that preserve the distinction between national and local authority. He submits this brief to explain why the Court should grant certiorari to make clear that the Commerce and Necessary and Proper Clauses reach purely local, noneconomic activity only when regulating that activity is genuinely necessary and proper to the regulation of interstate trade or transportation—and why *Raich*, which abandoned that limit, should be overruled or clarified.

[*] Pursuant to Supreme Court Rule 37.6, *amicus* represents that this brief wasn't authored in whole or in part by any party or counsel for any party. No person or party other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* timely notified counsel for all parties of his intention to file this brief as required by Supreme Court Rule 37.2.

INTRODUCTION

Raich was wrong when it was decided, and it remains wrong today. The government's reliance on *Raich* in this case—to defend the federal prohibition on distilling spirits for personal consumption in one's own home—confirms as much. The courts of appeals have squarely split on the constitutionality of that prohibition. In resolving that split, this Court should confirm that Congress lacks the power to regulate (or prohibit) truly local, noneconomic activity—such as the distillation of spirits in one's home for personal use at issue here—and either overrule or clarify *Raich*.

The federal government has "no claim to any authority but such as the States have surrendered" to it. *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J.) (emphasis omitted). Among those surrendered powers is the Commerce power, which permits Congress to "regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3.

At the Founding, that phrase was understood to permit Congress to govern *interstate* trade, exchange, and transportation. The States didn't surrender the power to regulate purely *intrastate* conduct, such as farming, mining, or manufacturing—much less the power to regulate what a citizen does with his own property, in his own home, for his own use.

The Necessary and Proper Clause permits Congress to reach some local conduct as a means of executing its Commerce power, and the original public meaning of the Clause authorizes only laws genuinely "incidental to those powers which are expressly given." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

Here, the government's use of *Raich* confirms the degree to which Congress has encroached on States' power to regulate purely local, intrastate activities—such as growing marijuana or distilling spirits for personal consumption—in a manner wholly inconsistent with the Constitution's original understanding. This Court should restore clarity—and the balance of power between the federal and State governments—by overruling *Raich* and confirming that Congress lacks the power to prohibit purely local, noneconomic activity without a meaningful showing that reaching this activity is necessary to the execution of its enumerated powers. *Landor* v. *La. Dep't of Corr. & Pub. Safety*, 146 S. Ct. 1931, 1946–48 (2026).

The government convinced the Sixth Circuit that the federal prohibition on home distilling was a "necessary and proper" way of exercising its Taxing power—protecting tax revenue by banning the taxed activity. Pet. App. 11–19; see 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6), 5615. If that sounds nonsensical, that's because it is—as the Fifth Circuit concluded in *McNutt* v. *U.S. Department of Justice*, 173 F.4th 204 (5th Cir. 2026).

This Court should grant review on both questions. This case presents an ideal vehicle to confirm that *Raich* was inconsistent with the original public meaning of the Commerce and Necessary and Proper Clauses when it was decided, and it remains inconsistent with those provisions—and with this Court's own decisions. *Raich* was wrong in two respects: its definition of "economic," which it took from a 1966 dictionary; and its use of rational basis review to assess whether the prohibition of local activity is "essential" to the regulation of interstate commerce. Both of these errors require correction.

Additionally, resolving only the taxing-power issue won't finally resolve the home-distilling ban. The government argued below that the ban was a valid exercise of Congress's Commerce power, too. Pet. App. 74–83. That argument relied wholly on *Raich*, a decision that this Court and this Court alone has the power to overrule or clarify. *Ibid.* Now, before this Court, the government "is no longer advancing that theory." BIO 11. The Court shouldn't rely on the future indulgence of the government to rule on the constitutional viability of *Raich*.

At the end of the day, this case isn't about whether home distilling is wise, safe, or desirable—the States remain free to regulate it (or prohibit it altogether). It's about the Constitution's vertical division of power between the federal and State governments. Under both the original understanding of the constitutional text and a faithful reading of this Court's pre- and post-*Raich* decisions, it's clear that Congress lacks the power to criminalize the production of spirits in one's home for personal consumption. That's because the activity is neither commerce nor economic activity, and because prohibiting it isn't necessary and proper for the regulation of interstate commerce.

The Court should grant the petition because this case presents an ideal vehicle for overruling *Raich* or, at minimum, clarifying that it doesn't extend to prohibiting the purely local, noneconomic conduct at issue here.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO OVERRULE *GONZALES* V. *RAICH*.

The time to revisit *Raich* is long overdue, and its continued vitality is squarely presented here. Below, the government argued Congress has the power to ban home distilling under both its Taxing power *and* its Commerce power. Pet. App. 74–83. The Sixth Circuit resolved the case on taxing-power grounds, pretermitting the Commerce Clause question. But resolution of the ultimate issue in this case—whether the home-distilling ban exceeds Congress's enumerated powers—requires addressing, and resolving, both the government's Taxing power and its Commerce power arguments.

Whether to overrule *Raich* is a purely legal question that's squarely presented and ripe for this Court's resolution. Below, the government staked its Commerce Clause argument on *Raich*. Pet. App. 76–83. And this Court regularly resolves cases on legal questions—like *Raich*'s continued viability—that were pressed but not decided below. See, *e.g.*, *Trump* v. *Hawaii*, 585 U.S. 667, 682, 697–702 (2018); Pet. 13 (collecting cases).

There isn't any reason to delay revisiting *Raich*, either. Resolving the taxing-power question alone inevitably delays resolution of this case—especially given that the courts of appeals can't revisit *Raich* themselves. See *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("only this Court may overrule one of its precedents"). And the government's position before this Court, BIO 11, isn't reason to pass on the important constitutional questions presented here. *E.g.*, *Riley* v. *Bondi*, 606 U.S. 259, 266 (2025) (granting review where government agreed with petitioner). This Court and this Court alone can restore clarity and enforce the original public meaning of the Commerce and Necessary and Proper Clauses—and this case presents an ideal vehicle for doing so.

II. THE COURT SHOULD OVERRULE *RAICH*—OR, AT MINIMUM, CLEARLY DISTINGUISH IT.

As the three dissenting Justices concluded, *Raich* was wrong when it was decided—and remains equally wrong two decades later. *Raich* upheld the Controlled Substances Act as applied to two Californians who grew marijuana at home for their own medical consumption—as expressly authorized by state law. 545 U.S. at 5–7. According to the *Raich* majority, the Commerce and Necessary and Proper Clauses together authorized Congress to regulate purely intrastate, noneconomic activity on two theories: first, that the local activity in question was "economic"; second, that regulating this local activity was "essential" to Congress's regulation of interstate commerce. *Id.* at 25–26, 30–31.

The *Raich* Court primarily justified its broad ruling by describing marijuana regulation as "quintessentially economic" because it involved "the production, distribution, and consumption of commodities." 545 U.S. at 25–26. Its only authority for this characterization was *Webster's Third New International Dictionary*. But under *Webster*'s sweeping definition, Congress may regulate vast swaths of personal activities that aren't, in fact, economic. Justice Scalia was careful not to adopt the majority's definition of "economic," and the Court should now reject it. See 545 U.S. at 36–38 (Scalia, J., concurring in the judgment).

Responding to the respondents' claim that their activity was noneconomic, the Court adopted a secondary theory: permitting the wholly intrastate cultivation, possession, and use of marijuana solely for personal consumption would undercut Congress's interstate regulation of controlled substances, and Congress need only show a "rational basis" for so believing. 545 U.S. at 22. That framing permits Congress to regulate virtually any purely intrastate local activity—whether economic or noneconomic—as long as Congress has a "rational basis" for thinking that permitting such local conduct "would leave a gaping hole" in its larger regulatory scheme. *Ibid.*

That reasoning can't be squared with **(A)** the Constitution's original public meaning or **(B)** this Court's precedents, so **(C)** this Court should grant review and overrule *Raich*—or, at minimum, clarify that the holding of *Raich* doesn't authorize the home-distilling ban at issue here.

A. *Raich* Is Inconsistent with the Original Public Meaning of the Commerce and Necessary and Proper Clauses.

As the public understood it at the Founding, the Commerce Clause gives Congress power over interstate trade and transportation. *United States* v. *Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring) (collecting dictionaries and *The Federalist*). The Necessary and Proper Clause permits Congress to employ means genuinely incidental to executing an enumerated power. *Landor*, 146 S. Ct. at 1946–48.

Purely local, noneconomic activity—distilling spirits at home for personal consumption—doesn't fall in either category.

1. The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As originally understood, "the Commerce Clause authorizes Congress only 'to regulate the buying and selling of goods and services trafficked across state lines.'" *United States* v. *Hemani*, 146 S. Ct. 1677, 1695 (2026) (Thomas, J., concurring) (quoting *Raich*, 545 U.S. at 58 (Thomas, J., dissenting)).

Founding-era dictionary definitions of "commerce" illustrate that the term's reach was limited to trade, exchange, commercial intercourse, and transportation. See, *e.g.*, 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) ("commerce" means "Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick"); Nathan Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789) ("trade or traffick"); Thomas Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) ("Exchange of one thing for another; trade, traffick").

Nor was the original meaning of "intercourse" much broader. Samuel Johnson defined "intercourse" as "Commerce; exchange" and "Communication: followed by *with*." Johnson, *A Dictionary of the English Language*. Both "commerce" and "intercourse" included the transportation, movement, or communication of people and things from one place to another—as distinct from the *production* of the items being transported or communicated. See generally Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. Ill. L. Rev. 623; see also *The Federalist No. 11*, at 71 (Hamilton) (describing interstate commerce as "trade" advanced by the "interchange" of state productions).[1]

Debates during the drafting of the Constitution confirm that "commerce" meant the discrete act of trade and transportation. For example, Charles Pinckney proposed to the Philadelphia Convention that Congress has the power to "establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades and manufactures," treating "commerce" as a distinct activity from the others. James Madison, *Notes of Debates in the Federal Convention of 1787* 478 (1966).

The same was true during ratification. In defending the Constitution's Commerce power, Hamilton made the same distinction: he described "commerce" as "nearly allied" to "the mechanic and manufacturing arts," not as encompassing them, and explained that those arts merely "furnish the materials of mercantile enterprise and industry." *The Federalist No. 35*, at 219–21 (Hamilton).

Use of "commerce" at State ratification conventions tells the same story. See 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 57–58 (Jonathan Elliot ed., 2d ed. 1836) (Thomas Dawes) (distinguishing "agriculture, commerce, and manufactures" and describing commerce as "our own domestic traffic that passes from

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[1] All references to *The Federalist* are to the Jacob E. Cooke 1961 edition.

state to state"); see generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) (surveying every use of the word "commerce" at the Convention, in the ratification debates, and in *The Federalist*); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) (surveying every use of "commerce" in the *Pennsylvania Gazette* from 1728 to 1800).

The words surrounding "commerce" in the Commerce Clause further clarify—and restrict—the scope of Congress's power. "Among the several States" limits the power to exchange, transportation, or intercourse "*between* the States," leaving internal trade *within* a State beyond Congress's direct control. See *The Federalist No. 23*, at 146–47 (Hamilton) (emphases added); see also *The Federalist No. 42*, at 283 (Madison) (referring to the power "to regulate the trade *between* State and State") (emphasis added).

The Commerce Clause thus gave Congress no direct dominion over commerce—however broadly or narrowly it's defined—that's wholly *intra*state, much less over purely local, noneconomic activity. The distilling of alcohol at home isn't commerce and doesn't take place between one State and another, so it doesn't fall within Congress's power "to regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3.

This Court's early cases recognized as much. In *Gibbons* v. *Ogden*, Chief Justice Marshall explained that the specification of commerce "among the several States" in the Clause left outside of Congress's power the "completely internal commerce of a State," which "may be considered as reserved for the State itself." 22 U.S. (9 Wheat.) 1, 194–95 (1824). That is, the Clause itself gives Congress "no power of regulation" nor "direct control" over "internal commerce or domestic trade." *The License Tax Cases*, 72 U.S. (5 Wall.) 462, 470–71 (1867).

2. The Necessary and Proper Clause doesn't enlarge Congress's "few and defined" federal powers, including its Commerce power. *The Federalist No. 45*, at 313 (Madison). Rather, it provides a "*limitation* on the means which may be used" to carry into execution an enumerated power. *Gibbons*, 22 U.S. at 187 (emphasis added). Such means "shall" be both "necessary" and "proper." Those are separate and distinct requirements. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 560 (2012) (opinion of Roberts, C.J.).

By its plain terms, the Necessary and Proper Clause is "a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." *Kinsella* v. *U.S. ex rel. Singleton*, 361 U.S. 234, 247 (1960) (alteration in original) (quoting VI *The Writings of James Madison* 383 (Gaillard Hunt ed., 1906)). The Clause preserves the Constitution's scheme of limited federal powers by cabining Congress's lawmaking power to appropriate means directed at carrying "some other identifiable constitutional power" into execution. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 274–75 (1993).

The original public meaning of "necessary and proper" at the Founding embraced means that were closely tethered to an enumerated power and weren't otherwise prohibited by or inconsistent with the Constitution. See *Printz* v. *United States*, 521 U.S. 898, 923–24 (1997); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

Contemporary sources illustrate the limited reach of the language used in the Necessary and Proper Clause. See generally Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183 (2003) (surveying founding-era sources). Founding-era legal usage treated "proper" as marking what belongs to a particular office, authority, or governmental department, and it isn't "proper" for a law to infringe or impair a fundamental right. See Lawson & Granger, 43 Duke L.J. at 291–97. So a law could be useful, convenient, or even closely related to a federal end and still fall outside Congress's proper authority. See *ibid.*; see also Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745, 772–77 (1997).

Even ardent champions of broad federal power acknowledged the limitations of "necessary and proper." While defending the constitutionality of the First Bank, Alexander Hamilton accepted that the Necessary and Proper Clause's reach turned on the "*relation* between the *measure* and the *end*, between the *nature* of *the mean* employed towards the execution of a power and the object of that power." Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 *The Papers of Alexander Hamilton* 104 (Harold C. Syrett ed., 1965).

In *McCulloch*, Chief Justice Marshall similarly noted the required means-ends connection and the Constitution's limited allocation of authority: Congress can select means "plainly adapted" to an end "within the scope of the constitution." 17 U.S. at 421. But it may not, "under the pretext of executing its powers," pass laws for "objects not entrusted to the government." *Id.* at 423. Any such law must be "*really* calculated to effect any of the objects entrusted to the government." *Ibid.* (emphasis added).

3. Congress's ability to reach wholly intrastate activity is therefore limited to means that are "necessary and proper" to carry into execution its enumerated power over interstate commerce. That is, it extends only to the extent that regulating *intra*state activity is *really calculated* to be necessary to the regulation of *inter*state "trade or transportation of things or persons" and not an improper intrusion into the reserved police power of the States. Barnett, 2012 U. Ill. L. Rev. at 623.

A legislative "act" that reaches further—regulating local activity without the required connection to interstate commerce—is beyond Congress's power and therefore isn't "proper." See *McCulloch*, 17 U.S. at 423 ("should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal * * * to say that such an act was not the law of the land").

4. In *Raich*, Congress had made no findings as to whether regulating home-grown marijuana used for medical purposes as authorized by state law was essential to its regulation of interstate commerce in marijuana. 545 U.S. at 21. Instead, the Court applied rational basis scrutiny to permit Congress to regulate wholly local, intrastate production, possession, and consumption whenever it *might have* concluded that exempting a "class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18. That expansive construction of the Commerce power—governed by any hypothetical or conceivable rational basis scrutiny—is flatly inconsistent with the original public meaning of the Necessary and Proper Clause. *McCulloch*, 17 U.S. at 423 (Congress may not "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government"); see generally Barnett, 55 Ark. L. Rev. 847.

The Constitution doesn't "confer on Congress a general 'police power' over the Nation." *Raich*, 545 U.S. at 65 (Thomas, J., dissenting). Yet that's precisely the power *Raich* grants—so long as Congress clears the low bar of a judicially imaginable "rational basis," it may exercise expansive power to accomplish its regulatory objectives. *Id*. at 22 (majority).

The Court in *Raich* thus erred in two ways. First, by adopting a definition of "economic" that allowed it to reach personal activities too far removed from its power to regulate commerce among the several States. Second, by adopting a standard of review of the claim that it is "essential" to reach such local activity that allows Congress to improperly intrude into the police powers of the States. These two constitutional errors undermine our federal structure and must eventually be corrected—the sooner, the better.

B. *Raich* Is Also Inconsistent with This Court's Pre- and Post-*Raich* Decisions.

Raich conflicts with not only the original public meaning of the Commerce and Necessary and Proper Clauses but also this Court's decisions that pre- and post-date *Raich*. In the two decades since *Raich* was decided, this Court has repeatedly narrowed *Raich*'s expansive conception of federal power. Overruling *Raich* ensures the Commerce power remains within the confines of both the original public meaning and two centuries of this Court's precedents.

This Court's early decisions held that "certain categories of activity such as 'production,' 'manufacturing,' and 'mining' were within the province of state governments"—and were therefore beyond Congress's Commerce power. *Lopez*, 514 U.S. at 554.

In *United States* v. *Dewitt*, for example—in an opinion by Chief Justice Chase—the Court held that a federal criminal ban on the intrastate sale of certain illuminating oils was a "police regulation" reserved to the States—beyond Congress's Commerce power and untethered to its Taxing power. 76 U.S. (9 Wall.) 41, 45 (1869). The Fifth Circuit correctly relied on *Dewitt* to reject "Congress's attempt to ban one product in order to further taxation of another." *McNutt*, 173 F.4th at 219–20 (citing *Dewitt*, 76 U.S. at 44–45).

Although later cases "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause," this Court repeatedly confirmed that the Commerce Clause power "is subject to outer limits." *Lopez*, 514 U.S. at 556–57. The Court never went so far as to hold that production itself qualifies as "commerce." See *id.* at 628 (Breyer, J., dissenting). Instead, it employed the Necessary and Proper Clause to allow Congress to regulate only *intra*state activity that had a *substantial effect* on *inter*state commerce—on the theory that such regulation was a necessary means of exercising Congress's Commerce power. *Id.* at 557 (majority).

As broad as the substantial-effects inquiry effectuating the "necessary" prong of the Necessary and Proper Clause might seem, this Court made clear in *Lopez* that it isn't limitless. 514 U.S. at 557. *Lopez* involved a federal prohibition on carrying guns in school zones. See *id.* at 551. The Gun-Free School Zones Act "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Sustaining it would have required the Court "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"—which the Court refused to do. *Id.* at 567.

Lopez—and later, *United States* v. *Morrison*, 529 U.S. 598 (2000)—enforced the Commerce power's outer limits with a judicially administrable line. This Court would uphold regulation of intrastate activity under the substantial-effects rubric only where that local activity is economic in nature, as it was in *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Banning gun possession near schools failed that test because it was "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. So did preventing gender-motivated violence: Congress can't "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617.

That is, by requiring that these activities be economic in nature, *Lopez* and *Morrison*'s gloss on the substantial-effects test provides "some assurance" that regulating intrastate conduct "is a truly necessary means to effectuate the permissible end of regulating interstate commerce." Randy E. Barnett, *Foreword: Limiting* Raich, 9 Lewis & Clark L. Rev. 743, 748 (2005).

The Court recently reaffirmed this fundamental principle in *Landor*. There, the Court stated that the Necessary and Proper Clause "authorizes Congress to employ 'necessary and proper' means for 'carrying into Execution' its other enumerated powers." 146 S. Ct. at 1946 (quoting U.S. Const. art. I, § 8, cl. 18). That is, "the Clause allows Congress to enact laws 'incidental to those powers which are expressly given.'" *Ibid.* (quoting *McCulloch*, 17 U.S. at 411).

As *Landor* clarified, the Necessary-and-Proper inquiry is whether the means is incidental to "Congress's constitutionally enumerated power" itself—not whether the means conveniently serves the purpose or goals of a statute enacted under that power. 146 S. Ct. at 1946. The enumerated power at issue in *Landor* was the Spending power, but the principle applies with equal force to the Commerce power.

So under the "necessary" prong of the Necessary and Proper Clause, the means of intrastate regulation must be "plainly adapted" and "really calculated to effect" a legitimate end within an enumerated power, *McCulloch*, 17 U.S. at 421, 423—here, the regulation of interstate trade in spirits. In addition, the intrastate regulation must also be "proper"—that is, consistent with the Constitution's text, history, and tradition. See Part II.A.

Raich, however, eschewed those well-recognized limits. Instead, it adopted an expansive definition of economic activity it found in *Webster's Third New International Dictionary* 720 (1966), which embraced "the production, distribution, and consumption of commodities." 545 U.S. at 25–26. This definition sweeps far beyond true economic activity and reaches conduct that is not economic at all—possessing and consuming any homemade commodity, for instance. That can't be right. "Economic" activity, properly understood in this context, is activity undertaken *for gain*. Under that definition, which is consistent with this Court's pre- and post-*Raich* decisions, home distilling for personal consumption clearly isn't an economic activity.

With *Lopez* and *Morrison*'s economic requirement erroneously expanded in this way, the substantial-effects doctrine allows Congress to exceed its powers under the original meaning of the Commerce and Necessary and Proper Clauses and allows it to intrude into the police powers of the States. So too does giving Congress unfettered discretion to decide whether its broader regulation of interstate commerce would be undercut if it can't prohibit some local noneconomic activity. See *Morrison*, 529 U.S. at 614 ("[W]hether 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.") (quoting *Lopez*, 514 U.S. at 557 n.2).

Any such interpretation is therefore "improper." Compare *NFIB*, 567 U.S. at 560 (opinion of 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."), with Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 621–34 (2010) (advancing the limiting-principle analysis *NFIB* ultimately adopted); see also *Morrison*, 529 U.S. at 618–19 ("we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (quoting *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring)); *United States* v. *Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring in the judgment) (federal police power "does not exist").

This Court has time and again affirmed that Congress has no "plenary police power" to regulate local, noneconomic activity. *Morrison*, 529 U.S. at 618 (quoting *Lopez*, 514 U.S. at 566). *Raich*'s two errors represent an unprincipled departure. This Court's intervention is needed to confirm *Raich* is inconsistent with this Court's Commerce Clause decisions. Its expansive understanding of "economic" activity twists the substantial-effects doctrine beyond incidental powers of the Commerce Clause and thwarts the original public meaning of the Commerce and Necessary and Proper Clauses. So too does its deference to Congress's decision whether reaching local activity is "essential" to its regulation of interstate commerce.

C. At Minimum, the Court Should Clarify That *Raich* Doesn't Permit Congress to Regulate Home Distilling for Personal Consumption—A Purely Local, Noneconomic Activity.

If this Court doesn't overrule *Raich*, it should nevertheless clarify that *Raich* doesn't extend to the federal prohibition here. *Raich* turned on the argument that (a) marijuana was "a fungible commodity for which there is an established, albeit illegal, interstate market"; (b) Congress had "undertaken to extinguish" this market altogether; so (c) allowing any local production whatsoever would necessarily undercut the interstate prohibition itself. 545 U.S. at 18; *id.* at 39–40 (Scalia, J., concurring in the judgment). But distilling, possessing, and consuming spirits is a far cry from growing, possessing, and consuming marijuana—or at least it was two decades ago when *Raich* was decided.

For starters, there's an entirely lawful and active interstate market for distilled spirits. Far from seeking to extinguish distilled spirits, Congress wants to *tax* them. The government seeks only to extinguish *home* distilling—purely local, noneconomic activity—on the theory that the activity evades this taxing scheme. And unlike *Wickard*, there's no attempt to regulate the total amount of product on the market or bar it altogether.

The Sixth Circuit reasoned that the ban nonetheless protects revenue—purportedly by "shift[ing] consumption" from potentially untaxed home-distilled spirits to taxed, commercially produced spirits. Pet. App. 15. That reasoning proves too much—as this Court confirmed more than 150 years ago. See *Dewitt*, 76 U.S. at 44–45 (Congress can't use Taxing power to bar sale of low-flashpoint lighting oils); see also *McNutt*, 173 F.4th at 219–20 (invoking *Dewitt*).

Every untaxed activity in the home—cooking, gardening, sewing—shifts demand away from some taxed market substitute. If that suffices to permit federal regulation (and prohibition), then buried in the Taxing power is a general police power over domestic life—the very power this Court has always denied Congress under the Commerce Clause. See Part II.B. That "expansion" of the Commerce power isn't "proper." *NFIB*, 567 U.S. at 560 (opinion of Roberts, C.J.).

So, at minimum, the Court should distinguish *Raich* from prohibitions like the one at issue here. That's because *Raich*'s rationale doesn't apply to a federal regulatory scheme that permits (and taxes) interstate commerce, rather than prohibits it. The statute in *Raich* outlawed a commodity market from manufacture through distribution to possession, so exempting home growers arguably left a hole in a scheme regulating economic activity. Where Congress permits, licenses, and taxes the market, exempting purely personal home production leaves no *Raich*-style gap. Congress's own scheme proves it, since home beer and wine production is exempt from the excise tax altogether. 26 U.S.C. §§ 5042(a)(2), 5053(e). *Raich*'s expansive reasoning therefore doesn't reach this case.

* * *

The Constitution's original public meaning gives Congress no power over purely local, noneconomic activity like distilling spirits at home for personal consumption. And the Necessary and Proper Clause permits Congress to regulate intrastate activity only insofar as doing so is both necessary and genuinely incidental to regulating interstate trade.

The government's theory is that, under *Raich*, Congress may criminalize home production of anything with its regulatory power over an interstate market. That theory conflicts with both the Constitution's original public meaning and this Court's precedents. It confirms that *Raich* was wrong when it was decided and is wrong today. Nothing in the Constitution—or this Court's other precedents for that matter—supports such an expansive (and limitless) view of Congress's Commerce power. It's also wrong that Congress may prohibit any local activity that conflicts with its scheme of taxation—and for the same reason.

Resolving the taxing question alone only half answers the ultimate question: whether Congress can ban home distilling. The Court should take on the ban in full force rather than hold it pending *McNutt*, as the government now requests. Whether the Court overrules *Raich* or clarifies that its holding has no bearing here, the petition presents important constitutional questions that this Court—and only this Court—can and should resolve now.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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August 20, 2026