

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE; ALCOHOL
AND TOBACCO TAX AND TRADE BUREAU, A BUREAU OF
THE UNITED STATES DEPARTMENT OF THE TREASURY,
PETITIONERS

v.

SCOTT McNUTT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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No. 26-204

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Respondents agree (Br. 1, 8-12) that this Court should resolve the question whether 26 U.S.C. 5178(a)(1)(B)’s longstanding prohibition on the production of distilled spirits in particular locations is necessary and proper for carrying into execution Congress’s enumerated power to lay and collect taxes. Respondents further agree (Br. 1, 8, 14) that the question should be resolved—and the petition for a writ of certiorari should be granted—in this case. The only dispute is whether the Court should also grant (rather than hold) the parallel petition that respondents’ counsel filed in *Ream v. Department of the Treasury*, No. 26-93 (July 20, 2026). There are several reasons why that petition should be held, and no countervailing reason why it should be granted.

As the government has explained, this case presents a superior vehicle because, unlike petitioner Ream, respondent McNutt has unquestioned standing to challenge the home-distilling ban. See Pet. 13-14; Gov't Cert. Resp. Br. at 9-11, *Ream*, *supra* (No. 26-93) (*Ream* Gov't Br.). McNutt owns a still he had been using for legal purposes, had received a notice of potential liability from the enforcing agency, and had his attorney inquire as to the possibility of acquiring a permit for home distilling. Pet. App. 8a-9a. Ream alleged none of those facts. He suggests that such factual distinctions do not matter, see Cert. Reply Br. at 8-9, *Ream*, *supra* (No. 26-93) (*Ream* Reply Br.), but two judges in his case found otherwise, see *Ream v. United States Dep't of the Treasury*, 174 F.4th 480, 489-493 (6th Cir. 2026) (Mathis, J., dissenting), petition for cert. pending, No. 26-93 (filed July 20, 2026); *Ream v. United States Dep't of the Treasury*, 771 F. Supp. 3d 998, 1008-1010 (S.D. Ohio 2025). This Court would have an independent obligation to determine whether those distinctions make a difference for standing if it granted the *Ream* petition in addition to the *McNutt* petition, see *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009), and it can avoid the need to consider that fact-bound question by simply holding the *Ream* petition instead.

Respondents urge (Br. 12-14) the Court to ignore the standing issue and grant the *Ream* petition in order to inject a question presented addressing whether the home-distilling ban exceeds the scope of Congress's commerce power. But far from a reason to grant *Ream*, the additional commerce-power question is a compelling reason *not* to do so. No court of appeals has addressed that question, and the government is not pressing that argument in either case. It would be inconsistent with this Court's role

as “a court of review, not of first view,” to grant certiorari to resolve that question in such circumstances. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Indeed, considering whether a federal statute may be upheld on a ground that the Department of Justice has expressly waived would be in significant tension with “the principle of party presentation” that courts “rely on the parties to ‘frame the issues for decision.’” *Margolin v. National Ass’n of Immigration Judges*, 608 U.S. 339, 342 (2026) (per curiam); cf. *Wood v. Milyard*, 566 U.S. 463, 466 (2012) (“A court is not at liberty * * * to bypass, override, or excuse a State’s deliberate waiver of a limitations defense.”).

Respondents accuse the government of acting strategically to “forestall review on the limits of the commerce power,” see Br. 13, and their counsel even suggests the government may try to revive the commerce-power argument on remand in *Ream* if this Court rejects the government’s taxing-power argument in *McNutt*, see *Ream* Reply Br. at 4. Both assertions are incorrect. The government declined to raise the commerce-power argument in its initial briefing before the court of appeals in both this case, see Pet. App. 11a n.5, and in *Ream*, where the government addressed only standing (the sole issue on which the district court had ruled), see 25-3259 Gov’t C.A. Br. 12-36. When the Sixth Circuit issued an order requiring the government to address the merits, the government complied by responding to all of the merits arguments that *Ream* had raised, including those addressing the commerce power, in an abundance of caution. See 25-3259 Gov’t C.A. Supp. Br. 3-24. The government has unambiguously stated in *Ream*, however, that while it adheres to the view that the home-distilling ban is constitutional, it is “no longer advancing

[the commerce-power] theory in th[at] case.” *Ream* Gov’t Br. at 11. That includes on any remand there, as the government here makes doubly clear. Resolving the taxing-power question presented in this case will thus resolve the merits of all arguments the government is advancing in defense of the statute at issue in both cases. Of course, that in no way forestalls this Court’s ability to reconsider *Gonzales v. Raich*, 545 U.S. 1 (2005), if it wishes in an appropriate case—namely, in a Controlled Substances Act case where the government is actually defending the statute’s constitutionality based on the commerce power.

Finally, respondents err in suggesting (Br. 13-14) that the Court’s ordinary practice is to grant and consolidate dueling petitions for writs of certiorari. The Court frequently grants only a single petition when considering multiple petitions arising from either side of a circuit conflict. See, e.g., *Anderson v. Intel Corp. Inv. Policy Comm.*, cert. granted, No 25-498 (oral argument scheduled for Oct. 6, 2026); *Murthy v. Missouri*, 603 U.S. 43 (2024). The Court should do the same here.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2026