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

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

TYLER MARTINEZ
Counsel of Record
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
tmartinez@ntu.org
(703) 683-5700

August 20, 2026

QUESTIONS PRESENTED

Amicus agrees with the petitioner's statement of the question presented:

1. Whether the federal prohibition on home distilling exceeds Congress's enumerated powers; and
2. Whether the Court should overrule *Gonzales v. Raich*, 545 U.S. 1 (2005) 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.

This brief addresses only the first question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

The Sixth Circuit's decision below interprets both Congress's taxing power and the Necessary and Proper Clause as it relates to the exercise of that power. Because the proper scope of the federal government's taxing and ancillary powers has a profound impact on the American taxpayer, *Amicus* has an institutional interest in this Court's decision.

---

[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* certifies timely notice was provided to all parties of the intent to file this brief. *Amicus* thanks Patrick Miller for his contributions to this brief.

SUMMARY OF THE ARGUMENT

The implications of this case extend beyond moonshine and the federal prohibition on home distilling. In many areas, Congress has used its taxing power for far more than revenue raising. In effect, the taxing power is becoming a back door federal police power. Because many provisions of the Internal Revenue Code do not directly raise revenue, both current and future tax law depends on a correct understanding of the scope of the Necessary and Proper Clause in the context of the taxing power.

This interaction between the Congress's taxing power and the Necessary and Proper Clause has substantial implications not only for the whiskey industry, but for firearms, cryptocurrencies, and the entire Internal Revenue Code. Because the Sixth Circuit's decision below conflicts with that of the Fifth Circuit in *McNutt v. Department of Justice* and presents a matter of significant national importance, this Court should grant certiorari. *McNutt v. Dep't of Justice*, 173 F.4th 204 (5th Cir. 2026). This Court should decide this case and provide a consistent and workable standard that enables the government to raise revenue without eroding essential limits on enumerated powers.

The decision below does not adopt such a workable standard. The Sixth Circuit held that the prohibition was "necessary" to respond to a long national history of alcohol tax evasion, and "proper" because it was intended to raise revenue, is not explicitly forbidden by the Constitution, and does not "circumvent some other limit on Congress's power." *Ream v. Dep't of the Treasury*, 174 F.4th 480, 488 (6th Cir. 2026). Even granting these debatable contentions, the logic is capacious. While the opinion protests that “alcohol is *sui generis*, or very close to it,” *id.*, any number of prohibitions may meet these broad criteria, from prohibitions on home gardening to 3-D printing. Furthermore, the standard creates a perverse incentive for Congress to create new excise taxes to allow prohibitions on substitutes.

In *McNutt*, the Fifth Circuit applied a better standard that preserves the existing tax code while preventing unchecked expansion of federal power through the tax code. 173 F.4th at 221. A law passed in support of the taxing power is only “proper” if it operates upon existing taxable events. In other words, the Necessary and Proper Clause does not empower Congress to prevent taxable events from occurring merely because it may be difficult to tax them. See *id.* This distinction will help lower courts address emerging disputes related to the taxing power while preserving the existing federal collection apparatus because liens, levies, summonses, bonds, marks, registrations, and records all operate upon existing taxable events and properly facilitate revenue collection.

Despite the substantial disagreement between the Fifth and Sixth Circuits on the validity of this federal home distilling prohibition, both courts agreed that the prohibition cannot be sustained under the taxing power itself because it does not directly raise revenue. This agreement, however, raises the stakes for the circuit courts’ subsequent split on the proper application of the Necessary and Proper Clause. To preserve reasonable tax enforcement structures while honoring the limited nature of the federal government's enumerated powers, this Court should grant a writ of certiorari.

ARGUMENT

I. THE DECISION BELOW CREATED A CIRCUIT SPLIT ON THE VALIDITY OF THE FEDERAL PROHIBITION ON HOME DISTILLING.

The decision in *Ream* allows the federal government to enforce the prohibition on home distilling within the Sixth Circuit. The decision in *McNutt* prevents it from enforcing the same statute in the neighboring Fifth Circuit. Such a geographical disparity creates an intolerable situation where identical conduct may be punished in one jurisdiction but not in another.[2]

In the decision below, the Sixth Circuit splits from the Fifth's reasoning in *McNutt* both in the focus of the analysis and the conclusion. While both courts applied the two-prong test from *McCulloch v. Maryland* to determine whether the prohibition is necessary and proper, they differ substantially in their application of each prong. *McCulloch v. Maryland*, 4 Wheat. (17

---

[2] The inequity of the situation borders on comical—the home distilling ban is unenforceable in Mississippi, the last state to repeal prohibition, while it remains fully enforceable in Kentucky and Tennessee, both famous for their iconic spirits. *See, e.g.*, *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 148 (2023) ("A bottle of Jack Daniel's—no, Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey—boasts a fair number of trademarks. Recall what the bottle looks like (or better yet, retrieve a bottle from wherever you keep liquor; it's probably there)[.]").

U.S.) 316, 421 (1819); *Ream*, 174 F.4th at 486–87; *McNutt*, 173 F.4th at 217–21. This Court should grant certiorari here to clarify both the application of the *McCulloch* test in the context of the federal taxing power and the result with respect to this case.

A. This Court Should Clarify How To Determine Whether A Law Is "Necessary" To Implement the Taxing Power.

In both *Ream* and *McNutt*, the circuit courts applied *McCulloch's* formulation that "to be 'necessary,' a law must be 'plainly adapted' to an enumerated power." *McNutt*, 173 F.4th at 219; see also *Ream*, 174 F.4th at 487. Despite applying the same standard, each court's reasoning bears little resemblance to the other. The direct circuit split on federal powers warrants this Court's attention.

The *McNutt* court examined the role of the home distilling ban in the overall statutory structure and its connection to the core purpose of the taxing power: raising revenue. *See McNutt*, 173 F.4th at 218–20. The Fifth Circuit concluded that the provision did not raise revenue, but rather prevented it, by prohibiting the occurrence of an event that would otherwise be taxable. *Id.* at 219. Consequently, the prohibition was not plainly adapted to raising revenue and therefore not necessary, within the meaning of the necessary and proper clause.

The *Ream* court, in contrast, examined the historical circumstances surrounding the passage of the ban in 1868. *See Ream*, 174 F.4th at 488. The court paid special attention to widespread evasion of excise taxes, as reflected in the congressional debates. Because it would be difficult to track and tax spirits distilled in homes, the court reasoned, it was necessary to prevent distilling outside of heavily regulated locations subject to inspection at any time. *See id.* at 487. The court did not, however, explain how preventing the occurrence of a taxable event furthers the purpose of the taxing power: raising revenue. The government takes the same perspective in its response to this petition, arguing that the statutory location restrictions are necessary to secure revenue collection. *See* Fed. Respondents Br. at 15.

This logic rests on the unstated-but-essential premise that the prohibition on home distilling increases (or at least preserves) the demand for and production of taxed distilled spirits. In other words, both the *Ream* court and the government assume that by preventing activity that may be difficult to tax, the government stimulates revenue from commercial spirits. This assumption is tenuous, resembling the long-debunked theory that Congress may seek to increase tax revenue from the sale of one particular good by prohibiting the sale of substitute goods. *See, e.g.*, *United States v. Dewitt*, 76 U.S. 41, 44 (1869) (rejecting similar taxation theory in prohibition of sale of oil as "too remote and too uncertain" to be part of the proper "execution the power of laying and collecting taxes."). A federal power to mandate commerce in order to collect a tax would have no limiting principle because, "the Government's logic would justify a mandatory purchase to solve almost any problem." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 553 (2012) ("*NFIB*"). Apart from this impermissible substitution-of-demand theory, the nexus between prohibiting home distilling and the revenue received from commercial distilling is too attenuated for the prohibition to be "plainly adapted" to raising revenue.

Therefore, the Court should grant *certiorari* to clarify how courts should determine what is "necessary" to implement the taxing power and resolve the split between *Ream* and *McNutt*. The Court should clarify whether the focus of the analysis should be on necessity at the time of legislation or at the time of challenge, and whether the *Ream* court's substitute-goods theory is a valid approach to the necessity analysis.

B. The Court should clarify how to determine whether a law is "proper" to implement the taxing power.

The second inquiry likewise split the circuits: whether the distilling prohibition is a "proper" use of federal power to implement the enumerated taxing power. The Necessary and Proper Clause grants only power "incidental" to the enumerated power and "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (2012) (quoting *McCulloch*, 4 Wheat. (17 U.S.) at 411). While both circuit courts examined the propriety of the home distilling ban, they divide over whether it was a proper exercise of this ancillary power.

The Sixth Circuit in *Ream* concluded that the prohibition is proper because it was intended "to collect revenue," it is "not expressly 'prohibited by the constitution'; nor does it seek to regulate conduct indirectly, or to circumvent some other limit on Congress's power." *Ream*, 174 F.4th at 488 (quoting *McCulloch*, 4 Wheat (17 U.S.) at 423). While each of these assertions is at least debatable, the last is the most significant—if Congress may prohibit an entire class of products merely to further its ability to tax a subset of that class, it will have substantial power to circumvent traditional limits on its enumerated powers. It would become a back door to a federal police power, all in the dubious assertion of raising revenue.

In contrast, the Fifth Circuit denied that the Necessary and Proper Clause provides such broad power. *See McNutt*, 173 F.4th at 221. The court explicitly noted the lack of a limiting principle, observing that the government's logic (logic later adopted by the *Ream* court) would allow it to "criminalize nearly any at-home conduct only because it has the possibility of concealing taxable activity." *Id.* While the Fifth Circuit provided the example of home-based businesses, many other activities may also fall within the sweep of *Ream*'s logic. For example, making one's own fly-fishing lures and biofuel, or reloading ammunition, all avoid various federal excise taxes. *See*, *e.g.*, 26 U.S.C. § 4161(a) (tax on fishing equipment); 26 U.S.C. § 4081 (tax on gasoline and diesel); 26 U.S.C. § 4181 (tax on ammunition) *cf*. 26 U.S.C. § 4218 (tax imposed on private use as if sold in interstate commerce).

The Court should grant certiorari in this case to resolve these competing understandings of the sweep of the Necessary and Proper Clause. Left unchecked, the *Ream* decision could provide the basis for a nascent police power that is reserved to the states.

II. CONGRESS HAS INCREASINGLY ABUSED THE TAXING POWER TO IMPLEMENT SUBSTANTIVE REGULATIONS.

The importance this case extends beyond the prohibition on home distilling, creating a question of nationwide importance. Congress has increasingly turned to its taxing power to implement substantive policy and regulations in an array of fields including firearms, pharmaceuticals, and cryptocurrencies.

These laws come in many forms, but three of the most significant patterns are (A) taxes that are not intended to be paid, but rather to influence behavior; (B) large regulatory regimes tied to a tax they outlive; and (C) regulations that create substantial burdens with only a tenuous connection to raising revenue. Each area of congressional action implicates the Necessary and Proper Clause relative to the taxing power, and the Court should take this opportunity to clarify that relationship to aid lower courts wrestling with these problems.

A. Congress Increasingly Relies On Taxes Designed To Be Avoided, Rather Than Paid, To Influence Private Behavior.

While the essential purpose of the taxing power is to raise revenue, Congress has increasingly deployed taxes to influence behavior with no reasonable expectation that they will produce revenue.

A key recent example involves the changes to Medicare Part D created by the Inflation Reduction Act of 2022. The changes impose an excise on sales of certain drugs when the manufacturer and the Department of Health and Human Services cannot agree on a "maximum fair price." 26 U.S.C. § 5000D. The exaction is measured by gross sales, rather than income, and increases over time if the manufacturer does not reach an agreement with the Department. *See id.* The penalty escalates dramatically—as observed by the Third Circuit, "[t]he daily excise tax begins at 185.71% of a selected drug's sale price on the first day of noncompliance and reaches 1,900% of the sale price after 270 days." *Bristol Myers Squibb Co. v. Sec'y*, 155 F.4th 245, 254 (3d Cir. 2025), *cert. denied sub nom. Bristol Myers Squibb Co. v. Kennedy*, 608 U.S. ___, 224 L. Ed. 2d 830 (May 18, 2026). The manufacturer can avoid these ruinously large taxes only by reaching an agreement with the Department or withdrawing all of its drugs (not just those subject to the dispute) from the major Medicare Part D programs. *See id.*; 26 U.S.C. § 5000D(c)(1)(A), (2).

No firm will pay such a confiscatory charge, and Congress did not expect one to.[3] Like the prohibition

---

[3] As Judge Hardiman noted, "the excise tax would be so confiscatory that Congress's Joint Committee on Taxation projected that a nearly identical excise tax provision in a precursor bill would raise 'no revenue.'" *Bristol Myers Squibb Co.*, 155 F.4th at 272 (Hardiman, J., dissenting) (citing JOINT COMM. ON TAX'N, *Estimated Budget Effects of the Revenue Provisions of Title XIII*, at 8 (Nov. 19, 2021)).

on home distilling, this provision does not operate to tax a course of conduct but to foreclose it. A manufacturer who cannot reach an agreement with the Department forfeits, in a matter of days, sums exceeding the entire commercial value of the product. As in this case, the key provisions of the law are not designed to increase revenue, but to influence behavior. Congress did not want anyone to pay the drug-pricing tax any more than it really wants liquor excise taxes from home distilling. Instead, the legislature is using the taxing power as a way to regulate conduct, with no legitimate aim for growing the federal fisc. The Court should grant certiorari to reinforce the principle that the taxing power is to raise revenue, not a back door federal police power.

B. Congress Has Enacted Extensive Regulatory Schemes To Support A Tax, Then Repealed The Tax And Leaving The Regulations In Place.

Congress has also built extensive regulatory schemes on a simple tax, then maintained the regulations even after repealing the tax. While this Court upheld the Affordable Care Act's individual mandate as an exercise of the taxing power, *see NFIB*, 567 U.S. at 570, in 2017 Congress reduced the shared responsibility payment to zero but left the coverage requirement in force. 26 U.S.C. § 5000A(c). The Court expected that "the [ACA] payment will raise considerable revenue," despite it being "plainly designed to expand health insurance coverage." *Id.* at 567. But now the tax rate is zero, leaving behind the regulatory structure, but no federal taxes collected.

Similarly, the National Firearms Act of 1934 (NFA) was passed pursuant to the taxing power and is housed in the Internal Revenue Code. 26 U.S.C. §§ 5801–5872; see also *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). In addition to imposing taxes on regulated firearms and "destructive devices," the NFA prohibits the unlicensed manufacture, possession, sale, and transfer of unregistered items. 26 U.S.C. § 5861. The licensing process is extensive for prospective purchasers, who must pay a $200 tax and complete an arduous application process. *See* 27 C.F.R. § 479.84; 26 U.S.C. § 5812(a). In 2025, however, the One Big Beautiful Bill Act reduced the tax rates to zero on short-barreled shotguns, short-barreled rifles, silencers, and certain other weapons, while leaving the registration apparatus, the approval process, and the associated criminal penalties in place. *See* 26 U.S.C. § 5811(a)(2). Without the tax to ground the federal exercise of power, a district court recently enjoined the NFA's provisions regulating the newly untaxed firearms and devices. *Silencer Shop Found. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 6:25-CV-056-H, 2026 WL 2255460, at *12 (N.D. Tex. Aug. 5, 2026). The district court relied heavily on the Fifth Circuit's decision in *McNutt* and rejected the government's argument that the regulatory framework was necessary and proper to implement the NFA's remaining special occupational tax. *Id.* at *15–18.

The dispute at issue in the present case will have ramifications far beyond the home distilling ban.

C. Many Provisions of the Internal Revenue Code Impose Substantive Requirements And Prohibitions Only Tenuously Connected To Revenue Collection.

The Internal Revenue Code is replete with substantive provisions that bear only a tenuous connection to revenue production. For example, 26 U.S.C. § 6033(b)(5) currently requires § 501(c)(3) organizations to provide the Internal Revenue Service (IRS) with "the names and addresses of all substantial contributors" to the organization. This information does not aid the IRS in its collection practices—the agency typically examines less than 10% of the forms annually[4]—but imposes a substantial reporting burden on charitable organizations. More significantly, the disclosure of this information potentially violates the First Amendment's protections of the freedom of association and related privacy rights. See, *e.g.*, *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958). Similarly, the Johnson Amendment (26 U.S.C. § 501(c)(3)) threatens the tax-exempt status of organizations if they "participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). These provisions have only a tenuous relationship, if any, to raising revenue for governmental operations,

---

[4] See, *e.g.*, Internal Revenue Serv., *2025 Data Book*, Pub. No. 55-B at 53, table 3-5 (April 2026), https://www.irs.gov/pub/irs-pdf/p55b.pdf; Internal Revenue Serv., *2024 Data Book*, Pub. No. 55-B at 53, table 21 (May 2025), https://www.irs.gov/pub/irs-prior/p55b--052025.pdf.

but both have profound effects on taxpayers and charitable organizations.

To provide one final example, 26 U.S.C. § 6050I(a) requires individuals "engaged in a trade or business, and . . . who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" to make certain reports to the government. In 2021, Congress expanded the definition of "cash" to include "any digital asset[.]" 26 U.S.C. § 6050I(d)(3). The potential privacy ramifications from these reports are extensive, and the Sixth Circuit recently reversed a district court decision dismissing a challenge to the law on enumerated powers, First Amendment, and Fourth Amendment grounds. *Carman v. Yellen*, 112 F.4th 386, 394 (6th Cir. 2024).

Each of these three categories expands federal power without raising revenue. The first imposes taxes that are never meant to be paid to compel the desired course of conduct. The second regulates even after the revenue-raising measures have been repealed. The third regulates without a direct tie to generating revenue. As courts confront cases arising from these various types of laws, they need a workable standard to evaluate their validity under the Necessary and Proper Clause. This case provides the Court with an opportunity to provide that standard.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant a writ of certiorari and reverse the decision below.

Respectfully submitted,

TYLER MARTINEZ
Counsel of Record
NATIONAL TAXPAYERS
UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
tmartinez@ntu.org
(703) 683-5700

August 20, 2026