

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 AMICI CURIAE ADVANCING AMERICAN
FREEDOM; LIBERTY JUSTICE CENTER; AMERICAN
LEGISLATIVE EXCHANGE COUNCIL (ALEC); AMERICAN
ASSOCIATION OF SENIOR CITIZENS;
(Additional Amici Curiae Listed on Inside Cover)**

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QUESTION PRESENTED

1. Whether the federal prohibition on home distilling exceeds Congress's enumerated powers.
2. Whether the Court should overrule *Raich* or at least clarify that Congress's commerce power does not extend to regulation of local, noncommercial conduct and that its exercise is subject to meaningful judicial scrutiny.

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all people are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”² and believes that the governmental structures established by the Constitution are necessary for the preservation of the liberty of the people.³ Advancing American Freedom files this brief on behalf of its 7,555 members in Ohio and its 164,819 members nationwide.

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize

¹ All parties have received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee* 212 (Green Hill Publishers, Inc. 1983).

³ Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at <https://theindependenceindex.org/>.

constitutional restraints on government power and protections for individual rights. *See, e.g. Janus v. AFSCME*, 138 S. Ct. 2448 (2018). This case interests amicus because the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819).

Amici American Legislative Exchange Council (ALEC); American Association of Senior Citizens; Americans for Fair Treatment; Committee For Justice; Illinois Policy Institute; Independent Women’s Law Center; Institute for Policy Innovation; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Louisiana Family Forum; Men and Women for a Representative Democracy in America, Inc.; Mountain States Legal Foundation; New York State Conservative Party; North Carolina Values Coalition; NSIC Institute; Orthodox Jewish Chamber Of Commerce; Rio Grande Foundation; 60 Plus Association; Southeastern Legal Foundation; Taxpayers Protection Alliance; Tea Party Express; Tradition, Family, Property, Inc.; Unify.US; Women for Democracy in America, Inc.; Yankee Institute; Shawwna Bolick, Arizona State Senator, District 2; Michael Farris, Attorney; Charlie Gerow, Former Vice Chairman, American Conservative Union; Tim Jones, Former Speaker, Missouri House, Founder, Leadership for America Institute; Seton Motley, President, Less Government; Michael C. Munger, Professor, Political Science and Economics, Duke University; Melissa Ortiz, Principal & Founder, Capability Consulting; Ann Schockett, Former President, National Federation of Republican Women; Richard Viguerie, Chairman, ConservativeHQ.com; and Hon. William Wagner (Ret), Distinguished

Professor of Law Emeritus, believe, as did America's Founders, that the maintenance of the separation of government powers into three co-equal branches is essential to ordered liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the statutory and regulatory prohibition of the home distillation of spirits under 26 U.S.C. § 5178(a)(1)(B) and § 5601(a)(6) and 27 C.F.R. § 19.51-19.52. This prohibition touches activity of the most local type, taking place purely in the home of an individual or family. So long as Congress regulates such behavior, the constitutional bargain the states accepted when they ratified the Constitution is undermined.

Splitting with the Fifth Circuit, which found the home-distilling ban to be beyond the power of Congress to enact, *McNutt v. U.S. Department of Justice*, 173 F.4th 204, 221-22 (5th Cir. 2026), the Sixth Circuit below ruled that Congress validly enacted the ban as an exercise of its Necessary and Proper Clause power to carry into execution its power under the Taxing Clause. *Ream v. U.S. Dept. of the Treasury*, 174 F.4th 480, 489 (6th Cir. 2026).

Each of the government's three theories advanced below to sustain Congress's power to enact the ban fails. As both circuits concluded, the Tax Clause, U.S. Const. art. I, § 8, cl. 1, itself, does not empower Congress to ban home distilling. Neither court addressed the Commerce Clause but the district court in *McNutt* correctly found that it does not empower

Congress to enact the home-distilling ban. *Hobby Distillers Ass’n v. Alcohol and Tobacco Tax and Trade Bureau*, 740 F. Supp. 3d 509, 534 (N.D. Tex. 2024) *aff’d as modified sub nom. McNutt v. US Dep’t of Just.*, 173 F.4th 204 (5th Cir. 2026).⁴ And Congress cannot use the Necessary and Proper Clause to “pass laws for the accomplishment of objects not intrusted to the government.” *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819).

The Constitution vests in Congress the power to “regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. The original meaning of this clause is clear: commerce meant trade and among the states meant—well—among the states. A broader reading turns much of the rest of the Constitution, including the Tenth Amendment, on its head.

Similarly, the original meaning of the Necessary and Proper Clause confers on Congress only the power to carry out the powers vested in the federal government. Article I empowers Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 18. The Framers assured the public while it considered ratification that the Necessary and Proper Clause expands Congress’s powers but only vested in it those powers which would

⁴ “[T]he Constitution is *written* to prevent societal amnesia of the defined limits it places on this government *of and by* the people. That is where the judiciary must declare when its coequal branches overstep their Constitutional authority. Congress has done so here.” *Hobby Distillers Ass’n*, 740 F. Supp. 3d at 536.

have been inherent in its other authorities and responsibilities.⁵

The founding generation did not—and almost assuredly would not have—ratified a constitution that gave the federal government the power to prohibit the trivia of local life as home distilling. The Constitution they did ratify limits Congress to those powers enumerated. Because no enumerated power supports the home-distilling ban, it must be struck down.

ARGUMENT

I. The Commerce Clause Is a Limited Delegation of Power, Not a Grant of General Police Power.

During much of the twentieth century, the Court failed to enforce the original meaning of the Commerce Clause, instead allowing Congress to exercise expansive power over even wholly local activity. Infamously, the Court stepped aside as Congress expanded its reach to regulate such minutiae as a man's growing of wheat for use on his own farm. *Wickard v. Filburn*, 317 U.S. 111 (1942).

The Court has, however, recognized limits to that power in recent decades. In *United States v. Lopez*, the Court found that the Gun-Free School Zones Act of 1990 was beyond the power of Congress to enact under the Commerce Clause. 514 U.S. 549 (1995). As the Court concluded, to allow Congress to regulate even the intrastate possession of a handgun without

⁵ The Federalist No. 33, at 158 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

showing some greater relation to interstate commerce, the Court “would have 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.” *Id.* at 568.

Certainly, if Congress can prohibit under the Commerce Clause such local, noncommercial activity as home distilling, it could usurp much of the power the constitutional bargain reserved to the states.

A. The text of the Commerce Clause, understood according to its original meaning, grants to Congress only the ability to regulate interjurisdictional trade.

The original meaning of the Commerce Clause is simple: Congress may “regulate the buying and selling of goods and services trafficked across state lines.” *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 586-89 (Thomas, J., concurring)). This understanding of “commerce” as trade was common not only to the drafters of the Constitution but to the general public, including those who ratified it. *Id.* (citing Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-62 (2003)).

“[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably.” *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). Commerce did not include, on the other

hand, agriculture and manufacturing, which were wholly intrastate activities. *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (“Commerce, or trade, stood in contrast to the productive activities like manufacturing and agriculture.”). In fact, “the term ‘commerce’ was used in contradistinction to” such “productive activities.” *Lopez*, 514 U.S. at 586.

“Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, the Federalist Papers, and the ratification debates, the term ‘commerce’ is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.” *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 586-87 (Thomas, J., concurring) (quoting Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112-25 (2001))). Of thirty-four appearances of the term “commerce” in Madison’s notes on the constitutional convention:

Eight of these are unambiguous references to commerce with foreign nations which can only consist of trade. In every other instance, the terms “trade” or “exchange” could be substituted for the term “commerce” with the apparent meaning of the statement preserved. In no instance is the term “commerce” clearly used to refer to “any gainful activity” or anything broader than trade.⁶

⁶ Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 114-15 (2001).

Similarly, “[i]n none of the sixty-three appearances of the term ‘commerce’ in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange.”⁷ One helpful example of the use of “commerce” comes in Federalist 35. Hamilton asks, “Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?”⁸ Further, in the reports of the ratification debates, “commerce” “was uniformly used to refer to trade or exchange, rather than all gainful activity.”⁹

“Commerce . . . among the several states” means today what it meant more than two hundred years ago when the Constitution was ratified: trade across state lines. The Commerce Clause does not empower Congress to touch all economic activity, much less all activity that might have some attenuated effect on interstate trade. The textual evidence is clear. It is also buttressed by contextual evidence that those who ratified the Constitution did not believe themselves to be granting Congress power over the minutiae of intrastate life.

B. Contextual evidence demonstrates that the Commerce Clause grants to Congress only the ability to regulate interjurisdictional trade.

Not only is the evidence supporting the narrow meaning of the term “commerce” overwhelming, but

⁷ *Id.* at 116.

⁸ *Id.*

⁹ *Id.*

the historical and constitutional context also demands a narrow interpretation of the power granted by the Clause.

The Antifederalists were deeply concerned that the federal government would swallow up states' authority over internal affairs, inducing *The Federalist Papers*' assurances that the general government's powers were "few and defined."¹⁰ Of particular concern to the Antifederalists was the Necessary and Proper Clause.¹¹ For example, George Mason warned that, under that clause, the federal government could "extend [its] power as far as [it] shall think proper; so that the state legislatures have no security for the powers now presumed to remain to them; or the people for their rights."¹²

Hamilton dismissed such concerns, accusing the Antifederalists of holding the Necessary and Proper Clause up "in all the exaggerated colors of misrepresentation as the pernicious engines by which

¹⁰ The Federalist No. 45, at 241 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

¹¹ See, e.g., The Antifederalist No. 32, at 82-86 (Brutus) (Morton Borden ed. 1965) ("If then the objects of this power cannot be comprehended, how is it possible to understand the extent of that power which can pass all laws which shall be necessary and proper for carrying into execution? It is truly incomprehensible. A case cannot be conceived of, which is not included in this power.").

¹² George Mason, *The Objections of the Honorable George Mason to the Proposed Federal Constitution*, in *Pamphlets of the Constitution of the United States, published during its Discussion by the People* 331 (Paul Leicester Ford ed., 1888) available at <https://oll.libertyfund.org/titles/ramsay-pamphlets-on-the-constitution-of-the-united-states-1787-1788>.

their local governments were to be destroyed and their liberties exterminated,” when, in fact, it could “be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article.”¹³

Unlike the Necessary and Proper Clause, the Commerce Clause caused conspicuously little controversy during the pre-ratification debates.¹⁴ Madison noted that, in relation to the Articles of Confederation, “[t]he regulation of commerce . . . is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.”¹⁵ This demonstrates that at the time of the Founding, even those who were worried about an expansive federal government were largely unconcerned with the expansiveness of the commerce power, clearly indicating that that power was not understood by the founding generation to be the grant of broad power it acts as today.¹⁶

¹³ Hamilton, *supra* note 5, at 158.

¹⁴ Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment* 25 Minn. L. Rev. 432, 434 (1941) (“Among the first things that strikes one on going through the mass of materials dealing with the formation and adoption of the constitution is the nearly universal agreement that the federal government should be given the power of regulating commerce.”).

¹⁵ Madison, *supra* note 10, at 242.

¹⁶ Of course, the inverse is not thereby true. It is not true that just because the Antifederalists were concerned about the Necessary and Proper Clause, therefore the clause was in fact a

As the Federalists' assurances demonstrate, the purpose of the federal government was national unity, not national uniformity. "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."¹⁷ The Founding generation understood that the powers delegated to the federal government "w[ould] be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected."¹⁸ The federal government does not have a general police power. It cannot "regulate marriage, littering, or cruelty to animals, throughout the 50 states . . . Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

On the other hand, "The powers reserved to the several states [were to] extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state."¹⁹ Or, as Hamilton explained, "The administration of private justice between the citizens

general grant of authority. As will be discussed below, the Federalists were right to give their assurances that the Necessary and Proper Clause itself was not a source of unbridled federal authority, and those assurances formed the original meaning on which the Constitution's ratifiers relied.

¹⁷ Madison, *supra* note 10, at 241.

¹⁸ *Id.*

¹⁹ *Id.*

of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.”²⁰

This distinction between wholly intrastate activity and activity that crossed state lines was crucial. As Noah Webster said a month after the end of the constitutional convention, Congress cannot “interfere in any affair which respects one state only. This is the general line of division, which the Convention endeavored to draw, between the powers of Congress and the rights of the states.”²¹

A few months later, David Ramsay of South Carolina wrote that “all the powers of Congress . . . shew that they all may be referred to this single principle, ‘that the general concerns of the Union ought to be managed by the general government.’”²² Internal regulation, these supporters of the Constitution promised, would remain the province of state legislation.

This understanding of the federal government as concerned with national—not local—issues is also evident in the way those of the Founding generation discussed commerce as related to productive industries. Speakers and writers at the time of drafting and ratification frequently used “the term ‘commerce’ . . . in contradistinction to . . . productive

²⁰ The Federalist No. 17 at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

²¹ 1 *Debates on the Constitution* 145 (Bernard Bailyn ed., 1993).

²² 2 *id.* at 148.

activities,” such as agriculture and manufacturing. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring).

Arguing that the power to regulate navigation was encompassed in the power to regulate commerce, Professor Barnett quotes ratification debaters distinguishing between “commerce and navigation” on the one hand and “‘various branches of business thereon dependent’ as well as specifically from agriculture,” on the other.²³ In light of the Constitution’s purpose, this distinction between agriculture and manufacturing—activities that take place within a state—and commerce or trade—an activity that may cross state lines—makes perfect sense. Those who voted to ratify the Constitution in the states thus did not understand the Constitution to cede regulatory power over local activities to the federal government.

That is why, for federal district court Judge John Davis, a member of Massachusetts’s ratifying convention, it was inconceivable that Congress had the power to regulate the growing of corn. “It would not be admitted, I presume, that an act, so *extravagant*, would be constitutional . . . And why? Because it would be, most manifestly, without the limits of the federal jurisdiction, and relative to an object, or concern, not committed to its management.” *United States v. The William*, 28 F. Cas. 614, 622 (1808) (emphasis added).

²³ Barnett, *supra* note 6 at 126 (quoting Jonathan Elliot, ed, 2 *The Debates in the Several State Conventions on the Adoption of the Constitution* at 170, 83 (Taylor & Maury 2d ed. 1863)).

Had those considering the ratification of the Constitution believed that the Commerce Clause conferred “so extravagant” a power upon the federal government as was upheld in *Wickard* and its progeny, Antifederalists like Mason would have objected more strenuously and the Constitution would almost assuredly not have been ratified.

The expansive reading of the Commerce Clause not only violates the expectations of the ratifying public; it also undermines the guarantee of the Tenth Amendment. The Tenth Amendment was a reaffirmation, not a novel proclamation, that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. amend. X. The Court’s broad interpretation of the Commerce Clause, however, turns the Tenth Amendment “on its head.” *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The Court’s “case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution.” *Id.*

Textual context, too, demands a textualist reading of the Commerce Clause. An expansive interpretation of the clause gives Congress powers it does not have. Simultaneously, it renders redundant many of those powers the Constitution actually does vest in Congress. As Justice Thomas explains, “much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would have been surplusage if Congress had been given authority over matters that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 589 (Thomas, J., concurring).

As the Court has long recognized, “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,174 (1803). The words of the Commerce Clause certainly do not require that it be read in a manner that would render meaningless large swaths of constitutional language.

Were the Commerce Clause a grant of power to regulate all things which substantially affect commerce:

[T]here [would be] no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to “punish Piracies and Felonies committed on the high Seas,” cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that

Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Lopez, 514 U.S. at 588-89 (Thomas, J., concurring). Such an interpretation “simply cannot be correct.” *Id.* at 589. Surely all of this constitutional language is not swallowed up by one clause which, again, received very little attention at the time of the founding even from the Constitution’s critics.

Because a broad interpretation of the Commerce Clause would directly conflict with the ratifying public’s understanding of the federal government’s purpose, such an interpretation is not plausible. That broad interpretation—be it that the Commerce Clause grants Congress the power to regulate all of what today is considered commercial activity, or that it grants Congress the power to regulate those things that have a substantial effect on commercial activity—is inconsistent with the evidence of the text’s original meaning, is contrary to the general purpose of the national government as understood by those who drafted and ratified the Constitution, and would render much of Article I Section 8 of the Constitution a redundant waste of ink and parchment. The Commerce Clause grants Congress exactly the power it says it does: the power to regulate commerce among the several states. It is not a Trojan horse that once ratified would beget an unseen and unanticipated army of federal powers.

II. The Ban on Home Distilling is Unconstitutional Because it Depends on a Principle That Would Allow the Federal Government Overbroad Regulatory Power Under the Taxing and Commerce Clauses and Thus Undermine the Constitutional Bargain Between the People, the States, and the Federal Government.

The Constitution also grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” U.S. Const. art. I, § 8, cl. 18. The Sixth Circuit found that the home-distilling ban is a necessary and proper execution of Congress’s taxing power. The government below argued that it is both a necessary and proper exercise of Congress’s power under the Taxing and Commerce Clauses. It is not.

The scope of the powers vested in Congress by the Necessary and Proper Clause is limited by “the word ‘proper’ [which] in this context requires executory laws to be distinctively and peculiarly within the jurisdictional competence of the national government—that is, consistent with the background principles of separation of powers, federalism, and individual rights.”²⁴

Chief Justice John Marshall famously explained the Necessary and Proper Clause in *McCulloch v. Maryland*, writing, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to

²⁴ Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234-35 (1994) (emphasis added).

that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 17 U.S. 316, 421 (1819). Properly understood, *McCulloch* establishes two requirements for a law to be necessary and proper:

First, the law must be directed toward a “legitimate” end, which *McCulloch* defines as one “within the scope of the [C]onstitution”—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution . . . Second, there must be a necessary and proper fit between the “means” (the federal law) and the “end” (the enumerated power or powers) it is designed to serve . . . The means Congress selects will be deemed “necessary” if they are “appropriate” and “plainly adapted” to the exercise of an enumerated power, and “proper” if they are not otherwise “prohibited” by the Constitution and not “[in]consistent” with its “letter and spirit.”

United States v. Comstock, 560 U.S. 126, 160-61 (2010) (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). Thus, an act of Congress is not “proper” if it is “otherwise ‘prohibited by the Constitution’” or is “[in]consistent’ with its ‘letter and spirit.’” *Id.*

The home-distilling ban is not a proper means of exercising Congress’s taxing power, both because it depends on an expansion of Congress’s substantive

power beyond those enumerated and because it violates the principles of federalism.

The home-distilling ban is not a “proper” means of exercising Congress’s Taxing or Commerce powers because it is a substantive expansion of congressional power beyond those enumerated. The federal “government is acknowledged by all, to be one of enumerated powers.” *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). An “enumeration of powers is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (alteration in original) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)).

Despite the strict language of the Necessary and Proper Clause, Antifederalists were concerned that it vested in Congress vast powers. Whether the proposed Constitution vested too much power in the federal government was a central question for the ratifying generation.

Responding to Antifederalists’ concerns that the Clause granted Congress expansive powers, Hamilton assured the public:

[I]t may be affirmed with *perfect confidence*, that the constitutional operation of the intended government would be *precisely the same*, if the [Necessary and Proper Clause and the Supremacy Clause] were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by the necessary and unavoidable implication from the very act

of constituting a Federal Government, and vesting it with certain specified powers.²⁵

Hamilton continues, “What is a power but the faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power but a power of making LAWS?”²⁶

As Chief Justice Marshall explained in *McCulloch*, echoing Hamilton, the Necessary and Proper Clause does not confer upon Congress any “great substantive and independent power.” 17 U.S. at 411. The power to prohibit purely local, noneconomic activity is just such a “great substantive and independent power,” not delegated in the Constitution to Congress but necessary to uphold the home-distilling ban. On these grounds alone, then, the home-distilling ban is not a proper exercise of either Congress’s taxing or commerce power.

The Constitution’s enumeration of limited powers protected the liberty of the people in two ways; first as a limit on federal power *per se*, and second as a protection of state authority over local regulation. When the ratifying conventions adopted the Constitution, they did so expecting that they were adopting a system of government that established these overlapping objectives.

As shown above, the home-distilling ban exceeds the authority granted to Congress in its enumerated powers because it depends on a substantive and

²⁵ Hamilton, *supra* note 5, at 158 (emphasis added).

²⁶ *Id.* at 159 (emphasis in original).

independent power not vested in Congress by the Constitution. Relatedly, the home-distilling ban usurps power the Framers assured the public would be reserved to the states.

Granting Congress the power to regulate such wholly local—in fact domestic—noneconomic activity as distillation in one’s own home would upend the balance between the federal and state governments by transferring massive power to the federal government contrary both to the bargain struck by the ratifying generation and the explicit language of the Tenth Amendment.

The Tenth Amendment pledges that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. amend. X. That amendment grew out of pre-ratification debate about the relationship between the federal and state governments. Antifederalists expressed concern that the proposed federal government would swallow up the powers of the states. But proponents of the Constitution repeatedly assured the public that the federal government would concern itself with national, not local, issues, leaving regulation of local activity to the states.²⁷

²⁷ These statements, further, are not mere commentary. “The Federalists clearly intended these lists to induce public reliance. They were published and republished. They also evince a certain amount of coordination, for when the enumerations [of powers reserved to the States] overlapped they remained remarkably consistent.” Robert G. Natelson, *The Founders Interpret the Constitution: The Division of Federal and State Power*, 19 Fed.

Alexander Hamilton, who after the adoption of the Constitution clashed with Madison and others when he advocated for an expanded view of federal power, wrote in Federalist No. 17 as an advocate for the Constitution's adoption, "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."²⁸

James Madison wrote that the power of the federal government would, "be exercised principally on external objects, as war, peace, negotiation, and

Soc. Rev. 60, 60 (2018). *See also*, Robert Natelson, *More News on Powers Reserved Exclusively to the States*, 20 Fed. Soc. Rev. 92, 92 n. 4 (2019) ("As today, representations of meaning by a measure's sponsors carried far more weight than allegations by opponents. Such representations bound the sponsors later."). Maxims of construction prohibited a "bait and switch" of offering one interpretation to get a measure passed or ratified and another interpretation after its adoption. *See id.* While the subjective intentions of the Framers, whether individually or as a whole, are not legally binding, the public statements that were intended to induce reliance on the part of the ratifiers should be given weight in determining the original public meaning of the Constitution. Original meaning is "[t]he understanding of a text, esp. an important text such as the Constitution, reflecting what an informed, reasonable member of the community would have understood at the time of adoption according to then-prevailing linguistic meanings and interpretive principles." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 435 (Thomson/West 2012). An informed, reasonable ratifier would have read the proposed Constitution in light of the explanations provided by proponents.

²⁸ The Federalist No. 17 at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

foreign commerce,” while, “[t]he powers reserved to the several states [would] extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state.”²⁹

Madison assured the public that “the most convincing evidence” showed “that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union.”³⁰ At the Virginia ratifying convention, “he identified as outside the sphere . . . anything that would ‘subvert the whole system of state laws.’”³¹

“At the North Carolina ratifying convention and in other venues,” James Iredell, who would later become a Justice of this Court, “emphasized that all authority not granted to the federal government was reserved exclusively to the states and the people.”³² This included the “punishment of crimes other than treason, offenses against the law of nations, or felonies on the high seas.”³³

²⁹ Madison, *supra* note 10.

³⁰ The Federalist No. 46 at 248 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

³¹ Natelson, *The Founders Interpret the Constitution*, *supra* note 27 at 61 (quoting *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* [hereinafter “Elliot’s Debates”] 620 (Johnathan Elliot ed., 2d ed. 1901)).

³² *Id.* at 63.

³³ *Id.* (quoting Elliot’s Debates at 219). And there are many more

This bargain was made explicit with the adoption of the Tenth Amendment.

When the Federal Government exercises the “powers delegated to the United States by the Constitution,” U.S. Const. amend. X, the resulting law supersedes and displaces state law where the two conflict. U.S. Const. art. VI, cl. 2; *McCulloch*, 17 U.S. at 316 (“The government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the constitution, form the supreme law of the land.”). Thus, if the taxing or commerce powers include the power to ban home distilling and any other purely local, yet federally taxed, activity, then the Necessary and Proper Clause includes the authority to displace state regulation of all such activities.³⁴ The result would be that a great mass of regulatory power is held in reserve by the states only until the federal government decides to tax and regulate that activity.

such statements. See generally *id.*; Natelson, *More News on Powers Reserved Exclusively to the States*, *supra* note 27; Robert G. Natelson, *The Enumerated Powers of the States* 3 Nev. L. J. 469 (2002-2003).

³⁴ The implications of the Government’s proposed principle here are unbelievable. The Government’s theory, for example, would presumably mean that Congress could levy a tax on all production of food for human consumption and then ban at home food production, forcing Americans to eat at restaurants where the Federal Government could ensure that the excise tax on cooking was paid. The point, of course, is not that Congress would ever pass such a law; the point is that any theory of constitutional application that entails such vast federal power over the minutiae of local daily life would undermine what all involved believed they were agreeing to in proposing and ratifying the Constitution of the United States.

The home-distilling ban thus rests on a principle that would make the powers of the Federal Government incredibly “formidable to those reserved to the individual States,”³⁵ in contravention of the constitutional bargain to which the states and the people agreed.

If the ratifying public had understood the Constitution as vesting in Congress massive regulatory power touching even local and private activity, the Constitution would almost assuredly not have been ratified. The home-distilling ban is thus both prohibited by the Constitution and inconsistent with its letter and spirit. For these reasons, it cannot be a proper exercise of Congress’s power under either the Taxing or Commerce Clause.

Because the home-distilling ban is not supported by Congress’s enumerated powers or the Necessary and Proper Clause, the Court should grant certiorari and hold that the home-distilling ban is unconstitutional.

³⁵ Madison, *supra* note 30.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and rule for Petitioners.

Respectfully submitted,

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