NO. 26-93

In the Supreme Court of the United States

JOHN REAM,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TREASURY, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

Ondray T. Harris
Counsel of Record
Soriya R. Chhe
Marin Murdock
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-2265
ondray.harris@cei.org

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Counsel for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES (Cont.)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

INTEREST OF THE AMICI CURIAE[1]

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1 Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel provided timely notice to the parties of the intent to file this brief.

SUMMARY OF THE ARGUMENT

Federal law prohibiting home distilling deprives Americans of the right to pursue an activity whose history predates the founding of America itself. Home distilling and the consumption of spirits was an everyday routine in early America. Sarah H. Meacham, *Every Home a Distillery: Alcohol, Gender, and Technology in the Colonial Chesapeake* 18 (2009). It was legal before, during and after the Constitution was drafted, passed and ratified in 1788. The activity remained legal for 80 years, until 1868, when Congress permanently outlawed this common practice in the spirit of taxation.

This Court is now presented with a circuit split on whether the ban should continue. The Fifth Circuit reversed the ban, finding it: (1) exceeded Congress' taxing power because it does not further the collection of revenue and (2) unjustifiable under the Necessary and Proper Clause because it is not "plainly adapted" to "effectuate Congress's taxation of spirits" and improperly "invaded the reserved police and regulatory power of the states." *McNutt v. DOJ*, No. 24-10760, slip op. at 17, 21 (5th Cir. Apr. 10, 2026).

The Sixth Circuit affirmed the ban. Although it agrees that the ban exceeds Congress' taxing power because it proscribes payment to the Federal treasury, the court found it justifiable under the Necessary and Proper Clause. Among other things, the court cited to a "history of tax evasion as old as the Republic itself" to justify the ban as necessary for the collection of distilled spirit taxes. *Ream v. U.S. Dep't of the Treasury*, No. 25-3259, slip op. at 8 (6th Cir. Apr. 21, 2026). In doing so, the court ignores the rest of the historical record up until that point. For 80 years after America's founding, the government taxed liquor without ever banning home distilling. The Court ignored Congress' own role leading up to the ban that culminated in, if not created, the government's inability to effectively collect taxes on spirits.

The history of home distilling in America leading up to the 1868 ban undercuts the Sixth Circuit's narrative, demonstrating instead that Congress's ban on home distilling was neither a necessary nor proper exercise of its Article I power.

ARGUMENT

I. The History of Home Distilling in America Undermines the Sixth Circuit's Determination That Banning It Is a Necessary and Proper Exercise of Congress's Taxing Power

The art of distilling started thousands of years ago, tracing back to ancient Mesopotamia around 3500 BC and has since been practiced in homes and other settings across the world. Maria Rosaria Belgiorno, *Ancient Distillation and Experimental Archaeology about the Prehistoric Apparatuses of Tepe Gawra*, EXARC J., Issue 2020/2, 2020. In America, it arrived with the colonists. Records from colonists dating back to the 1600's recall the successful distillation of spirits from corn with stills they brought over from Europe. *Letter from George Thorpe to John Smyth* (Dec. 19, 1620), in *Encyclopedia Virginia*, encyclopediavirginia.org (last visited Aug. 13, 2026).

The distillation of alcohol was a routine and vital part of early American life. *Bourbon and Kentucky: A History Distilled* at 36:35, Witnessing History Education Foundation 2008, distillerytrail.com. Alcohol recipes preceded those for food in cookbooks. Meacham, *supra* 8. Alcoholic beverages were a staple for early Americans. *Id.* at 1-2. It was the only safe and accessible beverage for colonists. *Id.* at 1 "Colonists drank alcoholic beverages during church services, in courtroom proceedings, in the House of Burgesses, at quiltings, at home, at taverns, at weddings, and at funerals." *Id.* at 2. The provision of alcoholic beverages was written into contracts for indentured servitude along with shelter, clothing and food. *Id.* at 6. By historical accounts of a Virginia plantation from the 1600s, 150 gallons of brandy and four hogsheads of rum alone was consumed annually to the tune of £100 per year. *Id.* Alcohol was used in medicine. *Id.* at 8. Babies and sick people bathed in spirits. *Id.* Spirits were used as cleaning agents. *Id.* Candidates handed out liquor to their supporters at the polls. Even George Washington spent over £37 on brandy, rum, cider, beer, and wine to woo freeholders during his 1758 run for the House of Burgesses. *Id.* at 69.

In Chesapeake, making alcohol was left to women. *Id.* at 24. Women brewed beer, cider and distilled spirits. *Id.* Distillation was the most effective way to preserve fruit cider, grain and other early American crops. *Id.* at 56. In the 1700s, when stills were expensive, owners passed stills down to their children. *Id.* at 59. "[B]y the late eighteenth century, the diffusion of the new apples, presses, and stills meant that even men of smallplanter status could make most of their alcohol their households required at home." *Id.* at 115.

During the American Revolution, "George Washington and the Quartermaster's Department adopted rum and whiskey as part of the official ration." *Id.* at 109. In 1781, Congress contracted with individual men to provide army rations, which included, among other provisions, a daily ration of one gill of rum per man. *Id.* at 113.

After leaving office, in 1797, George Washington himself started a distillery on his plantation at Mount Vernon. *Id.* at 92. Thomas Jefferson owned a home still at Monticello, where he made brandy from "Lemon Cling" peaches he cultivated in his orchards. Robert Stiffler, *Seeds of History*, VA. PILOT, July 3, 1994, at G1, https://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1994/vp940703/07010066.htm. Patrick Henry also distilled at home. *Letter from Patrick Henry to unnamed neighbor* (July 28, 1794), in *RR Auction*, https://www.rrauction.com/auctions/lot-detail/31949500348241-patrick-henry-henry-writes-to-his-neighbor-concerning-supplies-of-rye-and-corn-for-his-distillery-only-months-before-the-whiskey-rebellion-in-western-pennsylvania/ [perma.cc] (last visited Aug. 14, 2026). During the early nineteenth century, Americans began "heading westward, where corn grew more easily than other crops in the thin, rocky soil of the newly settled areas." Meacham, *supra* 123. Given the distance, western farmers found it difficult to bring produce like corn, rye, and grain to market before the goods spoil. *Id.* and Harrison W. Mark, Whiskey Rebellion, *World History Encyclopedia* (Aug. 13, 2024), https://www.worldhistory.org/Whiskey_Rebellion/. So, they prevented "their produce from spoiling through distilling it as whiskey." Meacham, *supra* 123. This also made it easier to transport. Mark, *supra*. Whiskey prices dropped as supply rose. Meacham, *supra* 123. And Americans began drinking larger amounts of corn whiskey. *Id.*

Distilling alcohol was so central to early America that it caused an uprising when Alexander Hamilton proposed a whisky tax to pay for the Revolutionary War, which Congress passed in 1791. Mark, *supra*. The farmers out west rebelled because it was seen as an attack on their livelihood. *Id.* Most of the farmers operated small stills. *Id.*

The Whisky Rebellion, as it was later named, was the first major rebellion after America adopted the U.S. Constitution. *Id.* Opposition grew so strong that it had to be quelled personally by America's sitting president, George Washington. *Id.* Although the riots ended, federal tax collectors had difficulty collecting the tax. *Id.* In 1802, the year after Thomas Jefferson became president, Congress repealed the Whiskey Act. *Id.* Importantly, in the face of active resistance and tax evasion, the founders did not respond with a ban on home distilling to address the hardship of collecting taxes. Hamilton's enforcement of the tax required every still, no matter how small, to be registered with the federal government. U.S. Statutes at Large, 1 Stat. 199, 205 (1791) He did not, however, ban home stills.

Distilling continued to be an active part of American life. Still technology continued to improve over time. Meacham, *supra* 103. In 1801, with the invention of a condenser, distilling found more patrons, with early authors noting, "'we find men of science, men of capital, lawyers, doctors, and merchants abandoning other pursuits to learn the art of extracting spirit from grain.'" *Id.* "Distilling was no longer merely a household chore or a farmer's practice; it had become a hobby." "Revenue over Reason: A Case for Home Distilling," is formatted as: Ben Semark, *Revenue over Reason: A Case for Home Distilling*, CEI BLOG (Aug. 6, 2026), https://cei.org/blog/revenue-over-reason-a-case-for-home-distilling/.

Between 1780 and 1800, "25 percent of households in Augusta County, Virginia, owned stills." Meacham, *supra* 106. In 1810, "Bourbon County boasted of 128 distillers, one of every five farmers in the county was a distiller, a statistic that mirrored much of the Commonwealth of Kentucky." *Bourbon and Kentucky: A History Distilled* at 36:35 (Witnessing History Education Foundation 2008), distillerytrail.com

The Whisky Act was not the only time Congress imposed taxes related to spirits. To fund the War of 1812, Congress imposed a temporary tax to fund the military in 1813. Act of July 24, 1813, ch. XXV, 3 Stat. 42. But, rather than taxing alcohol, Congress imposed a license tax on distillers and retailers. Act of July 24, 1813, ch. XXV, 3 Stat. 42 and Act of Aug. 2, 1813, ch. 39, 3 Stat. 72. For distillers, the license tax was based on the cubic capacity of the still and the license term length purchased. Act of July 24, 1813, ch. XXV, 3 Stat. 42. The tax applied to anyone owning or superintending a still. *Id.*

For enforcement purposes, the law allowed collectors "to apply at all reasonable times for admittance into any distillery or place where any still or stills are kept or used" to examine and measure the still. Act of July 24, 1813, ch. 25, § 6, 3 Stat. 42, 43. Refusing admittance carried a $500 forfeiture. *Id.* Unlike the 1868 Act at 26 U.S.C. § 5203, the 1813 law provided for reasonable enforcement measures for access and imposed a monetary penalty rather than forcible entry. The law also imposed penalties for false statements and rewards for informers. Act of July 24, 1813, ch. 25, § 3, 3 Stat. 42, 43. The law was scheduled to sunset at the end of the war. Act of July 24, 1813, ch. 25, § 14, 3 Stat. 42, 44.

In December 1814, Congress added a 20 cent-per-gallon excise on the spirits, in addition to the license tax. Act of Dec. 21, 1814, ch. 15, §§ 1, 23-24. In 1816, Congress abolished the per-gallon excise tax. Act of Apr. 19, 1816, ch. 58, §§ 1-3. In December 1817, the distiller license tax was repealed. Act of Dec. 23, 1817, ch. 1, §§ 1-2. Federal internal taxation of spirits ended entirely until the Civil War.

The 1813 tax was better tolerated than the Whiskey Act. David D. Stewart & Joseph J. Thorndike, *Drunk Tax History*, TAX NOTES TALK (Apr. 1, 2018), taxnotes.com. It allowed the government to successfully tax spirits to help manage its revenue crisis without imposing any ban on home distilling. This runs counter to the factual basis the Sixth Circuit relied on in finding the 1868 tax to be a "necessary and proper" measure for collecting taxes. It shows that the government is capable of collecting taxes without resorting to extreme measures of banning traditionally legal activities in the home of Americans.

The Civil War revived a permanent excise tax on spirits. To finance the war, Abraham Lincon signed the Revenue Act of 1862, ch. 119, 12 Stat. 432 (1862), setting the tax at 20 cents per gallon on distilled spirits. Two years into the war, in June 1864, Congress increased the taxes to $1.50 per gallon. Act of June 30, 1864, ch. 173, § 55. By the end of the war in 1865, spirit excise taxes peaked to $2.00 per gallon. *Act* of June 30, 1864, ch. 173, § 55.

With exception of the Whiskey Act and the War of 1812, "from the establishment of our government till the outbreak of the Civil War, distilled spirits were for the most part comparatively free from taxation . . . " Jeremiah W. Jenks, *The Development of the Whiskey Trust*, 4 Q. J. ECON. 241, 297 (1890). As such, spirits were cheap and there was little incentive to overproduce in the years leading up to 1862. *Id.* When Congress began rolling out the taxes and raising it over those two years, it did not make the new rates effective immediately. *Id.* Instead, the increases were announced months in advance. Act of June 30, 1864, ch. 173, § 55. While doing so, Congress also exempted all existing liquor supplies that were already distilled before the taxes took effect.

The advance notice of tax increases created tremendous speculation in whiskey. Jenks, *supra.* As a result, "[t]he stock of whiskey and high wines accumulated in the country … without precedent." *Id.* The gains realized by stock holders in anticipation of the tax increase were estimated at no less than $50,000,000. *Id.* After the speculation ended, excess production capacity and huge stockpiles made it nearly impossible for honest distillers—those not defrauding the revenue office—to survive. *Id.* The surplus product, high tax and decline in demand, "kept the distilling business in a comparatively depressed condition after the speculative period following the war." *Id.* The excessive $2.00 per gallon tax on a 30 cent per gallon product led to massive tax evasion. *Id.*

In an investigative Committee Report dated March 12, 1868, Representative Charles Henry Van Wyck from the Committee on Retrenchment discussed his investigation of rampant fraud that resulted from the exorbitant tax hike. H.R. Rep. No. 40-24, at 1-8 (1868) (*Whiskey Frauds report from the H. Comm. on Retrenchment*), reprinted in 1357 U.S. Serial Set. Fraudulent conduct, however, was not limited to distillers, and the problems most certainly did not come from home distillers. *Id.* Referring to the group as a "ring," VanWyck described a crime syndicate that comprised of commercial distillers, government officers and officials who collectively profited from the rampant fraud, noting in some case "warehouses had the appliances of fraud connected with them easily to be seen and detected except by officers sworn to protect the revenue." *Id.* According to Van Wyck, "[t]he whiskey ring is stronger than political combinations, controlling the selection of inspectors; in some instances it has dictated the appointment of consuls, to have a willing tool at foreign ports." *Id.* "The proof showed wonderful facility in bribing storekeepers carrying the keys, and the assessors making returns for the distillery." *Id.* In one case, a distillery owner "engaged a political partner, went to another district, paid no tax to the government, while officers knew he was publicly manufacturing." *Id.*

The report found the existing laws created a protection paradox: "Congress attempted to check this class of frauds by authorizing the appointment of an inspector for each distillery, requiring him to be paid by the distiller, thus making him a creature of the distiller." *Id.* To solve the problem, he proposed:

> First of all is needed a simplification of the system and abolition of bonded warehouses, that the great and rapacious army of officials

> may be mustered out. Second, that the tax should be materially reduced, and collected at the still estimating the capacity. All plans looking to a correct estimate of production are liable to serious objections and many abuses, but the capacity system has probably the least. Experts can ascertain to a reasonable certainty, basing judgment upon quantity of beer, fermenting power, size of still, surface of heat, and extent of' steam; then storekeepers, agents, and inspectors might be consigned to the honest walks of life. The tax should be reduced to fifty cents per gallon. The history of all nations shows that a tax greatly in excess of the cost of production increases the risk of determined frauds and violations. Smuggling is never so generally practiced or so remunerative as when duties are high.

Id.

VanWyck's investigative report identifies corruption and high taxes as the drivers of the widespread fraud that Congress was attempting to tackle. In fact, he noted "[d]istillation from grain requires cumbrous machinery, and the place cannot easily be kept secret." *Id.* The problem was not that officials could not observe the stills or spirits being moved, but because they were in the pockets of commercial distillers and turned a blind eye. *Id.* He recommended lowering the tax rate based on history: "[w]e ought not to ignore the experiences of the world, certainly not of our own; in 1864, when the tax was twenty and sixty cents, nearly as much revenue was realized as in 1866," when the tax was raised to $2.00. *Id.*

The records are consistent with VanWyck's observation. In 1864, spirit taxes generated $28,431,797.83 in revenue. Bruce E. Stewart, *Moonshiners and Prohibitionists: The Battle over Alcohol in Southern Appalachia* 78 (2011). After Congress raised taxes from 60 cents to $2 a gallon, "revenues dropped to $15,995,701.66 in 1865, as high taxes encouraged evasion." *Id.* Home distillation was not the root cause of tax evasion. It was high taxes that distorted the market and made illegal distillation profitable. When taxes were reasonable at the beginning of the Civil War, there was no incentive to produce illegal spirits.

In June 1868, head of the special revenue committee David A. Wells, Commissioner of Internal Revenue, E.A. Rollins, and U.S. Secretary of Treasury Hugh McCulloch met in Washington and arrived at the same conclusion as Van Wyck. *Id.* They pointed to "two causes as operating to reduce revenue: an excessively high [tax] rate, and the inefficiency and corruption of officials." *Id.* Wells later explained that "in framing for the assessment and collection of taxes, to know when the maximum revenue point in the case of each tax is reached, and to recognize that beyond that point the government 'over-reaches itself." *Id.*

Soon after taxes on spirits were lowered from $2.00 to 50 cents, tax revenue jumped from just over $13 million in 1868 to more than $45 million in 1869. Joseph J. Thorndike, *An Army of Officials: The Civil War Bureau of Internal Revenue*, 93 TAX NOTES 1739 (2001). Thus, the government's failure to collect taxes stemmed not from home distilleries, but from the excessive tax rate itself. However, despite the near-tripling of tax revenue, tax fraud in various regions of America remained persistent.

But, the prevalence of tax-evasion in those regions was attributable less to home distilling and more to government corruption. In Vinegar Hill, Brooklyn, where tax-evasion distillation occurred in the basement of residential buildings, the government's failure to collect tax revenue stemmed from blatant corruption. Rebecca Dalzell, *The Whiskey Wars That Left Brooklyn in Ruin*s, SMITHSONIAN MAG. (Nov. 18, 2014), https://www.smithsonianmag.com/history/whiskey-wars-left-brooklyn-ruins-180953352/. In fact, between 1869-1871, the federal government, exercising its expanded powers, repeatedly raided the Vinegar Hill area. *Id.* Yet, it had little success because "law enforcement was on its payroll." *Id.* So, "the neighborhood was never taken by surprise." *Id.* In 1871, "when 1,400 soldiers stormed the district . . . , they took just one still and no prisoners" because "clearly the whiskey men were tipped beforehand." *Id.*

Tax evasion also continued in parts of Appalachia, where moonshiners hid their stills "in unfrequented districts, sometimes in the midst of an impenetrable jungle, or laurel brake, and carefully concealed when not in operation." Thorndike, *supra.* Others dug tunnels leading to a cave, where they hid their stills. *Id.* Some moonshiners hid their stills in a swamp. *Id.* In Appalachia, tax evasion persisted, and the government's failure to collect tax revenue there was not attributable to home distilling because it did not take place in the home.

In 1871, "Republican party operatives formed the Whiskey Ring . . . to raise funds for political campaigns in Missouri and other western states." Timothy Rives, *Grant, Babcock, and the Whiskey Ring,* PROLOGUE, Fall

2000, https://www.archives.gov/publications/prologue/2000/fall/whiskey-ring-1. The ring's operation was:

> [c]omplex in detail, but simple in design, the ring made money by selling more whiskey than it reported to the Treasury Department. Its success required collusion at every point of the production, distribution, and taxation process. To pull it off, ring leaders recruited, impressed, and blackmailed distillers, rectifiers, gaugers, storekeepers, revenue agents, and Treasury clerks into the operation. They split the seventy-cents-a-gallon tax money. . . .

Id.

By 1873, the ring developed into "a purely criminal enterprise, defrauding the federal treasury of an estimated million and a half dollars a year." *Id.* It continued until Ulysses S. Grant appointed Benjamin H. Bristow as Secretary of the Treasury in June 1874. Matthew C. Stephenson & Mariano-Florentino Cuéllar, Taming Systemic Corruption: *The American Experience and Its Implications for Contemporary Debates*, 151 World Dev. 105753 at 4 (2022). Bristow "exposed a ring of distillers, shopkeepers, and corrupt government agents who had colluded to defraud the U.S. government of millions in tax dollars." *Id.* The Whisky Ring affair was the most prominent corruption episode of Ulysses S. Grant's second administration. *Id.* It resulted in more than three hundred arrests, seizure of distilleries and rectifiers and criminal prosecutions with a hundred convictions. *Id.* Bristow's investigation ended when it began implicating senior officials with close ties to the Grant Administration. *Id.*

Tax evasion persisted as long as corruption did, despite draconian provisions that required distillers to hand over their distillery keys, gave inspectors round-the-clock access to the premises, and authorized them to use whatever force was necessary to gain entry. In places where corruption was less of an issue, illegal distillation did not take place in homes, but in the woods. These facts demonstrate that banning home distillation was excessive and failed to meaningfully boost the federal government's tax-collecting power over spirits.

In terms of boosting tax collection, the 1868 Act's most effective feature was the reduction in the tax rate. Systemic corruption—the root cause of widespread tax evasion at distilleries—was ultimately ended not by the ban on home distillation, but by sweeping anti-corruption reform and enforcement across the United States. *Id.* In Appalachia, it was the lower taxes, rise in the temperance movement and the pull of industrialization, rather than the 1868 enforcement measures, that left moonshiners behind. *Stewart*, *supra* 117 (2011).

The history of distillation and its role in early America is well established. What started as a regular part of life in colonial America evolved into a hobby by America's birth, as technology around stills improved. Even when Americans did not take too well to taxes levied during the Whisky Rebellion, the founding fathers did not introduce laws so intrusive as to prohibit Americans from the traditional practice of distilling spirits at own homes. And in 1812, Americans rose to the occasion, paying their share of spirt/distillation taxes, when taxes were levied to defend our fledgling nation.

History also shows that since then Americans paid tax revenues, when tax rates were reasonable at the beginning of the Civil War and soon after the tax rates were cut in 1868. It was only when Congress raised taxes to an exorbitant rate through poorly calculated means that rampant tax evasion, cited so extensively by the Sixth Circuit, arose. The historical record attributes the government's inability to collect taxes to commercial distillers, corrupt revenue officials, the tax structure, and the collection system, not home distillation.

CONCLUSION

The petition for a writ of certiorari should be granted. The ban on home distilling raises constitutional questions of national and historic significance that remain genuinely unresolved. Since *McNutt, supra* and *Ream*, *supra*, West Virginia (2024), New Hampshire (2024), and Maine (2025) have joined Missouri and Massachusetts in permitting home distillation. *See* 28-A M.R.S. § 1358, N.H. Rev. Stat. Ann. § 175:5-b, I, W. Va. Code § 60-6-10(b), Mass. Gen. Laws ch. 138, § 3, and Mo. Rev. Stat. § 311.055. Five states now affirmatively permit the home production of spirits for personal use, underscoring the growing practical significance of federalism question that is also at issue. As more states affirmatively choose to permit conduct that federal law categorically forbids, the consequences of the constitutional question—and the cost of leaving it unresolved —only continue to grow.

The Fifth Circuit is correct in finding the ban unconstitutional. The ban not only fails to raise revenue under the Tax Power, but even under the Sixth Circuit's treatment of the Necessary and Proper Clause as an independent basis for expanding congressional power, it is not plainly adapted to a constitutional—let alone legitimate—end. *Ream supra* 7 quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). The founding fathers never had to resort to banning home distilling to collect taxes, when distilling was a widely practiced activity. The tax evasion that Congress tried to address was a product of high taxes, poor roll out, and corruption–not home distilling. The ban was *ultra vires*, when enacted and even more so now. Amicus curiae respectfully urge this court to grant Petitioner Ream's petition for certiorari.

Respectfully submitted,

Ondray T. Harris
Counsel of Record
Soriya R. Chhe
Marin Murdock
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-2265
ondray.harris@cei.org

Counsel for Amicus Curiae

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