No. 26-93

IN THE

Supreme Court of the United States

JOHN REAM,

Petitioner,

v.

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

AMICUS CURIAE BRIEF OF TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Texas Public Policy Foundation ("TPPF") is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, TPPF has worked to advance these goals through research, policy advocacy, and impact litigation.

As part of that litigation, TPPF regularly brings Commerce Clause challenges in the lower courts. See, e.g., *Smith v. U.S. Department of the Treasury*, 761 F. Supp. 3d 952 (E.D. Tex. 2025) (Corporate Transparency Act); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021) (federal vaccine mandate); *Terkel v. CDC*, 15 F.4th 683 (5th Cir. 2021) (federal eviction moratorium); *Am. Stewards of Liberty v. DOI*, 960 F.3d 223 (5th Cir. 2020) (Endangered Species Act). TPPF believes that this on-the-ground experience with how this Court's Commerce Clause jurisprudence works in practice will aid this Court in deciding whether to grant certiorari in this case.

SUMMARY OF THE ARGUMENT

As originally postured, this case presented an appropriate vehicle for this Court to revisit its Commerce Clause jurisprudence. However, in its recently filed brief,

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1. In accordance with Rule 37.2, both Petitioner's and Respondent's counsel were provided timely notice of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel other than amicus curiae made a monetary contribution intended to fund preparation or submission of this brief.

the government appears to have abandoned any argument that the statute at issue is justified under the Commerce Clause.

Instead, the government has chosen to defend the constitutionality of the statute solely as a Necessary and Proper exercise of its Taxing Power—the same approach it took in *McNutt v. U.S. Dep't of Justice*, 173 F.4th 204 (5th Cir. 2026).

That choice matters. If the government's choice not to argue the Commerce Clause binds it in this and future litigation involving this statute, then there may be no need for this Court to address the Commerce Clause question here. But, if the government remains free to revive that argument later—after choosing not to defend the statute on that ground now—then the issue will continue to recur without guidance from this Court.

In that event, this Court should resolve the issue now. It should grant certiorari on the Commerce Clause question presented by the Petitioners and clarify whether *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), remain meaningful constraints after *Gonzales v. Raich*, 545 U.S. 1 (2005).

If the Commerce Clause question remains live in this case, it warrants this Court's review. When this Court decided *Lopez* and *Morrison*, it put down a marker: Congress's authority to regulate interstate commerce under the substantial-effects test is broad, but it is not unlimited. Those decisions matter not only because they rejected particular exercises of federal power, but because they supplied lower courts with a framework for deciding when Congress has crossed the constitutional line.

At the time, some predicted a Commerce Clause revolution. That revolution has not materialized. In the decades since *Morrison*, this Court has not struck down a single statute or regulation as exceeding Congress's authority under the Commerce Clause.

The reason is simple. Five years after *Morrison*, this Court decided *Raich*. While *Raich* claimed to leave *Lopez* and *Morrison* in place, it did not carefully follow their framework. Written by the dissenters in *Morrison*, the majority opinion in *Raich* used broad language that looks far closer to "rational basis scrutiny" than the meaningful, federalism-sensitive approach mandated by those cases.

The result has been confusion. Advocates and lower courts that seek to impose limits on the Commerce power apply the familiar four considerations from *Morrison*. As a result, sometimes these courts find federal actions unconstitutional.

Advocates for expansive government power point to the rational basis language from *Raich* to avoid applying the *Morrison* considerations altogether or use that language as an additional standalone reason to uphold federal action even after the *Morrison* considerations have been applied. Under that approach, the Commerce Clause analysis is transformed into a hyper-deferential form of rational basis scrutiny where the government almost always wins.

Assuming the government is not bound by its strategic abandonment of the Commerce Clause here, this case provides a vehicle to fix this problem. Like the prohibition on marijuana possession in *Raich*, the distillery regulations here regulate purely intrastate activity. But unlike *Raich*, the legislative record here does not contain the sort of findings, an elaborate interstate economic regulatory scheme, or concerns about fungible commodities that at least plausibly could have connected *Raich* to the *Morrison* approach. This case would therefore provide an opportunity to overturn *Raich*, clarify its connection to *Morrison*, or adopt a new test altogether.

ARGUMENT

I. Lower Courts Need Guidance on the Application of *Lopez* and *Morrison* After *Raich*.

The test this Court crafted in *Lopez* and *Morrison* was designed to solve a problem—how can the Court maintain its "substantial effects" precedents, like *Wickard v. Filburn*, 317 U.S. 111 (1942), without effectively blessing a federal police power? While not explicitly originalist, the test the Court came up with was both elegant and at least defensible on originalist grounds.

As members of this Court would later explain, the "substantial effects" test properly arises—if at all—from the Necessary and Proper Clause, not the Commerce Clause alone. *Raich*, 545 U.S. at 34 (Scalia, J., concurring).

As originally understood, the Necessary and Proper Clause had teeth. As St. George Tucker explained in his 1803 treatise, the Necessary and Proper Clause was not intended to "enlarge[] any power specifically granted, nor [was] it a grant of new powers to congress."

1 St. George Tucker, *Blackstone's Commentaries with Notes of Reference, to the Constitution and Law of the Federal Government of the United States and of the Commonwealth of Virginia*, app. Note D at 287-89 (St. George Tucker ed., Lawbook Exchange Ltd. 2011) (1803). Rather, the Necessary and Proper Clause was intended to provide textual guidance for the judiciary to prevent the "undue extension of the legislative power." *Id*.

Sixteen years later, this Court articulated how those limits work. In *McCulloch,* this Court held that to be justified under the Necessary and Proper Clause, a law must be both Necessary—*i.e.*, "plainly adapted" to the exercise of an enumerated power—and Proper—*i.e.*, consistent with the "letter and Spirit of the Constitution." *NFIB v. Sebelius,* 567 U.S. 519, 537 (2012) (Roberts, C.J.) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

The four *Lopez/Morrisson* considerations effectively track this approach. To determine whether the regulation is "plainly adapted" to the regulation of interstate commerce, the *Lopez/Morrison* framework asks whether a regulation targets economic activity, contains a jurisdictional element, was based on Congressional findings showing its connection to a broader regulation of interstate commerce, or requires the court to pile inference upon inference to uphold the law. See *Morrison*, 529 U.S. at 609–12.

To determine whether the regulation is "consistent with the letter and spirit of the Constitution," the *Lopez/ Morrison* framework asks whether the law intrudes on traditional powers of the states or provides a meaningful limiting principle that would prevent federal authority from creeping into a general police power. See *Id*. at 613.

If you squint hard enough, that framework allows the Court to plausibly uphold the Depression Era wheat regulations at issue in *Wickard* based on the narrow scope of the regulation, the robust congressional findings in that case showing the interconnectedness of the wheat market at the time, and the unique circumstances of the Great Depression. See *Wickard*, 317 U.S. at 125. But it would allow the same Court to strike down a federal prohibition on firearms possession in a school zone, (see *Lopez*, 514 U.S. at 560 (distinguishing *Wickard*)) or a federal mandate to purchase health insurance. See, generally *Sebelius,* 567 U.S. at 549 (Opinion of Roberts, C.J.) (same). In short, the *Lopez/Morrison* framework allows the Court to treat *Wickard* as a narrow fact-driven opinion rather than a new fount of unlimited federal power.

As explained below, however, the broad language in *Raich* has thrown that delicate balance into disarray.

A. Despite contrary guidance from this Court, some lower courts have treated *Raich* as if it overturned *Lopez* and *Morrison*

When this Court decided *Raich*, it claimed that it was not departing from its prior holdings in *Lopez* and *Morrison*. *Raich*, 545 U.S. at 25. But the uncomfortable fact is that the opinion in *Raich* was largely written by the dissenters in *Morrison*. As a result, *Raich* includes some of the rational-basis style language from the *Morrison* dissents and does not explicitly walk through the four considerations that were so essential to the majority opinion in *Morrison*.

The result has been confusion. Some courts have continued to faithfully apply the *Lopez/Morrison* framework, treating *Raich* as a faithful—even if sloppy—application of that approach. See, e.g., *Smith v. United States Dep't of the Treasury*, 761 F. Supp. 3d 952, 969 (E.D. Tex. 2025); *Terkel v. CDC*, 521 F. Supp. 3d 662, 671-77 (E.D. Tex. 2021). Others have used *Raich* as a standalone test, that can effectively replace the *Lopez/Morrison* considerations. See, e.g., *United States v. Doe*, No. 26-9900, 2026 LX 426341, at *4-5 (10th Cir. Aug. 3, 2026) (noting the four *Morrison* factors in passing, but holding that they are not dispositive, and then using *Raich* as a standalone way to resolve the case). Clarity is needed.

B. This case provides a vehicle to reconsider or clarify *Raich*

The cleanest way to resolve the confusion in the lower courts would be to overturn *Raich* in favor of an approach more in line with the original public meaning of the Constitution. See *Lopez*, 514 U.S. at 584 (Thomas, J., concurring). But even short of what Justice Scalia once described as Justice Thomas's "bloodthirsty originalism," this case provides a workable vehicle to clean up the modern Commerce Clause and Necessary and Proper Clause tests.

Cases like *Raich* and *Wickard* both turned on information gathered from robust Congressional findings tying those laws to broader statutory schemes regulating interstate commerce that would allegedly have been undercut but for the regulation of the local activities at issue—an essential element of the *Lopez/Morrison* analysis. In *Raich*, those findings showed that interstate marijuana was effectively indistinguishable by law enforcement from intrastate marijuana, thus making it extremely difficult to effectively police possession of the former without policing possession of the latter. *Raich*, 545 U.S. at 12 n.20. In *Wickard*, the Court pointed to stipulated findings regarding the interconnectedness of wheat markets and the inability to control those interstate markets effectively without the challenged regulation. *Wickard*, 317 U.S. at 125-129.

Putting aside whether those findings should have been sufficient to uphold those regulations, they certainly differ from the absence of Congressional findings or limitations here. Were this Court to take this case, it could simply distinguish *Wickard* and *Raich*, apply a firm version of the *Lopez/Morrison* framework, and let the chips in this case fall where they may. After all, even applying a strong version of *stare decisis*, Courts need not expand non-originalist precedents beyond their explicit holdings.

Such a decision could clarify that:

1. All substantial effects test cases are Necessary and Proper Clause cases. See *Raich*, 545 U.S. at 34 (Scalia, J., concurring).

2. The Necessary and Proper Clause mandates more than mere means-ends, rational basis scrutiny. See *United States v. Comstock*, 560 U.S. 126, 151-52 (2010) (Kennedy, J., concurring) (noting the danger of importing rational basis language into discussions of the Necessary and Proper Clause).

3. *Lopez* and *Morrison*, rightly understood, provide a viable framework for addressing limitations on Congress's authority to regulate interstate commerce.

Clarity on those three points would pull this Court's Commerce Clause jurisprudence significantly closer to something like the Constitution's original public meaning, and would provide a significant service to both litigants and the lower courts.

This clarity matters. In the past decade alone, lower courts have seen Commerce Clause challenges to the Endangered Species Act, a federal vaccine mandate, a federal eviction moratorium, federal firearms regulations, and portions of the Corporate Transparency Act. See, e.g., *United States v. Squire*, No. 25-30324, 2026 LX 388477 (5th Cir. July 20, 2026) (firearms); *Smith*, 761 F. Supp. 3d 952 (Corporate Transparency Act); *BST Holdings*, 17 F.4th 604 (federal vaccine mandate); *Terkel*, 15 F.4th 683 (federal eviction moratorium); *Am. Stewards of Liberty*, 960 F.3d 223 (Endangered Species Act). Nothing suggests these challenges are slowing down.

CONCLUSION

In many ways, this Court's decision in *Wickard* was a compromise. It sacrificed the clarity of its pre-New Deal jurisprudence for the perceived benefits of more flexibility to regulate the national economy in dire circumstances.

But, like any compromise, it had tradeoffs. When taken broadly, the substantial effects test popularized by *Wickard* removed any meaningful limiting principle on federal power.

Faced with these consequences, this Court wisely created a workable stopgap in *Lopez* and *Morrison*. But broad language adopted less than a decade later in *Raich* threatens to eliminate that stop-gap *sub silentio*, quietly returning this Court's jurisprudence to the unlimited view of federal authority it wisely rejected.

The government's briefing decision to avoid the Commerce Clause here does not eliminate that problem. It only changes how the Court should address it. If the government is bound by its decision to abandon the Commerce Clause as a defense of this statute, then the Court can say so. But if the government remains free to revive that argument later, this case presents an opportunity to fix the confusion now.

Either way, the Court should not leave litigants and lower courts guessing.

Respectfully submitted,

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