No. 26-204

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Petitioners,

v.

SCOTT MCNUTT, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215

DANIEL GREENBERG
AMERICAN FEDERALISM PROJECT
Box 3472
Little Rock, AR 72203

ANDREW M. GROSSMAN
Counsel of Record
KRISTIN SHAPIRO
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

QUESTION PRESENTED

Federal law prohibits "producing distilled spirits…in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house." 26 U.S.C. § 5601(a)(6); *see also id.* § 5178(a)(1)(B). The question presented is:

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

RULE 29.6 STATEMENT

Respondent Hobby Distillers Association is a trade name of Brewhaus (America) Inc., a Texas corporation. It has no parent corporation nor does any publicly held corporation own 10% or more of its stock. All other Respondents are natural persons.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional, Statutory, and Regulatory Authorities

Other Authorities

BRIEF FOR RESPONDENTS

Respondents agree that certiorari is warranted—but not because of any flaw in the reasoning of the Fifth Circuit. It faithfully applied this Court's precedents to hold that the federal prohibition on home distilling exceeds Congress's enumerated powers and, specifically, that it is not necessary and proper to execution of Congress's taxing power. As the court reasoned, an outright ban on taxable activity is not plainly adapted to the collection of tax revenue, but the opposite. And there is no limit to the government's claim of power to criminalize local conduct that might theoretically conceal taxable activity. That amounts to a federal police power in all but name, and its exercise would "completely obliterate the Constitution's distinction between national and local authority." *United States v. Morrison*, 529 U.S. 598, 615 (2000). The Fifth Circuit's judgment was correct, as a matter of constitutional text and structure.

But the Sixth Circuit reached the opposite conclusion all of eleven days later, while declining to engage the logic of the Fifth Circuit's decision. *Ream v. U.S. Dep't of the Treasury*, 174 F.4th 480 (6th Cir. 2026). That created a square conflict in authority that the Court's review is necessary to resolve. The Court should grant certiorari in this case and in *Ream* to consider the full range of constitutional justifications for the prohibition and definitively resolve its constitutionality.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 173 F.4th 204 and reproduced at App.1a. The opinion of the District Court for the Northern District of Texas is reported at 740 F. Supp. 3d 509 and reproduced at App.27a.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2026. The Fifth Circuit denied a timely petition for rehearing en banc on June 9, 2026. App.69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced at App.71a, *et seq*.

STATEMENT OF THE CASE

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

The home-distilling prohibition was enacted as part of an 1868 reform of the distilled spirits tax. Act of July 20, 1868, ch. 186, 15 Stat. 125. A report commissioned by Congress the year before determined that tax evasion was rampant, with "at least seven-eighths" of spirits going untaxed; that was the result of an excessive tax rate of two dollars per gallon—which exceeded the market price of spirits—that "offer[ed] great temptations for the evasion of its payment." H.R. Rep. No. 39-24, at 1–2 (1867). The 280-page report documents pervasive fraud, corruption, and tax evasion by and for the benefit of large commercial distillers. *Id.* at 2–3, 7. To evade the tax, commercial distillers routinely shuttled huge quantities of spirits between tax districts "until a pliant officer is found"—bribery being cheaper than the tax. *Id.* at 3. Meanwhile, two tax inspectors asked whether they

[1] *Available at* https://www.ttb.gov/regulated-commodities/beverage-alcohol/distilled-spirits/penalties-for-illegal-distilling (last visited September 14, 2026).

had ever discovered illegal stills hidden in dwelling houses denied that they ever had. *Id*. at 159, 194.

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

2. Respondents are individuals who seek to distill at home, as well as the Hobby Distillers Association, of which they are members. Rick Morris is a certified bourbon steward, owner of a company that manufactures and markets stills suitable for home distilling, and lawfully redistills alcohol at his business. App.2a, 32a. Scott McNutt owns a still that he has used to lawfully distill fuel alcohol and seeks to "tinker around" with beverage spirits. App.3a. Thomas Cowdrey also owns a still that he has previously used to lawfully distill fuel alcohol and likewise seeks to experiment in creating new beverage spirits, including "apple pie vodka," for which he has developed a recipe. App.3a, 32a–33a. And John Price was taught the basics of distilling by Mr. Morris, owns a still that needs a new condenser, and also seeks to distill beverage spirits. App.3a, 32a–33a.

Mr. Morris founded the Hobby Distillers Association in 2014 to promote non-commercial hobby distilling. App.3a. The Association's purposes include "encourag[ing] the legalization of at-home hobby distilling" and "advanc[ing] the cause of legalizing at-home distilling." App.10a. As of 2024, it had approximately 1,300 members. App.28a.

In 2014, the TTB sent Mr. McNutt a "Notice of Potential Civil and Criminal Liability" based on its stated belief that he "may have purchased a still capable of producing alcohol and/or equipment and materials that may be used in the manufacture of a still." It warned that "[f]ederal law provides no exemptions for the production of distilled spirits for personal or family use" at unauthorized locations and that "[u]nlawful production of distilled spirits is a criminal offense, punishable by a fine of up to $500,000 and/or imprisonment for not more than 5 years." Attached to the letter was a press release describing how the TTB works with state authorities in "targeting illegal possession of stills and illegal production of distilled spirits." App.4a–5a.

In November 2023, an attorney representing Messrs. Morris, McNutt, Cowdrey, and Price telephoned the TTB to inquire about obtaining permits to distill at home. He was informed that "the agency would not even consider a request for a permit to distill at home or in a residence because it is 'against the law' and 'illegal to distill spirits at a residence.'" App.5a.

3. Respondents filed suit, alleging that the home-distilling prohibition exceeds Congress's enumerated powers, including specifically its powers under the Commerce, Taxation, and Necessary and Proper Clauses, and seeking declaratory and injunctive relief. App.5a. The government defended the prohibition as lawful exercises of Congress's authority under those provisions. *See* App.41a–63a. The district court held that, of the individual Respondents, only Mr. McNutt had standing and that his standing supported the Association's. App.35a, 40a. On the merits, it declared the prohibition unconstitutional and permanently enjoined its enforcement against Mr. McNutt, the Association, and its members. App.67a.

4. The government appealed, raising only the taxing power justification for the prohibition. App.11a & n.5. As relevant here, the Fifth Circuit affirmed.[2] It concluded that the prohibition stands "outside the scope of Congress's taxing power" because neither statutory provision comprising it "raises revenue." App.11a, 14a.

Nor, it concluded, is the prohibition necessary and proper to exercise of the taxing power. First, the prohibition is not "necessary" because "prohibiting at-home distilleries is not 'plainly adapted' to effectuate

[2] Messrs. Morris, Cowdrey, and Price cross-appealed dismissal of their claims for lack of standing, which the Fifth Circuit reversed. App.25a–26a.

Congress's taxation of spirits." App.19a. Rather than "help Congress raise revenue" by preventing evasion of the distilled spirits tax, the prohibition "reduce[s] revenue by preventing individuals from making distilled spirits." App.19a. It counterproductively excludes home distillers from the generally applicable regulatory regime that requires would-be distillers to "obtain a license," "comply with the regulations," and "pay the spirits tax." App.21a. And to the extent that the prohibition might be said to shift demand from home-distilled spirits to those produced in commercial facilities, this Court "long ago rejected Congress's attempt to ban one product in order to further taxation of another product." App.21a (citing *United States v. Dewitt*, 76 U.S. 41 (1870)).

Second, the prohibition is not "proper" because it "invade[s] the reserved police and regulatory power of the states." App.24a. Under the logic required to uphold the prohibition, "Congress may criminalize nearly any at-home conduct only because it has the possibility of concealing taxable activity," including "[h]ome-based businesses" and "[r]emote work." App.25a. In short, the government's defense of the prohibition brooks no "limiting principle" and so would improperly "'creat[e] a general federal authority akin to the police power.'" App.25a. (quoting *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (Roberts, C.J.)).

Eleven days after the Fifth Circuit's decision, the Sixth Circuit issued its decision in *Ream v. Department of the Treasury* upholding the prohibition as "a necessary and proper means of collecting the federal excise tax on distilled spirits." 174 F.4th 480, 483 (6th Cir. 2026).

Relying principally on *Ream*, the government petitioned the Fifth Circuit for rehearing en banc. Its petition was denied after no judge called for a response. App.70a.

ARGUMENT

The court below correctly held that the federal home-distilling prohibition exceeds Congress's authority under the Taxation and Necessary and Proper Clauses. Nonetheless, Respondents agree with the government that the Court should grant certiorari. The decision below squarely conflicts with the Sixth Circuit's decision in *Ream*. It held unconstitutional a provision of federal law. And it raises important questions about the reach of Congress's powers. The Court should grant review here and in *Ream* so that it can resolve the prohibition's constitutionality in full.

I. The Constitutionality of the Federal Home-Distilling Prohibition Warrants Review

Although believing the decision below to be correct, Respondents agree that this case satisfies the criteria for review.

A. To begin with, the decision below directly conflicts with the Sixth Circuit's decision in *Ream*. *Ream*, like this case, challenges the federal prohibition on home distilling as exceeding Congress's enumerated powers. 174 F.4th at 483. As here, the government defended the prohibition as "a necessary and proper means of collecting the federal excise tax on distilled spirits." *Id*. Unlike in this case, the Sixth Circuit accepted that rationale.

It concluded, first, that the prohibition is "necessary" to collecting the federal excise tax on distilled spirits, notwithstanding that it directly prohibits the taxable activity of distilling spirits, because home producers might attempt to "evade the tax." *Id*. at 488. On that view, the prohibition "thus shifts consumption" from home-distilled spirits that might go untaxed to commercially produced spirits less likely to be the object of tax evasion. *Id*.

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

In so holding, *Ream* departs from original meaning and this Court's precedents, whereas the decision below follows both faithfully. *See infra* § I.C. The conflict is stark.

It is also consequential. Not only does the validity of the federal home-distilling prohibition now vary by the location of an individual's home, but the prohibition is also unenforceable against members of the Hobby Distillers Association, meaning that neighbors or even roommates may face radically different consequences for identical conduct. The Court's review is therefore necessary to secure uniformity of federal law.

B. The importance of this case and the questions it presents could hardly be overstated. It presents fundamental questions of the extent of federal power and the powers reserved to the states and the people. At stake is nothing less than federalism and its continued ability to "protect[] the liberty of all persons…by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, 564 U.S. 211, 222 (2011). It is therefore "of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *NFIB*, 567 U.S. at 560 (Roberts, C.J.) (quotation marks omitted).

The validity of the home-distilling prohibition is also a significant matter. It affects the conduct of a great many Americans, going by the vast numbers who have taken up homebrewing or sampled a friend's or relative's creations. *See* American Homebrewers Association, Homebrewing Rights (estimating that "at least 1.2 million Americans brew beer at home at least once a year").[3] Homebrewing revitalized beer culture in the United States; home distilling could do the same for spirits, but for the prohibition.

C. Review is not warranted because of any "flaws" in the Fifth Circuit's constitutional analysis. *See* Pet.14. As the decision below concludes, the home-distilling prohibition is not "a necessary and proper incident to Congress's constitutionally enumerated power" to tax. *Landor v. Louisiana Dep't of Corr. & Pub. Safety*, 146 S. Ct. 1931, 1946 (2026).

The prohibition is not "plainly adapted," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), to effectuate the distilled spirits tax. Rather than facilitate the raising of revenue, the prohibition "reduce[s] revenue by preventing individuals from making distilled spirits." App.19a. Nor does it serve to prevent tax evasion, given that the regulatory regime already requires the registration of all distilled spirits plants. 26 U.S.C. § 5171(c). If the "proper inquiry… considers whether *compliance* with the condition furthers tax collection," Pet.19, then the prohibition flunks that inquiry because all those to whom it applies are required to register with the government and disclose their distilling activity regardless.

The prohibition is also not "consist[ent] with the letter and spirit of the constitution," *McCulloch*, 17 U.S. (4 Wheat.) at 421, because it improperly "invade[s] the reserved police and regulatory power of the

[3] *Available at* https://homebrewersassociation.org/homebrewing-rights/talking-points/ (last visited September 14, 2026).

states," App.24a. As the court below observed, the government's theory in this case has no "limiting principle" that would "'avoid creating a general federal authority akin to the police power.'" App.25a (quoting *NFIB*, 567 U.S. at 536 (Roberts, C.J.)). Although disputing that conclusion, Pet.20, the government at this stage still fails to identify any limit on its claim to power here. If accepted, that claim would "completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615.

II. The Court Should Also Grant Certiorari in *Ream* and Consolidate the Cases

The Court should also grant certiorari in *Ream* so that it can address the full range of constitutional justifications for the home-distilling prohibition, definitively resolve its constitutionality, and thereby provide legal certainty to would-be home distillers. The government's request to limit this Court's consideration to *McNutt* and its taxing-power-based justification for the prohibition would leave unresolved the alternative commerce power theory that the government preserved before the Sixth Circuit in *Ream*. Although the government abandoned that theory on appeal in this case, it lies in wait for any remand in *Ream*, posing a potential threat to the rights Respondents brought this suit to vindicate.

That is a consequence of the government's unusual litigation decisions. The government forcefully advocated the commerce theory before the district courts in both cases. After abandoning the theory before the

Fifth Circuit in this case, App.11a n.5, it raised it before the Sixth Circuit in *Ream*—but only after the court had to order the government to brief the merits, which it had initially declined to do. Doc. No. 37, *Ream v. U.S. Dep't of Treas*ury, No. 25-3259 (6th Cir. filed Dec. 11, 2025). And now, with this case and *Ream* before the Court, the government again seeks to forestall review on the limits of the commerce power and the potential loss of legal ground (that is, power) the federal government gained in and under *Gonzales v. Raich*, 545 U.S. 1 (2005), on which its commerce power theory relies, *see* App.58a–61a.

The government's objections to the Court's consideration of the full range of justifications for the prohibition miss the mark. *See* Pet.13–14. The commerce power theory was preserved and is properly presented for review in *Ream*, is encompassed within the questions presented by both cases, and substantially overlaps with the taxing power theory on which the government does seek review, as both rely on the Necessary and Proper Clause. *See* Pet.13–15, *Ream v. U.S. Dep't of Treasury*, No. 26-93 (filed July 20, 2026). There is no good reason for the Court to defer to the government's preferences by artificially limiting the scope of its review.

The Court's ordinary practice when faced with dueling petitions for certiorari arising from conflicting appeals court decisions is to grant both and consolidate the cases. *See, e.g., Campos-Chaves v. Garland*, 602 U.S. 447 (2024); *Pugin v. Garland*, 599 U.S. 600 (2023); *Epic Systems Corp. v. Lewis*, 584 U.S. 497

(2018); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). Doing so here would permit the Court to resolve the acknowledged circuit conflict and all relevant issues, without making review depend upon a single vehicle.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
KRISTIN SHAPIRO
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215

DANIEL GREENBERG
AMERICAN FEDERALISM PROJECT
Box 3472
Little Rock, AR 72203

SEPTEMBER 2026