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

REPLY BRIEF FOR PETITIONER

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

The government agrees that the constitutionality of the federal home-distilling prohibition warrants the Court's review. Resp.8–9. It concedes the circuit conflict is direct and the issue important, and it has filed its own petition in *McNutt*[1] to secure review. That would ordinarily settle everything a brief in opposition exists to contest. But the government's agreement comes with conditions: review only its taxing-power theory, only as the government has framed it, and hold this case on ice while *McNutt* proceeds. Each condition serves a single, unstated end: to keep this Court away from *Gonzales v. Raich*, 545 U.S. 1 (2005), the precedent the government invoked at every stage below and now declines even to mention in its own defense.

Just observe how the government treats the commerce-power theory it pressed from its very first filing in this case. It does not confess error, repudiate the theory, or bind itself against asserting it in any respect—including on remand. It simply declines to advance that theory at this stage. The government knows how to disavow a position when it means to, as it regularly does in this Court in terms that leave nothing in reserve. This is not that. This unusual maneuver follows the government's decision in *McNutt* to abandon the commerce theory on appeal and its subsequent decision to assert the theory on appeal in this case, but only after the Sixth Circuit chastised its refusal to brief the merits. The evident aim is to forestall review of the power it won in and under *Raich*.

[1] *Dep't of Justice v. McNutt*, No. 26-204 (docketed Aug. 18, 2026).

The government does not, of course, go to these lengths to shield precedent it is prepared to defend. The response musters not one word in support of *Raich*'s reasoning, its wayward application of rational-basis deference, its misinterpretation of the constitutional text, or its conflict with precedent. This reflects an appraisal of *Raich*'s vulnerability, paired with an understandable institutional attachment to the most expansive expression of federal power ever to appear in the United States Reports. But the government is wrong to assume that *Raich* can be quarantined from this case by avoiding the commerce theory. Both of the government's theories run through the Necessary and Proper Clause, and *Raich* supplies the deferential standard of necessity on which the government's taxing-power theory also relies.

Accepting the government's proposal to grant *McNutt* and hold this case would reward its attempted evasion and leave open the commerce-power issue the government refuses to repudiate. Only this case presents the full range of constitutional justifications the government has asserted for the prohibition, pressed and preserved at every stage, alongside Petitioner's challenge to *Raich* maintained from day one. The home-distilling prohibition's constitutionality should be tested against both theories raised below.

Having conceded that review is warranted, the government is entitled to defend the prohibition, but it is not entitled to a writ drawn to the dimensions of its litigating strategy. The Court should grant this petition—whether or not it also grants *McNutt*—and resolve the constitutionality of the home-distilling prohibition in full.

I. The Question of Whether the Home-Distilling Prohibition Exceeds Congress's Enumerated Powers Warrants Review

The government concedes the "need for this Court's review," Resp.9, but seeks to limit its consideration to whether the home-distilling prohibition is "a necessary and proper means for carrying out Congress's taxing power," Resp.8. The Court should instead agree to consider the broader question of whether the prohibition exceeds Congress's enumerated powers, which also encompasses the commerce power theory the government pressed below. *See* Pet.i.

The government does not, in fact, disavow that theory. It states only that it "is no longer advancing [it] in this case." Resp.11. That falls conspicuously short of the express and binding repudiations that the government routinely makes when it has changed position. *E.g.*, Br. for United States, at 7, *Rojas v. United States*, No. 20-1594 ("[T]he government now agrees that a veterinarian's direct injection of animal drugs without a written or oral order in the course of her professional practice cannot provide the basis for a misbranding conviction."); Resp. Br., at 20, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 ("[The government] has reconsidered [its] position and now agrees that the removal restriction is unconstitutional."); Resp. Br., at 5, *Serna-Guerra v. Holder*, No. 08-983 ("[T]he government no longer adheres to its prior position that UUV is a crime of violence.").

There is no indication in this case that the government's position has changed one iota, let alone that it has bound itself in any way. It argued at length below that the prohibition was a necessary and proper means of carrying out the commerce power. *E.g.*, App.76–83 (Sixth Circuit briefing). Its position throughout has been that the "intrastate noncommercial distilling activities reached by [the prohibition] can be deemed to 'substantially affect interstate commerce' for the same reasons articulated by the Supreme Court in *Raich*." Defs. Reply Br., at 17, *Ream v. U.S. Dep't of Treas.*, No. 24-364 (S.D. Ohio filed Aug. 12, 2024). Rather than walk away from its consistent prior position, the government simply declines to press the commerce power theory at this stage. Its refusal to tie its hands against picking up that theory again later provides no assurance, given that it was pressed and preserved in the Sixth Circuit, where it lies in wait for remand—to Petitioner's detriment.

This strange non-disavowal follows the government's unusual treatment of the commerce power issue here and in *McNutt*. The government forcefully advocated the commerce theory before the district courts in both cases. After abandoning the theory in its *McNutt* appeal before the Fifth Circuit, 173 F.4th 204, 214 n.5 (5th Cir. 2026), it raised it before the Sixth Circuit in *Ream*—but only after the court was forced 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.*, No. 25-3259 (6th Cir. filed Dec. 11, 2025). And now, with *Ream* before this 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 *Raich*.

These "circumstances strongly suggest strategic behavior" on the government's part, and the Court need not and should not "reward [its] transparent tactic for evading [this Court's] review" on this issue. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 9 (2023) (Thomas, J., concurring). The government having raised the commerce theory below, there is no barrier to the Court's considering it as an alternative ground of affirmance. *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Beyond that, Petitioner's challenge to "the power of congress to pass" the prohibition makes it "necessary to search the constitution to ascertain whether or not the power is conferred." *United States v. Harris*, 106 U.S. 629, 636 (1883). That principle surely reaches an asserted constitutional basis that the government consistently advocated below and refuses to disavow.

Finally, the government has no response to the point that its commerce theory substantially overlaps with the taxing-related rationale accepted by the court below, in that both turn on Congress's power under the Necessary and Proper Clause. *See* Pet.14. There is, accordingly, no good reason to limit consideration to only one of two asserted applications of that clause. The better course is to take this "opportunity to reaffirm that the Necessary and Proper Clause means the same thing regardless of the enumerated power Congress invokes and to provide lower courts with a coherent and reliable framework that preserves Congress's legitimate incidental authority without allowing that authority to become a general federal police power." Amicus Br. of Goldwater Inst., at 4.

II. The Court Can and Should Consider *Raich*'s Continued Viability

Consistent with its refusal to engage the commerce theory it pressed below, the government musters no defense of *Raich*, the theory's cornerstone. *See* App.76–77. In the same way that the government's non-disavowal of that theory does not and should not prevent the Court's review, its non-response on *Raich* only weighs in favor of the Court's taking up its continued viability. There is a reason, after all, the government has gone to such unusual lengths to evade or at least delay *Raich*'s day of reckoning. And that reason is not the quality of *Raich*'s reasoning or its insignificance in our constitutional architecture. It is, instead, *Raich*'s vulnerability to reconsideration, as well as the government's attachment to the Court's most expansive expression of federal power. These things counsel in favor of taking up the second question presented.

In seeking to downplay *Raich*'s relevance by all but ignoring it, the government misses that it speaks to both of the government's theories in support of the prohibition. *Raich* turns on application of the Necessary and Proper Clause, 545 U.S. at 5, 22, such that its reach is not limited to measures in service of the commerce power. *See United States v. Comstock*, 560 U.S. 126, 134 (2010) (citing *Raich* for its standard on necessity). The government's taxing-power theory equally raises the questions of whether the home-distilling prohibition is necessary and whether it is proper. *See* Amicus Br. of Nat'l Taxpayers Union, at 5–8. It therefore equally implicates *Raich*. The petition's second question presented, concerning *Raich*, does not depend on the precise formulation of the first.

The importance of reconsidering *Raich* can hardly be overstated. The decision deforms federalism, invading powers reserved to the states and the people. Amicus Br. of Ohio and 14 Other States, at 13–15. It clashes with the original meaning of the constitutional text. Amicus Br. of Advancing American Freedom, et al., at 6–16; Amicus Br. of Cato Inst., at 6–17; Amicus Br. of Pacific Legal Found., at 6–16; Amicus Br. of Prof. Randy Barnett, at 8–14. It likewise clashes with precedent. *Id*. at 15–19; Amicus Br. of Manhattan Inst., at 12–17. Ultimately, it countenances no limiting principle on the reach of federal power. Amicus Br. of Center for Individual Rights, at 17–18. *Raich* should be reconsidered and overruled, or at least clarified.

III. This Case Is an Excellent Vehicle

This case presents an ideal vehicle for the Court to definitively resolve the constitutionality of the home-distilling prohibition and answer immensely important questions about the limits of federal power. Unlike in *McNutt*, in this case the full range of constitutional justifications for the prohibition was presented and preserved and is thereby available for the

Court's consideration. The government does not dispute that this case properly raises its commerce power theory for the prohibition or that Petitioner has preserved his challenge to *Raich* since day one. As such, only this case provides a vehicle for the Court to comprehensively address the prohibition's constitutional basis. For that reason, the Court should grant certiorari whether or not it grants the government's petition in *McNutt*.

The government raises the issue of Petitioner's standing, without actually disputing it—for good reason. *See* Resp.9–10. Beyond merely "wish[ing] to distill whiskey at home," Resp.6, Petitioner has taken every reasonable step to do so short of violating the statutory prohibition and risking criminal liability. *See* Pet.6–7; Decl. of John Ream, at ¶¶ 12–15, *Ream v. U.S. Dep't of Treas.*, No. 24-cv-364 (S.D. Ohio filed May 23, 2024). No precedent of this Court would require Petitioner to take such futile steps as purchasing a still that he may never be able to lawfully use, mere possession of which may risk legal jeopardy,[2] or applying for a permit that is barred from issuance by the very prohibition he challenges. 26 U.S.C. § 5178(a)(1)(B). Nor does standing doctrine require a personally engraved enforcement threat, especially when the government broadcasts severe penalties for violations. Alcohol & Tobacco Tax and Trade Bureau, U.S. Dep't of Treasury, Home Distilling (threatening "Federal charges for serious offenses" and property

---

[2] *See* 26 U.S.C. § 5601(a)(1), (6).

forfeiture).[3] Petitioner's demonstrated "intention to engage in prohibited conduct" and the "credible threat of enforcement" he faces, Resp.10, are on par with those of the plaintiffs in the government's preferred vehicle, *McNutt*, in every way that matters. *See McNutt*, 173 F.4th at 213–14 (rejecting similar objections to standing).

Finally, the Court should take this case to provide valuable guidance to the lower courts on the important constitutional issues that it presents. "Numerous cases in the lower courts are wrestling with these questions" concerning the extent of federal power. Amicus Br. of Goldwater Inst., at 15. Compared to them, this case "offers a cleaner vehicle that avoids the complex regulatory realms of firearms, national-security, corporate-regulation, and narcotics contexts." *Id.*

---

[3] *Available at* https://www.ttb.gov/regulated-commodities/beverage-alcohol/distilled-spirits/penalties-for-illegal-distilling (last visited Aug. 31, 2026).

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

SEPTEMBER 2026