No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE; ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, A BUREAU OF THE UNITED STATES DEPARTMENT OF THE TREASURY, PETITIONERS

v.

SCOTT MCNUTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since the Founding era, Congress has imposed an excise tax on the production of distilled spirits. After documenting the extensive evasion of the government's efforts to collect the tax, Congress enacted a comprehensive scheme requiring distillation stills to be licensed and subject to inspection. One aspect of the scheme prohibited stills from being located in various places, including within residential properties—a restriction that has now been in effect for 160 years. In the decision below, the Fifth Circuit held that the location restrictions exceed Congress's enumerated powers, in direct conflict with a decision of the Sixth Circuit upholding the restriction on home distilling. The question presented is as follows:

Whether the prohibition on the production of distilled spirits in particular locations, including "in any dwelling house" or "in any shed, yard, or inclosure connected with any dwelling house," 26 U.S.C. 5178(a)(1)(B), is necessary and proper for carrying into execution Congress's enumerated power to lay and collect taxes.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants/cross-appellees below) are the U.S. Department of Justice; and the Alcohol and Tobacco Tax and Trade Bureau, a Bureau of the U.S. Department of the Treasury.

Respondents (plaintiffs-appellees below) are Scott McNutt and Hobby Distillers Association. Additional respondents (plaintiffs-cross-appellants below) are Rick Morris; Thomas O. Cowdrey, III; and John Prince, III.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Hobby Distillers Ass'n v. *Alcohol and Tobacco Tax and Trade Bureau*, No. 23-cv-1221 (July 10, 2024)

United States Court of Appeals (5th Cir.):

McNutt v. *United States Dep't of Justice*, No. 24-10760 (Apr. 10, 2026)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 173 F.4th 204. The opinion and order of the district court (App., *infra*, 27a-68a) is reported at 740 F. Supp. 3d 509.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2026. A petition for rehearing en banc was denied on June 9, 2026 (App., *infra*, 69a-70a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this petition. App., *infra*, 71a-81a.

INTRODUCTION

Faced with rampant evasion of excise taxes on distilled spirits 160 years ago, Congress enacted a number of provisions regulating "the manufacture and storage, [and] the marking, branding, numbering, and stamping with tax stamps, of distilled spirits." *United States* v. *Ulrici*, 111 U.S. 38, 40 (1884); see Act of July 13, 1866 (1866 Act), ch. 184, §§ 21-45, 14 Stat. 153-163. Those provisions "were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits." *Ulrici*, 111 U.S. at 40. Among those provisions was a ban on distilling spirits in locations where tax evasion had proved difficult to uncover. That ban is currently codified at 26 U.S.C. 5178(a)(1)(B), which prohibits distilling spirits in locations including "any dwelling house," or "in any shed, yard, or inclosure connected with any dwelling house."

Despite Section 5178's venerable history and commonsense rationale, the Fifth Circuit held that its location restrictions are unconstitutional, reasoning that they reduce otherwise-taxable conduct and therefore are not necessary and proper in carrying out Congress's taxing power. That decision is erroneous. A law is necessary and proper if it is "convenient" or "useful" for carrying an enumerated power into effect, and "plainly adapted" to that legitimate end. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413, 421 (1819). That is the case here. Congress restricted home distilling because a distiller can more easily conceal a distilling operation or thwart necessary inspections—thereby evading the requisite tax—if the still is located in a dwelling-house or connected structure. The court of appeals held otherwise by focusing only on those who would decline to comply with the location restrictions. But the proper focus is instead on whether adherence to the restrictions promotes tax collection, and it does so here by channeling taxable conduct into locations where tax evasion is more difficult. Under *McCulloch* and its progeny, courts may not second-guess Congress's reasonable judgment that the increased ability to collect taxes from those complying with the restrictions would offset any reduction in the tax base from others who would forgo distilling altogether. And because the location restrictions were enacted only after lengthy experience with tax evasion, upholding those restrictions would not open the door to hypothetical laws restricting other conduct lacking that history.

This Court's review is plainly warranted. The Court "usual[ly]" grants review when, as here, a lower court invalidates a federal statute. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). Moreover, there is a direct conflict in the circuits, as the Sixth Circuit recently upheld the challenged provision on reasoning that is irreconcilable with the Fifth Circuit's. This case presents a clean vehicle to resolve that conflict, and it is a superior vehicle to the Sixth Circuit case for several reasons. The petition for a writ of certiorari should be granted.

STATEMENT

A. Legal Background

Since the First Congress, the federal government has imposed taxes on the distillation of spirits. The first such tax was proposed by Secretary of the Treasury Alexander Hamilton as a means of funding the federal government and paying the debts from the American

Revolution. 2 *The Works of Alexander Hamilton* 176-184 (Henry Cabot Lodge ed., 1904). Hamilton underscored the "expediency" of taxing distilled spirits and viewed the "mode of collection" as the "only point about which a difficulty or question can arise." *Id.* at 178. On that point, Hamilton "lamented" that experience with similar state taxes had demonstrated that the "vigilance of the public officers" and the "integrity of individuals" were "inadequate" to ensure collection. *Id.* at 178-179 (emphasis omitted). When Pennsylvania enacted such a tax, for example, "nearly every farmer distilled his own whiskey and deemed it his inalienable right to evade the tax, and resist the collector." Gallus Thomann, *Liquor Laws of the United States* 58 (1885); see *id.* at 57-58.

To address concerns with collection, Congress imposed a number of requirements and prohibitions related to the tax. See Act of Mar. 3, 1791 (1791 Act), ch. 15, 1 Stat. 199. For example, distillers were prohibited from removing spirits from a distillery "at any other times than between sun rising and sun setting, except by consent and in presence of" an officer charged with securing payment of the taxes due. *Id.* § 20, 1 Stat. 204. Such officers were also permitted to enter the "houses, store-houses, ware-houses, buildings and places" registered for distilling "at all times in the daytime, upon request." *Id.* § 29, 1 Stat. 206; see *id.* § 25, 1 Stat. 205 (requiring distillers within ten miles of an office of inspection to register as distillers).

The tax was met with hostility and resistance, culminating in the Whiskey Rebellion of 1794. Anthony A. Cilluffo & Jane G. Gravelle, Congressional Research Serv., *Alcohol Excise Taxes: An Overview* 1 (Sept. 12, 2024), https://www.congress.gov/crs-product/R48181. Although the Whiskey Rebellion was quelled, the tax remained unpopular and was regularly evaded. Tun Yuan Hu, *The Liquor Tax in the United States 1791-1947*, at 30 (1950). Over the following decades, the tax was raised, lowered, briefly repealed, and reenacted. *Id.* at 30-38.

In 1866, Congress amended the existing excise tax on distilled spirits and added a provision prohibiting the use of any still in specified locations associated with evasion, including "in any dwelling-house." 1866 Act, § 25, 14 Stat. 154; see Cong. Globe, 39th Cong., 1st Sess. 2839, 2841 (1866). In the Treasury Secretary's annual report for that year, the Secretary observed that "[t]he provisions of law bearing upon the distillation of spirits were essentially defective prior to the act of July," and had proved to be "insufficient, even in the hands of the most experienced and vigilant officers, to prevent frauds, either in large or small distilleries." U.S. Dep't of the Treasury, *Report of the Secretary of the Treasury on the State of the Finances for the Year 1866*, at 55 (1866) (Treasury Report). The report noted specifically that "[g]reat numbers of small stills, for the illicit manufacture of rum from molasses, were secreted in the garrets and cellars of the most populous cities." *Ibid.* Such stills had been found in the "cellar" of a "dwelling-house," Testimony attached to H.R. Rep. No. 24, 39th Cong., 2d Sess. 35 (1867) (House Report), and "concealed among the machinery of a large lager-beer brewery," where it had proved "impossible" for inspectors "to reach them," Cong. Globe, 39th Cong., 1st Sess. at 2841. A report from the Revenue Commission underscored the necessity of meaningful inspections and the difficulty of carrying them out, absent additional restrictions. H.R. Doc. No. 62, 39th Cong., 1st Sess. 36 (1866). "Without inspection—constant and watchful," the report explained, "fraud will prevail; while to allow every individual to engage in the manufacture of spirits without some proper restrictions, will render inspection impossible." *Ibid.*

Upon reviewing the evidence, a House select committee asserted that "the most stupendous frauds" were being perpetrated "daily" against federal "collection of the internal revenue on distilled spirits." House Report 1. By the committee's estimate, "at least seven-eighths of the entire amount of spirits manufactured" had "escaped taxation." *Ibid.* Following those reports, Congress adopted additional restrictions on the location of stills. Act of July 20, 1868 (1868 Act), ch. 186, § 12, 15 Stat. 130.

Today, much of that system remains in place. Federal taxes on distilled spirits attach as soon as a spirit is "in existence," 26 U.S.C. 5001(b), and are based on the spirit's volume and alcohol content, 26 U.S.C. 5001(a)(1), 5002(a)(10)-(11). Location restrictions provide that a distilled-spirits plant may not be located (1) "in any dwelling house," (2) "in any shed, yard, or inclosure connected with any dwelling house," (3) "on board any vessel or boat," (4) "on premises where beer or wine is made or produced, or liquors of any description are retailed," or (5) "on premises where any other business is carried on" (unless the business is authorized under an exception that will not "jeopardize the revenue"). 26 U.S.C. 5178(a)(1)(B) and (b).

In addition to the location restrictions imposed by statute, Congress authorized the Secretary to regulate the "location" and "construction" of distilled-spirits plants as he deems necessary to facilitate inspection and "afford adequate security to the revenue." 26 U.S.C. 5178(a)(1)(A) and (C). Any person who "uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits" in a prohibited location is subject to a fine of up to $10,000, imprisonment of up to five years, or both. 26 U.S.C. 5601(a)(6).

As with the earlier laws, the location restrictions are part of an "elaborate system [that] has been set up by legislation and regulations thereunder to protect the revenue on distilled spirits." *United States* v. *Goldberg*, 225 F.2d 180, 187 (8th Cir. 1955); see, *e.g.*, 1866 Act, §§ 24, 38, 14 Stat. 153-154, 159-160; 1868 Act, §§ 5, 14, 15 Stat. 126, 130-131. For example, Congress has required distilling systems to be constructed "to prevent the unauthorized removal of distilled spirits" before the tax is calculated, and to be secured "to facilitate inspection and afford adequate security to the revenue." 26 U.S.C. 5178(a)(2)(B)-(C); see 26 U.S.C. 5178(a)(1)(A), (2)(C)(ii) (permitting the Secretary to "order and require" fastenings, locks, and seals as necessary to secure the revenue). Distillers must register their stills and distilled-spirits plants, 26 U.S.C. 5171(c), 5179, and must obtain a distilling permit from the government, 26 U.S.C. 5171(d)(1); 27 U.S.C. 203-204; see 1868 Act, §§ 5, 14, 15 Stat. 126, 130 (requiring the same). The statute also requires distillers to "furnish" to the Secretary "such keys as may be required for internal revenue officers to gain access to the premises," 26 U.S.C. 5203(a), and it permits such officers to enter "at all times, as well by night as by day," as necessary to examine the operations and take inventory, 26 U.S.C. 5203(b).

B. Factual And Procedural Background

1. Respondents are Hobby Distillers Association—a Texas-based organization that advocates for the legalization of at-home beverage distilling—and four individual members of that organization who wish to distill spirits at their homes. App., *infra*, 2a-3a. Respondents brought a pre-enforcement suit in the United States Dis-

trict Court for the Northern District of Texas challenging the constitutionality of Congress's longstanding restrictions on the location of distilled-spirits plants. They sought declaratory and injunctive relief to prevent the enforcement of the restrictions against them. *Id.* at 29a.

2. The district court dismissed three respondents for lack of standing and granted the remaining respondents a permanent injunction. App., *infra*, 27a-68a. The court held that three individual respondents lacked standing because they had not shown a credible threat that they would be prosecuted if they engaged in home distilling. *Id.* at 35a-36a. But the court then held that respondent Scott McNutt had made such a showing because, unlike the other individuals, he had received a letter from the Alcohol and Tobacco Tax and Trade Bureau, which noted that the Bureau had learned that he had purchased a still or other equipment capable of producing alcohol and warned that unlawful production of distilled spirits is a criminal offense. *Id.* at 34a-35a. And because McNutt was a member of Hobby Distillers Association, the organization satisfied the requirements for representational standing. *Id.* at 39a-40a.

On the merits, the district court held that the location restrictions are not a necessary and proper means of collecting the federal excise tax on distilled spirits. App., *infra*, 41a-56a. The court reasoned that the restrictions "criminalize conduct of persons not subject to the tax" and do not "touch the product to be taxed." *Id.* at 53a. The court also held that the location restrictions exceed Congress's commerce power. *Id.* at 56a-63a. The court therefore enjoined the government from enforcing the location restrictions against McNutt, the association, and the association's members. *Id.* at 67a.

3. The court of appeals reversed the district court's partial dismissal and otherwise affirmed the injunction. App., *infra*, 1a-26a. The court concluded that each of the individual respondents had standing based on the government's history of enforcing the location restrictions, including against McNutt. *Id.* at 6a-9a. On the merits, the court noted that the government had declined to challenge the district court's Commerce Clause analysis. *Id.* at 11a n.5. As for the Necessary and Proper Clause, the court of appeals held that the location restrictions are not "plainly adapted" to support the government's taxing power because they "reduce revenue by preventing individuals from making distilled spirits" that could otherwise be taxed. *Id.* at 19a; see *id.* at 15a-25a. The court further hypothesized that upholding the location restrictions would allow Congress to "criminalize nearly any at-home conduct only because it has the possibility of concealing taxable activity." *Id.* at 25a.

4. The court of appeals denied rehearing en banc without noted dissent. App., *infra*, 69a-70a.

REASONS FOR GRANTING THE PETITION

For 160 years, Congress has restricted the location of distilling to combat tax evasion. 26 U.S.C. 5178(a)(1)(B). The court of appeals in this case held that longstanding provision unconstitutional. This Court usually grants review when a court of appeals has invalidated a federal statute. That course is particularly warranted here because the decision below conflicts with the decision of another court of appeals and contravenes this Court's precedents. The petition for a writ of certiorari should be granted.

A. The Decision Below Warrants This Court's Review

1. This Court has recognized that judging the constitutionality of a federal statute "is the gravest and most delicate duty that th[e] [Judicial Branch] is called on to perform." See *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991). Accordingly, "when a lower court has invalidated a federal statute," the Court's "usual" approach is to grant certiorari. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019); see, *e.g.*, *Department of Labor* v. *Sun Valley Orchards*, cert. granted, No. 25-966 (Apr. 27, 2026); *Kennedy* v. *Braidwood Mgmt., Inc.*, 606 U.S. 748, 758-759 (2025); *Fuld* v. *Palestine Liberation Org.*, 606 U.S. 1, 11-12 (2025); *SEC* v. *Jarkesy*, 603 U.S. 109, 119-120 (2024). Indeed, the Court applies a "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay).

2. This Court often grants review of a lower court's decision invalidating a federal statute even absent a circuit conflict, as in the cases cited above. Here, the case for certiorari is especially strong because the Fifth Circuit's decision below is directly contrary to a recent decision of the Sixth Circuit.

In *Ream* v. *United States Department of the Treasury*, 174 F.4th 480 (2026), petition for cert. pending, No. 26-93 (filed July 20, 2026), the Sixth Circuit addressed an identical constitutional challenge to the restriction on the production of distilled spirits in the home and connected areas. Unlike the Fifth Circuit below, however, the Sixth Circuit held that the challenged restriction is a "necessary and proper means of collecting the federal excise tax on distilled spirits." *Id.* at 483. In an opinion by Judge Kethledge, the Sixth Circuit relied on this Court's precedents holding that, "'in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable.'" *Id.* at 487 (quoting *Felsenheld* v. *United States*, 186 U.S. 126, 132 (1902)). The court of appeals reasoned that the challenged restriction is a rule "for the manufacture" of a taxable good that is not unreasonable because, at the time of enactment, "evasion of excise taxes on spirits had been rampant for literally all of the nation's history." *Ibid.* As the court explained, the rationale for the ban on home distilling "is almost self-evident," as stills are "easily hidden in homes" and it is more difficult for revenue officers to detect tax evasion in homes than in bonded premises dedicated to distilling. *Ibid.*

The Sixth Circuit also rejected the contention that upholding the challenged restriction would "expand Congress's power beyond its proper limits." *Ream*, 174 F.4th at 488. The court explained that "[t]he determination whether a law is necessary and proper unavoidably involves a degree of means-ends scrutiny," and the court's determination that Section 5178(a)(1)(B) is constitutional is necessarily "factbound." *Ibid.* The relevant facts included "a history of tax evasion as old as the Republic itself" and the "testimony before a select committee of the House" that persuaded Congress the location restrictions "were in fact necessary to collect federal excise taxes on spirits." *Ibid.* The court thus concluded that the "home-distilling ban was lawful when enacted, and remains so today." *Id.* at 489.

The Sixth Circuit's decision cannot be reconciled with that of the Fifth Circuit below. In addition to the square conflict in bottom-line result, the courts' legal reasoning diverged at every step. Where the Fifth Circuit viewed Section 5178(a)(1)(B) as "distinct from the regulation of distilling alcoholic products that is permitted by federal tax law," App., *infra*, 19a, the Sixth Circuit regarded the statute as a constitutional "rule 'for the manufacture' of a taxable good," *Ream*, 174 F.4th at 487 (quoting *Felsenheld*, 186 U.S. at 132). Where the Fifth Circuit took a blinkered view of the location restrictions as reducing taxable conduct for those who would not comply, App., *infra*, 19a-20a, the Sixth Circuit considered the restrictions' broader effect of increasing the ability to collect the taxes due, *Ream*, 174 F.4th at 488. Where the Fifth Circuit rejected reliance on the lengthy history of evasion of the distilled-spirits tax, App., *infra*, 20a-22a, the Sixth Circuit understood that history as evidencing the necessity of the challenged restriction to effectuating the collection of federal excise taxes on spirits, *Ream*, 174 F.4th at 488. And where the Fifth Circuit feared that upholding this law would allow the "criminaliz[ation] of nearly any at-home conduct," App., *infra*, 25a, the Sixth Circuit rejected concerns with hypothetical laws because its "factbound judgment" was based on the record and history before it, *Ream*, 174 F.4th at 488.

3. The question presented is important. Congress restricted home distilling 160 years ago in response to an extensive history of evasion of the distilled-spirits tax. The government has a substantial interest in its authority to safeguard a significant source of tax revenue—a source that was used to pay Revolutionary War debts at the Founding and now generates billions of dollars in tax revenue every year. See, *e.g.*, Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of the Treasury, *Statisti-*

cal Release, Tax Collections (FY2025), https://perma.cc/8DHE-UGQT. Moreover, the "diversion" of taxable products, including distilled spirits, "into domestic commerce without the payment of taxes" continues to be a problem that "threatens Federal revenues." Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of the Treasury, *Annual Financial Report, Fiscal Year 2025*, at 2, https://perma.cc/8HFN-ESP5.

4. Underscoring the existence of the circuit split and the importance of the question, the plaintiff in *Ream* has also filed a petition for a writ of certiorari. See *Ream* v. *Department of the Treasury*, No. 26-93 (filed July 20, 2026). But as explained in the government's response to that petition, this case is the better vehicle. See Gov't Cert. Resp. Br. at 9-11, *Ream*, *supra* (No. 26-93).

In this case, every judge to consider the issue has concluded that at least one of the individual respondents has standing, the government does not dispute that holding, and the resulting standing of the respondent association also protects against potential mootness concerns, see *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 718 (2007). By contrast, in *Ream*, the district court and the panel dissent concluded that the sole plaintiff lacked standing because he could not show a credible threat of prosecution. *Ream*, 174 F.4th at 489-493 (Mathis, J., dissenting); *Ream* v. *United States Dep't of the Treasury*, 771 F. Supp. 3d 998, 1008-1010 (S.D. Ohio 2025). In fact, the *Ream* dissent expressly distinguished that plaintiff's situation from this case: Ream "ha[d] not been denied a permit," "nor ha[d] he received a warning letter," unlike respondent McNutt. 174 F.4th at 493.

In addition, the petition in *Ream* asks this Court to resolve the additional question whether the location restrictions exceed the scope of Congress's commerce power. See Pet. at i, 13-32, *Ream*, *supra* (No. 26-93). Indeed, the majority of the petition is devoted to a discussion of that question, with a focus on whether *Gonzales* v. *Raich*, 545 U.S. 1 (2005), should be overruled. But that question was not addressed by either lower court in *Ream*, the government is no longer advancing a commerce-power theory in either case, and the question is therefore not the subject of a circuit split or otherwise appropriate for this Court's review. See Gov't Cert. Resp. Br. at 11, *Ream*, *supra* (No. 26-93).

In sum, this case is the superior vehicle. Because the plaintiffs' standing is on surer footing and the government's petition does not present extraneous questions, the best course is for the Court to grant certiorari here and hold the petition in *Ream*.

B. The Decision Below Is Wrong

Although certiorari is warranted wholly apart from the merits, the fundamental flaws in the Fifth Circuit's constitutional analysis underscore the importance of this Court's review. The location restrictions are a valid exercise of Congress's authority under the Necessary and Proper Clause to effectuate the federal tax on distilled spirits. The decision below departs from this Court's precedents and imperils Congress's legislative power.

1. The Constitution grants Congress the power to "lay and collect Taxes." U.S. Const. Art. I, § 8, Cl. 1. Congress has long employed that power to impose excise taxes, and it is undisputed that the excise tax on distilled spirits—which dates back to the First Congress—is a lawful exercise of Congress's taxing power.

While the Constitution vests Congress with certain enumerated powers, the Framers also understood that "a government, entrusted with such ample powers * * * must also be entrusted with ample means for their execution." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819). The Necessary and Proper Clause accordingly provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution" an enumerated power. U.S. Const. Art. I, § 8, Cl. 18. A law is necessary and proper if it is "convenient[] or useful" for carrying an enumerated power into execution, and the means chosen need only be rationally related, or at most "plainly adapted," to such a "legitimate" end. *United States* v. *Comstock*, 560 U.S. 126, 133-134 (2010) (quoting *McCulloch*, 17 U.S. at 413, 421). In short, the Necessary and Proper Clause gives Congress "great latitude in exercising its powers." *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 537 (2012) (opinion of Roberts, C.J.).

This Court long ago applied those principles in the context of the taxing power and held that Congress may "prescribe any rule or regulation which is not in itself unreasonable" with respect to the "manufacture and handling of goods which are subjected to an internal revenue tax." *Felsenheld*, 186 U.S. at 132. In that case, the Court upheld a provision requiring that tobacco packages "contain nothing but the article which is taxed," based on Congress's judgment that the provision was "necessary or advisable for the purposes of effectually securing the payment of the tax imposed." *Id.* at 131-132. The Court deferred to Congress's judgment that the prohibition should be "absolute," rejecting the contention that the Constitution would require the provision to contain "an exception [for] those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax." *Id.* at 132. Because it was "perfectly reasonable" for Congress to draw bright-line, administrable rules in regulating the contents of the packages it taxed, the Court held that the law fell within Congress's authority. *Ibid.*

Congress's regulation of the location of distilling operations is likewise constitutional. As with tobacco, Congress has long imposed an excise tax on distilled spirits, which is based on the volume and alcohol content of a spirit and attaches "as soon as [it] is in existence." 26 U.S.C. 5001(a)(1), (b), 5002(a)(10)-(11); see 1791 Act, § 15, 1 Stat. 203. Rampant evasion of the tax soon followed. See pp. 4-6, *supra*. Before Congress enacted the full set of location restrictions, a select committee of the House of Representatives estimated that "at least seven-eighths of the entire amount of spirits manufactured" had "escaped taxation." House Report 1; see *id.* at 21-22. And Congress had before it evidence that small stills in particular were being hidden in locations—including homes—where inspection was rendered effectively impossible. See *id.* at 35 (Testimony of Alexander Skinner); Cong. Globe, 39th Cong., 1st Sess. at 2841. In direct response to such widespread tax evasion, Congress enacted the location restrictions challenged here. As this Court observed thereafter, it is "clear" that "[a]ll the regulations for the manufacture * * * of distilled spirits" "were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits." *United States* v. *Ulrici*, 111 U.S. 38, 40 (1884).

The text of Section 5178 underscores that Congress adopted the location restrictions as a means of safeguarding tax revenue. Section 5178(a)(1)(B) prohibits distilling in a range of locations that are unified by one feature: Each is a place that particularly facilitated tax evasion. As the Sixth Circuit explained, "dwelling houses" are legally and practically difficult to access for the necessary inspections. *Ream*, 174 F.4th at 487. The mobility of a "vessel or boat," 26 U.S.C. 5178(a)(1), renders tax evasion more likely and inspection more difficult. And in locations where "beer or wine is made or produced" or "other business is carried on," 26 U.S.C. 5178(a)(1)(B), stills "may be concealed among the machinery," making it "impossible" for inspectors "to reach them," Cong. Globe, 39th Cong., 1st Sess. at 2841. Confirming the connection between the locations and revenue collection, Congress provided an exception that allows distilling to occur on premises where other business is carried on when the Secretary finds that doing so "will not jeopardize the revenue." 26 U.S.C. 5178(b); see 26 U.S.C. 5178(a)(1)(B) (prohibiting distilling in such locations "except when authorized under subsection (b)").

In addition, the location restrictions in Section 5178(a)(1)(B) are nested between two provisions that likewise expressly link Congress's concerns about particular locations to the ability to "afford adequate security to the revenue." 26 U.S.C. 5178(a)(1)(A) and (C). While Section 5178(a)(1)(B) imposes certain location restrictions that Congress deemed necessary, Section 5178(a)(1)(A) permits the Secretary to prescribe additional "regulations relating to the location * * * of distilled spirits plants as he deems necessary to facilitate inspection and afford adequate security to the revenue." 26 U.S.C. 5178(a)(1)(A). And Section 5178(a)(1)(C) likewise ties location to revenue by permitting the Secretary to "approve the location * * * of any establishment which was qualified to operate" prior to the statute's effective date, if the Secretary "deems that such location * * * will afford adequate security to the revenue." 26 U.S.C. 5178(a)(1)(C). Each of those provisions indicates that Congress viewed the locations of distilled-spirits plants as fundamentally connected with the government's ability to collect taxes on the spirits produced.

Congress's conclusion on that score accords with common sense. At the time of enactment, Congress had before it evidence highlighting the "[g]reat numbers of small stills" that could be "secreted in the garrets and cellars of the most populous cities," Treasury Report 55, including in the "cellar[s]" of "dwelling-house[s]," House Report 35 (Testimony of Alexander Skinner), and among the machinery of beer breweries, rendering inspection effectively impossible, see Cong. Globe, 39th Cong., 1st Sess. at 2841. Those practical realities have not changed. Today, as at the time of enactment, a distiller can more easily conceal a distilling operation (or conceal a spirit's strength and avoid the proper tax rate) if a still is located at a dwelling-house or another business. See *Ream*, 174 F.4th at 487. Restricting the location of distilled-spirits plants thus directly promotes collection of the distilling tax by channeling distilling activities to locations that facilitate the government's efforts to inspect distilling operations and prevent evasion of the tax.

2. In nevertheless holding Section 5178(a)(1)(B) unconstitutional, the Fifth Circuit principally reasoned that the location restrictions could not be necessary and proper in aid of the taxing power because they would reduce revenue by prohibiting otherwise taxable conduct. App., *infra*, 19a-22a; see *id.* at 14a-15a.

The Fifth Circuit reached that conclusion by focusing only on the conduct of those who stop distilling altogether rather than comply with the location restrictions. That blinkered focus would render any condition on taxable conduct impermissible. Requiring distillers to register their distilled-spirits plants, for example, would reduce taxable conduct of those who would decline to register. See 26 U.S.C. 5171(c)(1). The proper inquiry instead considers whether *compliance* with the condition furthers tax collection. Here, compliance with the location restrictions plainly does so, as they require distilling to occur in places where tax evasion is easier to detect and prevent. Congress made the empirical judgment that the revenue gain from increased collection would outweigh any loss to the overall tax base from those who may choose to forgo distilling. That is the type of legislative judgment that this Court has declined to second-guess. Where, as here, "it can be seen that the means adopted are really calculated to attain the end" of increased tax collection, "the degree of their necessity, [and] the extent to which they conduce to the end * * * are matters for congressional determination alone." *Comstock*, 560 U.S. at 135 (quoting *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934)).

The Fifth Circuit further erred in analogizing the location restrictions to the ban on the sale of certain illuminating oils at issue in *United States* v. *Dewitt*, 76 U.S. (9 Wall.) 41 (1869). See App., *infra*, 21a-22a. This Court there rejected the government's argument that a ban on one type of illuminating oils was "in aid and support of the internal revenue tax imposed on other illuminating oils." *Dewitt*, 76 U.S. at 44. But its reason was that banning an untaxed product in order to indirectly "increas[e] the production and sale of" separate, taxed products, is not a "plainly adapted means" of carrying out the taxing power. *Ibid.* By contrast, limiting production of the taxed product to locations where tax collection is practicable is closely connected to the taxing power. The Court in *Dewitt* thus expressly distinguished the ban on illuminating oils from existing laws "regulating the business of distilling liquors" because such regulations "are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed." *Ibid.*

Nor was the Fifth Circuit correct that upholding Section 5178's location restrictions would permit the prohibition of nearly any at-home conduct. App., *infra*, 25a. As the Sixth Circuit explained, such speculation "would strip away nearly all the particular facts on which the judgment here is based." *Ream*, 174 F.4th at 489; see *ibid.* (rejecting the argument that Congress could impose an excise tax on bread-baking or clothes-making and then prohibit those activities at home "on the theory that home-sewers or home-bakers are less likely to pay the tax"). Congress attempted to collect the tax on distilled spirits for years without success. Only when such efforts failed did Congress regulate the location of distilling as a means to collect that tax. See pp. 4-6, *supra*. That history firmly grounds the location restrictions in the taxing power. See *Ream*, 174 F.4th at 488.

"[S]hould Congress, under the pretext of executing its powers" of taxation, "pass laws for the accomplishment of objects not entrusted to the government," this Court would have the "painful duty" to hold such laws unconstitutional. *McCulloch*, 17 U.S. at 423. But here, "[t]here is no suggestion * * * that Congress enacted" Section 5178(a)(1)(B) within the tax code "as a 'pretext'" to ban home distilling for its own sake, and "the connection" between the ban and Congress's tax power is not nearly "so attenuated as to undermine the enumeration of powers." *Jinks* v. *Richland County*, 538 U.S. 456, 464 (2003). In these circumstances, the Fifth Circuit gravely erred in disregarding the relevant history and Congress's judgment as to the necessity of this protective measure. The Court should correct that error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10760

SCOTT MCNUTT, PLAINTIFF-APPELLEE

RICK MORRISS; HOBBY DISTILLERS ASSOCIATION; THOMAS O. COWDREY, III; JOHN PRINCE, III, PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

v.

US DEPARTMENT OF JUSTICE; ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, A BUREAU OF THE U.S. DEPARTMENT OF THE TREASURY, DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Filed: Apr. 10, 2026

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CV-1221

Before JONES and GRAVES, *Circuit Judges*, and RODRIGUEZ, *District Judge*.*

EDITH HOLLAN JONES, *Circuit Judge*:

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* District Judge for the Southern District of Texas, sitting by designation.

For more than 150 years, Congress has prohibited home distilleries as an adjunct to the law establishing a federal excise tax on distilled spirits. *See* Act of July 20, 1868, ch. 186, §§ 1-109, 15 Stat. 125, 125-168 (imposing excise taxes on distilled spirits and tobacco). In December 2023, a non-profit organization and several of its members challenged the law as unconstitutional.[1] The district court agreed with them. We concur that, while venerable, the statute violates the Constitution's Taxation and Necessary and Proper clauses. U.S. CONST. art. I, § 8, cls. 1, 18. The district court's judgment and injunction are AFFIRMED in part and REVERSED in part.

I. BACKGROUND

Plaintiff Rick Morris is a connoisseur of bourbon whisky and a certified bourbon steward, certified because he mastered the art of tasting spirits and learned the science behind distilling and aging alcoholic spirits.

Morris wants to distill bourbon at home, where he has ample space in the backyard and side yard to engage in distilling "a safe distance from [his] house and other houses." As the owner and operator of a company that manufactures stills for the legally approved distillation and re-distillation of alcohol, he could easily undertake this venture. He would distill at home to experiment

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[1] About a month later, a different plaintiff filed a separate lawsuit in Ohio, challenging the exact statute at issue here. Complaint, *Ream v. DOT*, No. 2:24-CV-364 (S.D. Ohio Jan. 30, 2024), Dkt. No. 1. That case is currently pending before the Sixth Circuit. Notice of Appeal, *Ream v. DOT*, No. 25-3259, (6th Cir. Apr. 8, 2025), Dkt. No. 1.

with bourbon recipes and try them out on his brother and friends.

Pursuing this passion, Morris founded the Hobby Distillers Association ("HDA"), a membership organization that "encourage[s] the legalization of at-home hobby distilling." The HDA claimed more than 1,300 members as of 2023, many of whom have donated time and money "to advance the cause of legalizing at-home distilling."

Plaintiff Scott McNutt is among the HDA's members who have expressed a desire to distill at home "for beverage purposes." Although he currently distills alcohol pursuant to a fuel-producer permit in a shed 261 feet away from his house, he wants to "tinker around" and create tastier distilled spirits that could potentially inspire a future business.

Plaintiff John Prince III also wants to distill spirits at home as a hobby. For years, he has (legally) produced homemade beer, wine, and other beverages, like hard cider, applejack, and sour-mash whiskey. To branch out into at-home distilling, he would only need to obtain a new condenser or a new still that could be set up in the garage attached to his house.

Likewise, Plaintiff Thomas O. Cowdrey III wants to distill alcohol at home as a hobby. Cowdrey learned about distilling through his friendship with Morris and through the Internet. He previously distilled alcohol for fuel in the garage near his house, but he wants to start at-home distilling to experiment with an apple-pie-vodka recipe he created.

But no one can legally distill consumable spirits at home. In 1868, a bill was enacted that generally imposed excise taxes on distilled spirits and tobacco. *See* Act of July 20, 1868, ch. 186, §§ 1-109, 15 Stat. 125, 125-168. Section 12 of the act did more than impose taxes; it prevented a person from using "any still, boiler, or other vessel for purpose of distilling" when the still was located, among other places, "in any dwelling-house" or "in any shed, yard, or enclosure connected with any dwelling-house." § 12, 15 Stat. at 130. Any violator could be fined and imprisoned. *Id.*

The law has been recodified but continues to provide that:

> No distilled spirits plant for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or [e]nclosure connected with any dwelling house, or on board any vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under subsection (b)).

26 U.S.C. § 5178(a)(1)(B). Any person who violates the law is subject to a fine of up to $10,000, up to 5 years imprisonment, or both. *Id.* § 5601(a)(6). In recent years, to administer and enforce the at-home distilling ban, some law-enforcement functions were moved from the Bureau of Alcohol, Tobacco and Firearms ("ATF") over to the U.S. Department of Justice ("DOJ") and to the newly created Alcohol and Tobacco Tax and Trade Bureau ("TTB") under the U.S. Department of the Treasury. *See* The Homeland Security Act of 2002, Pub. L. No. 107-296, § 111, 116 Stat. 2274, 2274-75 (2002).

McNutt is no stranger to the TTB. In fact, the TTB apparently believed that McNutt "may have purchased a still capable of producing alcohol and/or equipment and materials that may be used in the manufacture of a still." In 2014, the TTB sent him a "Notice of Potential Civil and Criminal Liability." McNutt was warned that "[f]ederal law provides no exemptions for the production of distilled spirits for personal or family use" at locations other than an authorized distilled-spirits plant. He was further advised that "[u]nlawful production of distilled spirits is a criminal offense, punishable by a fine of up to $500,000 [*sic*] and/or imprisonment for not more than 5 years." The TTB's letter attached a document reporting how it partners with state authorities in "targeting illegal possession of stills and illegal production of distilled spirits."

To question the home distilling ban and this kind of notice, Morris, McNutt, Prince, and Cowdrey had their lawyer telephone the TTB in November 2023 to ask whether they could acquire permits for home distillation. The TTB said no. According to the TTB representative, the agency would not even consider a request for a permit to distill at home or in a residence because it is "against the law" and "illegal to distill spirits at a residence." Although the TTB might consider issuing a distillery permit solely for fuel alcohol, the agency would not consider issuing a distilled spirits permit for personal consumption.

Shortly afterward, the individual plaintiffs and HDA sued the TTB and DOJ (collectively, "the government"), seeking injunctive and declaratory relief. Their petition asserted that the prohibition and associated criminal provision violate the Constitution's Commerce, Taxation, and Necessary and Proper clauses.

After they moved for a preliminary injunction, the district court advanced the motion to a trial on the merits under FED. R. CIV. P. 65(a)(2). Authoring a very thoughtful opinion, the district court dismissed Morris, Prince, and Cowdrey for lack of standing, but it granted relief to McNutt and HDA upon concluding that the relevant statutes, 26 U.S.C. §§ 5178(a)(1)(B) and 5601(6), violate all three constitutional provisions. The court entered final judgment the day after its order.

The government has appealed, and Morris, Prince, and Cowdrey cross-appealed their dismissal for lack of standing.

II. STANDARD OF REVIEW

"This court reviews questions of subject-matter jurisdiction de novo." *Jones v. Reeves*, 121 F.4th 531, 534 (5th Cir. 2024) (italics omitted). The court also reviews "the grant of summary judgment de novo, the permanent injunction for abuse of discretion, and the legal issues underlying the grant of the injunction de novo." *Med-Cert Home Care, LLC v. Becerra*, 19 F.4th 828, 830 (5th Cir. 2021) (italics omitted).

III. ANALYSIS

We address in turn the issues of Article III standing and the statutes' constitutionality.

A. Standing

A plaintiff satisfies the "irreducible constitutional minimum" for Article III standing by proving (1) an "injury in fact"; (2) a "causal connection between the injury and the conduct complained of"; and (3) a likelihood that a "favorable decision" will redress any injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2316 (1992). Because the TTB and DOJ challenge only the injury in fact prong on appeal, our analysis is confined to that element. Further, "standing is not dispensed in gross." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S. Ct. 2190, 2208 (2021). HDA's claim of injury is addressed separately.

A plaintiff asserting an Article III injury "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2316). A plaintiff who challenges a statute "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308 (1979) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675 (1974)). But "an actual arrest, prosecution, or other enforcement action" is not required. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 2342 (2014). Instead, an official threat may satisfy the injury-in-fact element when (1) the plaintiff has "an intention to engage in a course of conduct arguably affected with a constitutional interest"; (2) that conduct is "proscribed by a statute"; and (3) "a credible threat of prosecution" exists. *Id.* at 159, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298, 99 S. Ct. at 2309).

Each of the individuals here has satisfied these elements. First, each seriously intends to distill alcohol at or near his house or in his yard. They all declared under penalty of perjury that they would distill at home if they could. Their stated intentions are more than wishful thinking. Morris could easily start at-home distilling as the owner and operator of a company that manufactures stills for the distillation and re-distillation of fuel alcohol. McNutt has already been legally distilling fuel alcohol in a shed 261 feet away from his home, and the process for making distilled spirits is virtually the same. Prince only needs a new condenser or a new still to start distilling at home because he has already produced homemade beer, wine, and other beverages. And Cowdrey previously distilled alcohol for fuel purposes in the garage near his house and recently created an apple-pie-vodka recipe to distill at home.

Second, the individuals' serious intention to distill alcohol at home for beverage purposes is "proscribed by a statute." *Susan B. Anthony List*, 573 U.S. at 158, 134 S. Ct. at 2342. Because each individual intends to distill at a prohibited location, in or near their houses or on their property, they have shown an "intention to engage in a course of conduct *arguably* . . . proscribed by a statute."[2] *Susan B. Anthony List*, 573 U.S. at 158, 134 S. Ct. at 2342 (emphasis added). Indeed, the Supreme Court has assured that "[n]othing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact

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[2] The government contends that this requirement is not met because the statute only prohibits distillation *in* the home rather than *at* home, and McNutt's declaration, for example, does not reference *in-home* distillation. This argument is inaccurate. Although the statute prohibits distillation "in any dwelling house," it also prohibits distillation in any "yard" or "shed." 26 U.S.C. § 5178(a)(1)(B). The term "yard" includes the "[i]nclo[s]ed ground adjoining to an hou[s]e." 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); 2 N. WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("An inclosure; usually, a small inclosed place in front of or around a house or barn."). The government's distinction between *in* home and *at* home contradicts the statute's plain text.

violate that law." *Id.* at 163, 134 S. Ct. at 2345 (citing *Babbitt*, 442 U.S. at 301, 99 S. Ct. at 2310).

Finally, each individual faces a credible threat of prosecution. Shortly before filing this suit, a TTB employee informed the individuals' attorney that they could not acquire permits to distill at home because home distilling of consumable spirits is "against the law" and "illegal."[3] Apart from this conversation, the TTB has a history of enforcing this prohibition, as evidenced by the pointed warning letter McNutt received in 2014 when the TTB apparently found out that McNutt "may have purchased a still capable of producing alcohol and/or equipment and materials that may be used in the manufacture of a still." The letter and the conversation with the TTB indicate that all four plaintiffs face a credible threat of prosecution and the "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298, 99 S. Ct. at 2308. Given the "history of past enforcement," the individuals have provided "good evidence that the threat of enforcement is not 'chimerical.'" *Susan B. Anthony List*, 573 U.S. at 164, 134 S. Ct. at 2345 (some internal quotations omitted) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215-16 (1974)). The

[3] Unsurprisingly, both the TTB's website and federal regulations confirm this stance. *See Home Distilling*, Alcohol and Tobacco Tax and Trade Bureau, https://www.ttb.gov/distilled-spirits/penalties-for-illegal-distilling (last visited Dec. 5, 2025) (noting that "[f]ederal law strictly prohibits individuals from producing distilled spirits at home" and that "[p]roducing distilled spirits at any place other than a TTB-qualified distilled spirits plant can expose [the individual] to Federal charges for serious offenses"); 29 C.F.R. § 19.51 ("A person may not produce distilled spirits at home for personal use.").

credible threat here clearly falls within this court's recent precedent. *See, e.g.*, *Texas v. Yellen*, 105 F.4th 755, 765 (5th Cir. 2024) (recognizing a substantial threat of enforcement when the pertinent statutory requirement was mandatory and demonstrated that the plaintiffs had "an actual and well-founded fear that the law will be enforced against them" (citations omitted)). The individually named plaintiffs have standing to sue.

Separately, as an organization, the HDA can satisfy associational standing by proving three elements: (1) its members would "have standing to sue in their own right"; (2) HDA is trying to protect interests that "are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977). Here, the individual plaintiffs are members of HDA and have standing to sue in their own right. HDA seeks to protect interests that are relevant to its organizational purpose—namely, "encourag[ing] the legalization of at-home hobby distilling" and "advanc[ing] the cause of legalizing at-home distilling." Finally, neither HDA's constitutional claims nor its request for injunctive relief require individualized proof, rendering the participation of the HDA's members unnecessary. The HDA has associational standing.

B. 26 U.S.C. Section 5178(a)(1)(B)[4]

The government defends the statutory prohibition on at-home distillation of spirits as a "necessary and proper" exercise of Congress's power to "tax."[5] We disagree. First, contrary to the government's assumption, Section 5178 and Section 5601 are outside the scope of Congress's taxing power under the Constitution. Second, contrary to federalism principles, the statutory prohibition is not plainly adapted to executing Congress's taxing power and violates the Necessary and Proper Clause.

1. The Taxation Clause

Among Congress's enumerated powers is its authority to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The parties do not dispute that Congress may impose a tax on distilled spirits, which attaches "as soon as [the spirit] is in existence." 26 U.S.C. § 5001(b). But Section 5178, quoted above, does not mention the tax or the means of its assessment. Instead, the provision prohibits the activity that would generate taxable spirits and, together with Section 5601, imposes criminal penalties. We return to fundamental principles to determine whether the taxation power extends to such a prohibition.

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[4] 26 U.S.C. § 5601(a)(6) enforces the statutory ban by creating criminal penalties. For convenience, the statutes are both signified by the prohibitory provision alone.

[5] The government does not challenge the district court's Commerce Clause analysis on appeal. Accordingly, any such argument is forfeited, and we do not address it. *See* FED. R. APP. P. 28(a)(8); *Boone v. Rankin Cnty. Pub. Sch. Dist.*, 140 F.4th 697, 711 (5th Cir. 2025).

During the Founding era, to "lay" meant to "assess; to charge; to impose." 2 N. WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("Webster"). It also meant "[t]o charge as a payment." 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("Johnson"). To "collect" meant to "[t]o gather together; to bring into one place," 1 Johnson, or to "gather money or revenue from debtors; to demand and receive," 1 WEBSTER. And a "tax" meant "[a] rate or sum of money assessed on the person or property of a citizen by government, for the use of the nation or state." 2 WEBSTER; *see also* 2 JOHNSON (defining it as "[a]n impost" or "a tribute imposed"). Together, these definitions confirm the obvious: the power to "lay and collect Taxes" means Congress can charge or demand money from taxpayers.

It is also obvious that the purpose of a tax is to raise revenue for the government.[6] Indeed, "the *essential* feature of any tax" is that "[i]t produces at least some revenue for the Government." *NFIB v. Sebelius*, 567 U.S. 519, 564, 132 S. Ct. 2566, 2594 (2012) (emphasis added); *see also United States v. Butler*, 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936) ("A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction *for the support of the government*."

[6] *See* 1 THE POLITICAL WRITINGS OF JOHN DICKINSON 179 (1801) ("A '*tax*' mean[t] an imposition to raise money." (emphasis in original)); *id.* at 174 ("To the word '*tax*,' I annex that meaning which the constitution and history of *England* require to be annexed to it; that is—that it is *an imposition on the subject, for the sole purpose of levying money*." (emphasis in original)); 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 84 (Worthington C. Ford ed., 1904) (stating that Britain's taxes and impositions under the Stamp Act were "for the express purpose of raising a [r]evenue").

(emphasis added)); 2 Webster (defining a "tax" as "[a] rate or sum of money assessed on the person or property of a citizen by government, *for the use of the nation or state*." (emphasis added)). And Congress has the power to tax activity that it cannot directly regulate. *See License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867); *NFIB*, 567 U.S. at 537, 132 S. Ct. at 2579; *cf. Foreman v. United States*, 255 F. 621, 623 (4th Cir. 1918) (upholding regulations that affected the revenue, even though their effect was "only remote and incidental" and "tend[ed] to promote public health and morals and doubtless that consideration influenced its enactment").

Moreover, "'[e]very tax is in some measure regulatory.'" *NFIB*, 567 U.S. at 567, 132 S. Ct. at 2596 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513, 57 S. Ct. 554, 555 (1937)). But while "a tax is not any the less a tax because it has a regulatory effect," *Sonzinsky*, 300 U.S. at 513, 57 S. Ct. at 555-56, "Congress's ability to use its taxing power to influence conduct is not without limits," *NFIB*, 567 U.S. at 572, 132 S. Ct. at 2599. The Court emphasized in *NFIB* that "the power to tax is not the power to destroy while this Court sits." *Id.* at 573, 132 S. Ct. at 2600 (internal quotations omitted). Consequently, "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, *no more*." *Id.* at 574, 132 S. Ct. at 2600 (emphasis added). In fact, "[i]f a tax is properly paid, the Government has *no* power to compel or punish individuals subject to it." *Id.* (emphasis added). Or as the Court noted nearly a century ago, "[i]t is not contended that [the taxing] provision grants power to regulate agricultural production on the theory that such legislation would promote the general welfare." *Butler*, 297 U.S. at 64, 56 S. Ct. at 318.

Section 5178(a)(1)(B) and Section 5601(a)(6) exceed these constitutional limits. Primarily, neither provision raises revenue. Not only do they prohibit at-home distilleries, but in so doing, they amount to an anti-revenue provision that prevents distilled spirits from coming into existence. *Cf.* 26 U.S.C. § 5001(b) (taxation begins "as soon as [the spirit] is in existence"). The provisions operate to *reduce* revenue instead of raising it. This violates the Supreme Court's explanation of how the federal power of taxation works: "[I]mposition of a tax nonetheless leaves an individual with *a lawful choice* to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *NFIB*, 567 U.S. at 574, 132 S. Ct. at 2600 (emphasis added). These plaintiffs have only the choice *not* to do as they wish or risk fines and imprisonment.[7]

The government contends that this prohibition was enacted to prevent tax evasion because "[a] distiller can more easily conceal a spirit's strength (and thus avoid the proper tax rate)—or conceal a distilling operation altogether—if his still is in his house or connected with it."[8] But just as "Congress cannot authorize a trade or business within a State in order to tax it," it stands to reason that Congress cannot prohibit intrastate activity

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[7] This purely regulatory set of options is analogous to the Court's description of Congress's power under the Commerce Clause, which confers broader ability to control individual behavior than does the power of taxation. *See id.* at 572-73, 132 S. Ct. at 2599-600.

[8] *See* H.R. Rep. No. 39-24, at 1 (1867) ("[I]n the manufacture and sale of . . . spirits, . . . the most stupendous frauds are practiced against the government in the collection of its revenue. Indeed, it is believed that at least seven-eighths of the entire amount of spirits manufactured under the present law have escaped taxation.").

solely because it might produce products hard to tax.[9] *License Tax Cases*, 72 U.S. (5 Wall.) at 471. Congress's taxing power "reaches only existing subjects," not activity that may generate subjects of taxation. *Id.* Put otherwise, preventing activity lest it give rise to tax evasion places no limit whatsoever on Congress's power under the taxation clause. In contrast, all of the other statutory provisions governing the manufacture, bottling, and labelling of distilled spirits exist to facilitate collection of taxes associated with the activity, not to prevent spirits from being distilled in the first place. Section 5178(a)(1)(B) and Section 5601(a)(6) do not represent an exercise of the taxation power of Congress.

2. The Necessary and Proper Clause

The government's primary defense of the home distilling ban rests on the Necessary and Proper Clause. That clause has been characterized as the "last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923, 117 S. Ct. 2365, 2378-79 (1997). Congress is empowered 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. To satisfy

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[9] The government now contends that "[t]he location restriction does not ban plaintiffs from distilling . . . at home"—it simply limits where *on an individual's property* he may place his still, thus only "regulat[ing] the manner in which the plaintiffs go about that taxable activity." As discussed above, however, the statute not only prohibits distillation "in any dwelling house" but also in any "yard" or "shed." 26 U.S.C. § 5178(a)(1)(B). Contrary to the government, by its terms, the statute prohibits distillation anywhere on one's property.

the clause, a law must "carry[] into Execution" some other enumerated power. In general, the Necessary and Proper Clause "gives Congress power to pass laws both 'vertically' to implement its own enumerated powers and 'horizontally' to implement the constitutionally vested powers of federal executive and judicial officers." Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 n.23 (1993).

Chief Justice Roberts stated, "We have long read this provision to give Congress great latitude in exercising its powers." *NFIB*, 567 U.S. at 537, 132 S. Ct. at 2579. He reinforced the need for deference by quoting *McCulloch*'s famous statement: "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 that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Nonetheless, the Necessary and Proper Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 567 U.S. at 559, 132 S. Ct. at 2591. And the Court cautioned, "[o]ur respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Id.* at 537, 132 S. Ct. at 2579.

The Framers insisted that this clause grants no new power to Congress.[10] Moreover, by its own terms, "even

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[10] *See* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 468 (Jonathan Elliot ed., 2d ed. 1836) ("ELLIOT'S DEBATES") (James Wilson stating that the Necessary and Proper Clause "is saying no more than that the

where a law is necessary," "it may still be 'improper.'" *Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau*, 740 F. Supp. 3d 509, 526 (N.D. Tex. 2024). The issue thus becomes whether Section 5178 and Section 5601 are both "necessary" and "proper" in rela-

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powers we have already particularly given, shall be effectually carried into execution," and that it "gives more or other powers; nor does it, in any degree, go beyond the particular enumeration" because Congress's power under this clause "is limited and defined by the following, 'for carrying into execution the foregoing powers'"); 3 ELLIOT'S DEBATES, at 441 (Edmund Pendleton stating that the Necessary and Proper Clause does "not go[] a single step beyond the delegated powers," and if Congress wanted to pass a law under this clause, "they must pursue some of the delegated powers, but can by no means depart from them, or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers"); 3 ELLIOT'S DEBATES, at 455 (James Madison explaining that the clause "only extended to the enumerated powers," and "[s]hould Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause" because "it was a restraint on the exercise of a power expressly delegated to Congress"); 4 ELLIOT'S DEBATES, at 141 (Archibald Maclaine stating that "Congress can have no power but what we expressly give them"; that the Necessary and Proper Clause "gives no new power, but declares that those already given are to be executed by proper laws"; and that Congress "can make no laws to execute any other power" because the clause "specifies that they shall make laws to carry into execution *all the powers vested* by this Constitution" (emphasis in original)); 1 ANNALS OF CONG. 277 (Joseph Gales ed., 1789) (Elbridge Gerry stating that the clause "gives no legislative authority to Congress to carry into effect any power not expressly vested by the constitution"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 267 (1833) (the clause "neither enlarges any power specifically granted; nor is it a grant of any new power to congress" but "is merely a declaration for the removal of all uncertainty, that the means of carrying into execution those, otherwise granted, are included in the grant").

tion to the assessment and collection of federal taxes on distilled spirits.

a. Necessary

Dictionaries published at the time of the Founding defined "necessary" to mean "indispensably requisite;" "indispensable; requisite, essential;" or "[u]navoidable." 2 WEBSTER; *see also* 2 Johnson (defining "necessary" as "[n]eedful" or "indispensably requisite"). Early in our history, however, defining "necessary" to encompass "indispensable" arguably revealed some tension in the text of the Constitution. Several clauses use the word "necessary" in slightly different senses.[11] In *McCulloch*, Chief Justice Marshall recognized that "necessary" was defined as "indisputably requisite," but he resolved the incongruities in the constitutional text by holding that "necessary" does not always mean "indispensable" and may instead connote "one thing [that] is convenient, or useful, or essential to another." 17 U.S. (4 Wheat.) at 367, 413-14. The Court concluded that to be "necessary," a law must be "plainly adapted" to an enumerated power. *Id.* at 421. This description has prevailed since then. *See NFIB*, 567 U.S. at 537, 132 S. Ct. at 2579 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421); *Jinks v. Richland County*, 538 U.S. 456, 462, 464, 23 S. Ct. 1667, 1671 (2003) (recognizing the "plainly adapted" standard as the proper test); *United States v. Comstock*, 560 U.S. 126, 134, 130 S. Ct. 1949, 1956 (2010) (same); *James*

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[11] *Compare* U.S. CONST. art. I, § 10, cl. 2 (states limited to imposing duties "absolutely necessary" for inspection laws), and art. II, § 3 (President's State of the Union message to contain "necessary and expedient" information), *with* art. I, § 8, cl. 18 (the Necessary and Proper Clause enabling Congress to effectuate enumerated powers).

Everard's Breweries v. Day, 265 U.S. 545, 558-59, 44 S. Ct. 628, 631 (1924)("[i]t has long been settled that Congress . . . may adopt any means, appearing to it most eligible and appropriate, which are *adapted* to the end to be accomplished and consistent with the letter and spirit of the Constitution" (emphasis added)).

Judged by the *McCulloch* standard,[12] prohibiting at-home distilleries is not "plainly adapted" to effectuate Congress's taxation of spirits. The provisions challenged here do not tax the distilled spirits or the still; they flatly prohibit and penalize distillation inside a home or in any yard or shed connected to a home. *See* 26 U.S.C. §§ 5178(a)(1)(B), 5601(a)(6).[13] Because these provisions tax nothing, and are distinct from the regulation of distilling alcoholic products that is permitted by federal tax law, they do not help Congress raise revenue. On the contrary, the statutes reduce revenue by preventing individuals from making distilled spirits. The district court correctly explained that "the provisions at issue punish individuals Congress cannot reach," *Hobby Distillers Ass'n*, 740 F. Supp. 3d at 529, and this is be-

[12] We do not read *Comstock* as modifying *McCulloch* to import some kind of rational basis test into the Necessary and Proper Clause. Instead, the Court's discussion about the "necessity" of providing long-term confinement for certain incurable prisoners demonstrated a clear chain of causation from Congress's power, derived from its enumerated powers, to prescribe crimes and imprisonment. As noted, *Comstock* expressly relied on the *McCulloch* formulation. *See* 560 U.S. at 134, 130 S. Ct. at 1956. In any event, *NFIB*'s description of the Necessary and Proper Clause in relation to the taxing power is directly on point in this case.

[13] In fact, a separate provision criminalizes the mere possession by individuals of distillation equipment for use at their homes. *See* 26 U.S.C. § 5601(a).

cause it criminalizes the conduct of a person in order to prevent its taxation power from taking effect. Section 5178 has no "real or substantial relation to the enforcement of" the taxing power. *James Everard's Breweries*, 265 U.S. at 560, 44 S. Ct. at 632.

Pointing to the legislative justification for the 1868 enactment of what became Section 5178(b)(1)(A), the government cites then-rampant evasion of the spirits tax and the perceived need to curb abuse by regulating the location of distilleries.[14] Accordingly, separate paragraphs within Section 5178 as a whole authorize the Treasury Secretary to license distilleries and prohibit their location, without express approval, where any other business is carried on. *See* 26 U.S.C. § 5178(a)(1)(A), (C), (b). Together with these provisions, an "elaborate system has been set up by legislation and regulations thereunder to protect the revenue on distilled spirits." *United States v. Goldberg*, 225 F.2d 180, 187 (8th Cir. 1955). But instead of demonstrating how the at-home distillery prohibition is "plainly adapted" to protect the federal revenue stream, the regulations repudiate the government's position.

First, licensing and regulating distilleries accomplish the purposes of taxation because they allow spirits to be created. The regulations authorize a person to conduct distilling so long as he is willing to pay a tax. *Cf. NFIB*, 567 U.S. at 574 132 S. Ct. at 2600 ("imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice"). Section 5178, in contrast to

[14] *See* H.R. Rep. No. 39-24, at 1 (1867) ("[I]n the manufacture and sale of . . . spirits, . . . the most stupendous frauds are practiced against the government in the collection of its revenue.").

regulating the creation and distribution of distilled spirits, is a pure prohibition of conduct that might otherwise have generated taxable products.

Second, licensing at-home distilling would subject the plaintiffs, or any individuals, to the same regulatory regime that covers licensed distillers.[15] Thus, plaintiffs' failures to obtain a license or comply with the regulations or pay the spirits tax would be sanctionable, just as such noncompliance or evasion by currently licensed distillers is punishable. Excising the Section 5178 prohibition and the accompanying Section 5601 penalty would place at-home distilleries on the same level as current licensees. And it goes without saying that the economics and practicality of at-home distilling today are much different than they were in the nineteenth century, and so is the government's ability to investigate such activity. In sum, the challenged provisions do nothing to further tax collection; they only inhibit revenue raising.

Significantly, the Supreme Court long ago rejected Congress's attempt to ban one product in order to further taxation of another product. *See United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869). There, the challenged statute prohibited the sale of naphtha mixed with illuminating oils. *Id.* at 44. The government attempted unsuccessfully to defend the statute's constitutionality under the Commerce Clause and taxing power. As to

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[15] Indeed, the TTB might resurrect a proposal that Congress considered before it adopted the ban on at-home distilling: tax "the capacity of the distillery," a "simple, easy, and effective" method that would "greatly . . . reduce the expense of collection" and "avoid all the various temptations and opportunities for fraud." *See* H.R. Rep. No. 39-24, at 5 (1867).

the latter, it argued, the prohibition "was in aid and support of the internal revenue tax imposed on other illuminating oils." *Id.* The Court rejected the government's justifications as "too remote and too uncertain" to conclude that "the prohibition [wa]s an appropriate and plainly adapted" execution of the taxing power. *Id.* Further, "[i]f the prohibition . . . has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described." *Id.* While the government proposed analogies to various distilled-spirits regulations, the Court noted that those regulations were "restricted to the very articles which are the subject of taxation," but "in the case before [the Court], *no tax is imposed on the oils*. . . . " *Id.* (emphasis added). Therefore, the Court held that this prohibition was a "police regulation" —reserved to the states—and unconstitutional as a federal measure. *Id.* at 45.

Similarly, the government's citation of cases that are "restricted to the very articles which are the subject of taxation" are inapposite to Section 5178's prohibition of conduct in order to prevent taxable activity. In *Felsenheld v. United States*, the Court upheld a federal law that prohibited inserting coupons or other "prize[s]" in tobacco packages. *See* 186 U.S. 126, 127, 130-35, 22 S. Ct. 740, 741-43 (1902). Congress had not abused its power under the Taxation Clause, the Court concluded, because "for the manufacture and handling of goods which are subjected to an internal revenue tax," "it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed. . . . " *Id.* at 132, 22 S. Ct. at 742-43. And in *Stilinovic v. United States*, the court upheld the constitutionality of a law that prohibits sellers of distilled spirits from "plac[ing] in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping[.]" 336 F.2d 862, 863-65 (8th Cir. 1964) (quoting 26 U.S.C. § 5301(c)); *see also Goldberg*, 225 F.2d at 188 (upholding a similar regulation as "reasonably related to the protection of the revenue"). Such measures facilitate the measurement and integrity of the taxable products and clearly relate to tax collection. These cases thus concern "the very articles" subject to taxation, not those, as in this case, on which "no tax is imposed." *See Dewitt*, 76 U.S. (9 Wall.) at 44.

b. Proper

Among other definitions in dictionaries of the Founding era, "proper" meant "particularly suited to" or "correct" or "just," 2 WEBSTER, and it represented something that was "[n]atural" or "original" or even "[f]it; accommodated; adapted; suitable; qualified," 2 JOHNSON.

At the Founding, the term "proper" was frequently used when individuals were discussing "the allocation of governmental powers" or the separation of powers. Lawson & Granger, *supra*, at 291; *see also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 217 (2003) (stating that a law's propriety may be determined "(1) according to principles of separation of powers, (2) according to principles of federalism, and (3) according to the background rights retained by the people.").

Indeed, writing as Publius, Alexander Hamilton explained that "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded." THE FEDERALIST NO. 33, at 206 (J. Cooke ed. 1961). Accordingly, when "acts of the larger society . . . are not pursuant to its constitutional powers . . . [and] are invasions of the residuary authorities of the smaller societies," then these actions "will be merely acts of usurpation and will deserve to be treated as such." *Id.* at 207. Consistent with this understanding, *McCulloch* characterized a law as "proper" when it is "not prohibited" by another enumerated powers and is "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421. A law must be declared unconstitutional if Congress "adopt[ed] measures which are prohibited by the constitution" or "pass[ed] laws for the accomplishment of objects not [e]ntrusted to the government" and "under the pretext of executing its powers." *Id.* at 423. Relatedly, a law that exceeded Congress's powers would expand the federal government and necessarily infringe on state sovereignty. *Printz*, 521 U.S. at 923-24, 117 S. Ct. at 2379.[16] By purporting to ban activity without a plain connection to the exercise of Congress's taxation power, Congress has essentially—and "improperly"—invaded the reserved police and regulatory power of the states.

We agree with Plaintiffs that Sections 5178(a)(1)(B) and 5601(a)(6)'s banning and criminalization of at-home distilling "is not a proper means of exercising the tax

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[16] "[T]he Constitution established a system of 'dual sovereignty.'" *Id.* at 918, 117 S. Ct. at 2376 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399 (1991)). On one hand, it created "a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 1626 (1995) (citing U.S. CONST. art. I, § 8). But on the other, the state governments' powers are "numerous and indefinite." THE FEDERALIST NO. 45, at 313 (J. Cooke ed.). Because of these principles, Congress lacks "a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566, 115 S. Ct. at 1633.

power" because it "takes away Plaintiffs' choice to pay the tax" by engaging in otherwise legal, albeit licensed and regulated, activity. Indeed, by "claim[ing] the authority to ban [the imposition of] a tax liability out of fear of future tax avoidance," the government "invites a question: what cannot be banned?" Under the government's logic, Congress may criminalize nearly any at-home conduct only because it has the possibility of concealing taxable activity. Home-based businesses may be forbidden. Remote work may be deemed a crime. But "the taxing power does not give Congress the same degree of control over individual behavior [as the Commerce Clause]." *NFIB*, 567 U.S. at 573, 132 S. Ct. at 2600. Logically, the Necessary and Proper Clause cannot expand the reach of the taxing power to criminalize conduct that could produce taxable revenue under the pretext that generating revenue for the federal government will be enhanced. Without any limiting principle, the government's theory would violate this court's obligation to read the Constitution "carefully to avoid creating a general federal authority akin to the police power." *Id.* at 536, 132 S. Ct. at 2578. As a result, Sections 5178(a)(1)(B) and 5601(a)(6) are not "proper" within the meaning of the Necessary and Proper Clause.

IV. CONCLUSION

The statutory prohibitions on in-home distilling are neither "plainly adapted" to Congress's taxing power nor "consist[ent] with the letter and spirit" of the Constitution. *See McCulloch*, 17 U.S. (4 Wheat.) at 421. The district court correctly determined that these statutes here violate the Taxation and Necessary and Proper clauses. Because we have concluded that all plaintiffs have Article III standing to challenge these provisions, we AFFIRM as MODIFIED the district court's judgment and injunction[17] against their enforcement.

[17] Generally, for a permanent injunction, a plaintiff must establish that (1) he or she suffered an irreparable injury; (2) the remedies available at law are inadequate; (3) the balance of hardships between the plaintiff and defendant warrants a remedy in equity; and (4) a permanent injunction would not disserve the public interest. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (2006). On appeal, the government makes no arguments on the district court's permanent-injunction analysis of these four factors. Accordingly, any such argument is forfeited. *See* FED. R. APP. P. 28(a)(8); *Boone*, 140 F.4th at 711.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:23-cv-1221-P

HOBBY DISTILLERS ASSOCIATION, ET AL., PLAINTIFFS

v.

ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, ET AL., DEFENDANTS

Filed: July 10, 2024

OPINION AND ORDER

Before the Court is Plaintiffs' Motion for a Preliminary and Permanent Injunction (ECF No. 17), which the Court has advanced to the case's merits as authorized by Federal Rule of Civil Procedure 65. For the reasons distilled below, the Court **DISMISSES** three of the Individual Plaintiffs for lack of standing, but **GRANTS** the motion as to the remaining Plaintiffs, awarding them declaratory relief and a permanent injunction. But the Court **STAYS** the applicability of this Order for **fourteen days** to allow the government to seek emergency appellate relief, if it chooses to do so.

BACKGROUND

This case arises from two federal statutes that regulate the location of distilled spirits plants, or "stills," which are used to distill beverage alcohol, or "spirits." Individual Plaintiffs are four people from various states who wish to distill spirits at home for personal consumption. Association Plaintiff, the Hobby Distillers Association, is a Texas-based organization that advocates for the legalization of home-distilling beverage alcohol for personal consumption. The Association has approximately 1,300 members nationwide, including all four Individual Plaintiffs. And it was organized to advocate for the legalization of home distilling while providing information and education to its members on the nuances of distilling various spirits.

Enacted in 1868, 26 U.S.C. § 5178(a)(1)(B) provides that:

> [n]o distilled spirits plants for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or inclosure [sic] connected with any dwelling house, or on board any vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under subsection (b)).

And § 5601(6) makes it a felony to violate § 5178(a)(1)(B), providing that:

> [any] person who uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists therein, or causes or procures the same to be done, in [any location proscribed by § 5178(a)(1)(B), except as authorized by § 5178(a)(1)(C)], shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

Id. § 5601(a)(6).

Plaintiffs sued, alleging that these provisions are unconstitutional because they exceed Congress's enumerated powers. Plaintiffs seek declaratory relief and a permanent injunction to prevent their enforcement against them.

The Court held a preliminary injunction hearing on March 28, 2024, and took the Parties' contentions under advisement. Receiving no objection from either party, the Court advanced Plaintiffs' request for injunctive relief to the merits. *See* FED. R. CIV. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.").

Accordingly, the Court now considers the entire record on the merits, treating the Parties' filings as summary judgment briefs.

LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact" and "is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is "genuine" if the evidence presented would allow a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242-43 (1986). And a fact is "material" when it might affect the outcome of a case. *Id.* at 248. When determining whether summary judgment is appropriate, the Court views the evidence in the light most favorable to the nonmovant. *First Am. Title Ins. Co. v. Cont'l Cas. Co.*, 709 F.3d 1170, 1173 (5th Cir. 2013). In conducting its evaluation, the Court may rely on any admissible evidence of record, but need only consider materials cited by the parties. FED. R. CIV. P. 56(c)(1)-(3).

Here, neither Party disputes that there are no factual issues at stake. So, the determinative inquiry is which Party is entitled to judgment as a matter of law.

ANALYSIS

I. Standing

The government first contends that neither Individual Plaintiffs nor Association Plaintiff have standing to sue, primarily because they have not suffered any legal injury. ECF No. 30 at 16.

Article III standing is a "bedrock constitutional requirement that [courts have] applied to all manner of important disputes." *United States v. Texas*, 599 U.S. 670, 675 (2023). This is because Article III confines federal courts' jurisdiction to "Cases" and "Controversies." U.S. CONST., art. III, § 2, cl. 1. Federal courts are not public forums for citizens "to press general complaints [about] government," *Allen v. Wright*, 468 U.S. 737, 760 (1984), so "cases" or "controversies" only exist when a plaintiff has standing to sue. *Texas*, 599 U.S. at 675.

Thus, every court must ask its plaintiff: "What's it to you?" A. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 882 (1983). The correct answer requires three things. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992). *First*, there must be a concrete injury in fact that is not conjectural or hypothetical. *Whitmore v. Arkansas*, 495 U.S. 149, 149 (1990). *Second*, there must be causation—a fairly traceable connection between a plaintiff's injury and the complained-of conduct of the defendant. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S.

26, 41-42 (1976). And *third*, there must be redressability —a likelihood that the requested relief will really cure that injury. *See Lujan*, 504 U.S. at 562.

A. Individual Plaintiffs' Standing

An allegation of future injury may suffice for Article III standing if the threatened injury is certainly impending, or imminent, or if there is a substantial risk that the harm will occur. *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 415-16 n.5 (2013). Alleging that a future injury is merely "possible" is not enough, *id.* at 409, because imminence "cannot be stretched beyond its purpose[: to ensure] that the alleged injury is not too speculative for Article III." *Lujan*, 504 U.S. at 560-61.

Hence, a plaintiff bringing a pre-enforcement challenge to a criminal statute must "demonstrate a realistic danger of sustaining a direct injury [from its] enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). But plaintiffs who intend to engage in proscribed conduct allegedly protected by the Constitution do not need to "expose [themselves] to *actual* arrest or prosecution." *Id.* (emphasis added) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Where "a plaintiff raises a pre-enforcement challenge to a federal statute, the injury-in-fact requirement is satisfied where the plaintiff shows a serious 'intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Paxton v. Dettelbach*, --F. 4th--, 2024 WL 3082331, at *2 (5th Cir. June 21, 2024) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). So, the plaintiff's intent must be *serious*, and the threat of prosecution must be *credible*—meaning more than a "mere possibility." *Babbit*, 442 U.S. at 298-99.

This is not this Court's first tasting of pre-enforcement challenges. *See Paxton v. Restaino*, 683 F. Supp. 3d 565 (N.D. Tex. July 18, 2023) (Pittman, J.), *aff'd. Paxton*, 2024 WL 3082331. In *Paxton*, this Court considered a similar pre-enforcement challenge to federal statutes requiring individuals who wish to make a firearm silencer at home to first apply for the government's permission and pay a tax. *Paxton*, 2024 WL 3082331, at *1. The Fifth Circuit affirmed this Court's dismissal for lack of standing because the individual plaintiffs neither alleged an intent to violate the law, nor alleged enough specifics to demonstrate the seriousness of their intent. *Id.* at *2-3. As a result, they could not have faced a credible threat of prosecution. *Id*. But here, the opposite is true.

First, Individual Plaintiffs have shown a serious intent to engage in proscribed conduct they believe is affected with a constitutional interest. The statutes at issue make it a crime to possess a still with intent to produce distilled beverages on residential property, among other locations. 26 U.S.C. §§ 5178(a)(1)(B), 5601(6). And all Individual Plaintiffs allege an intent to distill beverage alcohol but for the federal prohibition. *See* ECF No. 17-2. At least one Plaintiff currently operates a still in a shed on his residential property, permitted for distilling ethanol. *Id.* at 5 (Declaration of Scott McNutt). Another currently possesses a still in his garage that he has used to produce ethanol in the past. *Id.* at 9 (Declaration of Thomas Cowdrey). Another possesses a permit to redistill alcohol at his place of business; and could "easily" transport one of his business's stills to his residence. *Id.*

at 3 (Declaration of Rick Morris). And the fourth has become proficient at making beer and wine at home and has identified only one missing part—a condenser—to repurchase before his home still is operable *again*. *Id.* at 7 (Declaration of John Price). In short, each of these plaintiffs is no more than one overt act away from criminal liability under the challenged statutes.

Likewise, all Individual Plaintiffs possess the requisite expertise to distill beverage alcohol if they wanted to. *See* ECF No. 17-2. Plaintiff Cowdrey has already "crafted a recipe for apple pie vodka," and lists its constituent ingredients. *Id.* at 9. Plaintiff Price is already "proficient" at home-brewing beer and wine and knows how to equip his still to produce liquor. *Id.* at 7. Plaintiff Morris is no joke, either. He is a certified "bourbon steward," which entails "mastering the art of tasting spirits and learning the science behind distilling and aging." *Id.* at 2-3. He also operates Brewhaus (America), Inc., a company currently allowed to redistill alcohol. *Id.* at 2. And Plaintiff McNutt has an electrical engineering degree from the United States Coast Guard Academy, currently distills alcohol for fuel, and understands that the chemistry of distilled alcohol is nearly identical regardless of its use—

> The alcohol is created by making beer or wine and then distilled down using the same process, whether for fuel or beverage purposes. Distilled alcohol for fuel use is nothing more than high-proof vodka. If you decide to use corn or grain to make alcohol, then all of a sudden, you're making whiskey.

Id. at 4-5. In sum, these Plaintiffs know what they want, what they need to do it, and how to make it happen.

Thus, Plaintiffs show a very "serious intent" to engage in proscribed conduct. *Paxton*, 2024 WL 3082331, at *2.

Second, the threat of prosecution for such conduct is credible. Plaintiff McNutt received an unsolicited letter from Defendant TTB entitled: "Notice of Potential Civil and Criminal Liability." ECF No. 31-1 at 2. Signed by the Director of the TTB's Trade Investigations Division, the letter states that "*[i]t has come to the Alcohol Tax and Trade Bureau's (TTB) attention* that you may have purchased a still capable of producing alcohol and/or equipment and materials that may be used in the manufacture of a still." *Id.* (emphasis added). Troubling, right? The letter further admonishes its recipient that the "[u]nlawful production of distilled spirits is a criminal offense, punishable by a fine of up to $500,000 and/or imprisonment for not more than 5 years."[1] *Id.* The letter finally reminds recipients that anyone wishing to produce alcohol, for whatever purpose, must first obtain the necessary federal permits, even though TTB knows that *no* permit will be considered for the home-distillation of *beverage* alcohol in any case. ECF No. 1 at 5-6.

Though this letter does not make it *certain* that Plaintiffs' will be prosecuted, it certainly makes it *credible.* The government received Plaintiffs' information

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[1] As a matter of principle, this Court is distressed at an impropriety contained in TTB's letter. Regardless of the reader's level of comfort with the federal government receiving purchase data and using that data to "forewarn" ne'er-do-well citizens about potential criminal liability, this Court is highly disturbed that the letter attempts to threaten a "$500,000 fine" when the statutory maximum is $10,000. *See* 26 U.S.C. § 5601(a).

from somewhere[2]—it was able to identify and notify those citizens who purchased equipment for stills. Accordingly, these notices of potential criminal liability are one step short of a target letter—ordinarily issued in criminal investigations. Thus, they make the threat of prosecution sufficiently credible for Article III standing. *Babbit*, 442 U.S. at 298-99.

But because the Court has advanced this matter to summary judgment, Plaintiffs must *each* produce sufficient evidence to establish standing. The receipt of TTB's notices is critical for determining the credibility of prosecution against *these* Individual Plaintiffs. *See Paxton*, 683 F. Supp. 3d. at 569 (it is insufficient for the plaintiffs at bar to allege that prosecution is likely because the matter is something that the government has prosecuted in the past). Without it, Plaintiffs' sincere intent to engage in proscribed conduct is not enough; the sincere intent must be *accompanied* by a credible threat of prosecution. *Paxton*, 2024 WL 3082331, at *2. And without the liability notice, a plaintiff may hypothetically intend to break the law with no threat of retribution. Here, only Plaintiff McNutt received such a notice. ECF No. 31 at 4. Therefore, on the present record, only Individual Plaintiff McNutt has established a sincere intent to engage in proscribed conduct *while facing* a cred-

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[2] At this Court's hearing on Plaintiffs' request for a preliminary injunction, the government conceded that it identified Plaintiffs by obtaining customer information from manufacturers of still equipment. The government further argued that, because it sent many of these notices, these Plaintiffs have not experienced an individualized threat of prosecution that would give rise to standing. The Court disagrees. Rather, any one of these recipients under these facts would be able to assert a credible threat of prosecution, and potentially have standing to sue.

ible threat of prosecution. *Paxton*, 2024 WL 3082331, at *2. Accordingly, the remaining Individual Plaintiffs will be dismissed.

Yet, the government argues that the proscribed behavior is still not "affected by a constitutional interest." ECF No. 30 at 16. The government claims that "[w]hile Plaintiffs in this case claim that Congress lacked the constitutional authority to enact the statutory provisions at issue, they do not assert a claim that the statute violates any constitutionally protected right." *Id.* This rebuttal is unavailing. The question of whether the Constitution or any court has "recognized" a particular right under the Constitution should not be conflated with the public's interest in ensuring that Congress has not acted beyond its enumerated powers. Indeed,

> the restrictions on government power in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play [] only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to [act], that law may not be enacted, *even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.*

NFIB v. Sebelius, 567 U.S. 519, 535 (2012) (emphasis added). Thus, a plaintiff need not allege the violation of an articulated right to keep Congress in its lane. Plaintiff McNutt has done just that. He has demonstrated a legal interest that could be lost if he is prosecuted for engaging in conduct that he believes Congress has no power to prohibit. McNutt has therefore suffered an injury-in-fact sufficient for Article III standing. *See Lujan*, 504 U.S. at 560.

The government next contests redressability and causation. ECF No. 30 at 19, n.1. In sum, the government contends that "the distilling activities they wish to undertake would [still] be subject to various state and local restrictions and requirements." *Id.* True. But Plaintiffs contend that they cannot have a state or local permit until a federal permit is issued. ECF No. 31 at 2-3. Thus, Plaintiffs have established causation and redressability because the federal ban on home-distilling is the necessary prerequisite to complying with any other law, regardless of whether they are the subject of this suit.[3] Similar to standing for a pre-denial-of-benefits challenge, McNutt has standing to challenge the federal prohibition here because it is the first hurdle to any permit he could receive from state or local authorities. *See Nuziard v. Minority Bus. Dev. Agency*, --F. Supp. 3d.--, 2024 WL 965299, at *11 (N.D. Tex. Mar. 5, 2024) (Pittman, J.) ("Absent clairvoyance, there's no way to know if Nuziard or Bruckner would *access* benefits if they applied. But that doesn't make their injuries 'conjectural' or 'hypothetical' because that's not the gravamen of their grievance."); *see generally Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664-65 (1993) ("[T]hese

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[3] Plaintiffs dispute the government's contention that Texas law prohibits at-home distilling in the first place, because the Texas Beverage Code's prohibition only applies to "illicit beverages," which they argue whiskey is not. *See* TEX. ALCO. BEV. CODE §§ 103.01-.02. Notwithstanding, Plaintiff McNutt is the only Individual Plaintiff with standing. He is coincidentally a resident of New Jersey, and New Jersey law expressly *allows* distilling and mixing beverages "for immediate personal use" so long as the still is registered with the state. *See* NJ Rev. Stat. §§ 33:2-10 (2014); 33:1-2. Thus, he could easily comply with local law but for the presence of the federal statutes.

cases stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit . . . [the injury is] the denial of equal treatment [as a result of the barrier], not the ultimate inability to obtain the benefit.").

To be sure, this is not an equal-protection case. But the basic principles are illustrative of why the government's theory of causation fails. Where a plaintiff's remedy (e.g., home-distilling) hangs in part on compliance with state law, but that compliance is prevented by federal statute, the federal government does not get rebuff causation by claiming: "It's not me, it's [the states]." If no one had standing to challenge the federal government's overreach of authority merely because there could be a state law they had to pursue next,[4] then the federal government could knock the wind out of any state's authority on any subject within the jurisdiction it shares with the feds. Federalism would indeed give way to pure subjugation.[5]

Accordingly, Plaintiff Scott McNutt has established Article III standing to challenge the prohibition at issue. The Court now turns to whether the Hobby Distillers Association has standing.

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[4] Which, as we know, is not the case here. *See* n. 3.

[5] This is not to say that we should do away with federal preemption of conflicting state laws. *See* U.S. CONST. art. V, § 1, cl. 2. Supremacy of the United States Constitution must be respected where states seek to subvert it by exempting its citizens from the operation of a *valid* federal law. *See Paxton*, 2024 WL 3082331, at *6. But this case is one where, rather than vindicating a state law in conflict with a federal one, the issue is whether Congress exceeded its enumerated powers in enacting the prohibition in the first place.

B. Associational Standing

Generally, associations have standing to challenge a law on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). "If an association can satisfy these requirements, we allow the association to pursue its members' claims, without joining those members as parties to the suit." *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 398 (2024) (Thomas, J., concurring).

First, Plaintiff Scott McNutt has individual standing. *See* Part I(a). McNutt is a member of the Hobby Distillers Association. ECF No. 1 at 3. Therefore, the Association meets the first *Hunt* requirement.

Second, the Hobby Distillers Association is the trade name of a Texas corporation and is a membership organization whose purpose is to promote the nationwide legalization of home distilling. *Id.* at 2. The Association has over 1,300 members nationwide and educates them on the processes involved in distilling beverage alcohol. ECF Nos. 17-2 at 1; 30 at 2. It's leader, Individual Plaintiff Rick Morris, is a certified bourbon steward permitted to redistill alcohol at his business, and he educates the Association's members in everything distillation. ECF Nos. 17-1 at 1-2; 17-4 at 1 ("I learned how to distill beverage alcohol through a friendship with Rick Morris."). Because the relief it seeks is germane to the organization's purpose to promote the practice of home distilling, the Association meets the second *Hunt* requirement.

Third, the association's claim that Congress exceeded its enumerated powers does not require the participation of any of its members to pursue. And its request for declaratory and injunctive relief does not require an individual member's participation, either. Claims for declaratory and injunctive relief are not like monetary damages asserted on behalf of someone else, who would be *required* to participate for their representative to state a claim. Here, the Association merely seeks declaratory and injunctive relief so that it may fulfill its purpose without advocating that its members commit a felony. Accordingly, the Association meets the third *Hunt* requirement.

Thus, because the Hobby Distillers Association has satisfied the three *Hunt* requirements, it has standing to pursue these claims on behalf of its members.[6] *Hunt*, 432 U.S. at 343.

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[6] The Court has thoroughly reviewed the issues surrounding the propriety of associational standing as articulated by Justice Thomas. *See FDA*, 602 U.S. at 397-405. The Court agrees, particularly in the implementation of remedies, that the doctrine's application causes issues. Take, for instance, this Court's dismissal of Rick Morris for failing to adduce evidence to establish individual standing. While he technically does not have standing, his organization does. So, he will presumably be included by operation into any relief the Court grants to the Association, despite failing to personally suffer an injury. While associational standing is not the primary issue before the Court, because the Association's standing is attained through Individual Plaintiff Scott McNutt (and, in any event, Morris' dismissal was an evidentiary record problem, not necessarily a legal one), the Court invites further clarity from its appellate colleagues on how to tailor relief in these cases.

* * *

For the reasons above, the Court concludes that only Individual Plaintiff McNutt and Association Plaintiff Hobby Distillers Association have standing to pursue this action. Individual Plaintiffs Rick Morris, Thomas Cowdrey, and John Price are therefore **DISMISSED**. The Court now turns to the merits of Plaintiffs' claim.

II. The Taxing Power

Plaintiffs first contend that 26 U.S.C. §§ 5601(a)(6) and 5178(a)(1)(B) are not proper uses of Congress's taxing power. ECF No. 17-1 at 17. The government responds that the provisions at issue are valid uses of the taxing power because they ensure protection of, and reduce fraud upon, the tax revenue generated on distilled spirits. ECF No. 30 at 11. For the reasons below, the Court concludes that neither Congress's enumerated taxing power nor its incidental powers sustain the provisions as enacted.

A. The Enumerated Power to Lay and Collect Taxes

Article I, Section 8 of the Constitution grants Congress the "[p]ower to Lay and Collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States." U.S. CONST. art I, § 8, cl. 1. "Put simply, Congress may tax and spend." *NFIB*, 567 U.S. at 537.

This "power of the purse" grants Congress a *broad* power to tax and spend on things it cannot directly regulate through some other enumerated power. *Id.*; *License Tax Cases*, 72 U.S. 462, 471 (1866) ("It is true that the power of Congress is a very extensive power . . . given in the Constitution, with only one exception and only two qualifications."). Thus, Congress may reach any subject through taxation, so long as it: (1) does not tax exports; (2) apportions direct taxes among the states; and (3) imposes indirect taxes uniformly across the nation. *See* U.S. CONST. art. I, § 8, cl. 1; § 9, cl. 4. So too can Congress reach any subject with spending, going so far as to use federal funds to induce a state's compliance in regulating subjects otherwise unreachable by Congress. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 205-06 (1987) (holding that Congress could condition the receipt of federal highway funds on South Dakota's raising the state's drinking age to twenty-one).

But even broad power is not limitless. While Congress can certainly tax its way to burdening or influencing behavior, like taxing marijuana to discourage its use, *United States v. Sanchez*, 640 U.S. 42, 44-45 (1950), "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it." *NFIB*, 567 U.S. at 574.

To determine whether a statutory provision is an appropriate use of the taxing power, courts look to its function over its form. *See, e.g., Nelson v. Sears Roebuck & Co.*, 312 U.S. 359, 363 (1941) (holding that courts are only concerned with an exaction's practical operation, rather than its definition or the words used to describe it); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) ("That the funds due are referred to as a 'penalty' . . . does not alter their essential character as taxes."). So, courts may consider how the exaction is assessed, by what mechanisms it is collected, and which agency is responsible for its enforcement to determine whether something Congress codifies as a tax is, really, a tax.

NFIB, 567 US, at 563-65; *see also License Tax Cases*, 72 U.S. at 471 (upholding "federal license fees" as taxes); *but see Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36-37 (1922) (striking "child-labor taxes" as "penalties" enacted beyond Congress's taxing power because they required a prerequisite intent to engage in conduct proscribed by state governments). Thus, neither placing a provision within a certain title of the United States Code, nor nicknaming it a "shared responsibility payment" determines whether Congress's taxing power authorizes it. *Id.*

But every tax must produce *some* revenue for the government, period. *NFIB*, 567 U.S. at 564. Indeed, the production of revenue, however negligible, is any tax's "essential feature." *Id.* (citing *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (abrogated on other grounds)); *see, e.g.,* U.S. CONST. art. I, § 7, cl. 1 (requiring all bills *for raising revenue* to originate in the House of Representatives).

Thus, mindful that "[e]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657 (1895), the Court concludes that §§ 5601(6) and 5178 (a)(1)(B) are not within Congress's enumerated taxing power.

First, §§ 5601(6) and 5178(a)(1)(B) do not raise revenue. Section 5178(a)(1)(B) simply prohibits the placement of a "distilled sprits plant . . . in any dwelling house, in any shed, yard, or inclosure [sic] connected with any dwelling house, or on board any vessel or boat," § 5178(a)(1)(B), nor does it allow any still in any location where beer or wine is produced, or any other business premises, unless excepted by the Secretary. *Id.* And § 5601(6) merely makes it a felony to violate § 5178.

Second, § 5178(a)(1)(B), compared to its textual neighbors, makes *no* mention of the secretary of the treasury, the commissioner of internal revenue, revenue generally, nor the protection of revenue. *See* 26 U.S.C. §§ 5178(a)(1)(A), (a)(1)(C). Subsection (a)(1)(a) requires the applicant for a distilling permit to truthfully describe the proposed premises for the operation; and it allows the secretary to "prescribe such regulations [on the] location, construction, arrangement, and protection of [the premises] as he deems necessary to *facilitate inspection and afford adequate security to the revenue.*" § 5178(a)(1)(A) (emphasis added). And subsection (a)(1)(C) allows the secretary to retroactively approve any existing plant that predates the statute "if he deems that such location, construction, arrangement, and method of operation *will afford adequate security to the revenue*." § 5178(a)(1)(C) (emphasis added).

"Statutory construction is a 'holistic endeavor,' . . . [but] limitations on a statute's reach are as much a part of the statutory purpose as specifications of what is to be done." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167, 168 (1st ed. 2012). And "[i]t is invariably true that intelligent drafters do not contradict themselves." *Id.* at 180. Accordingly, § 5178(a), holistically, reveals what Congress did *not* say in § 5178(a)(1)(B). Namely, that Congress did not say "revenue." And "[no] reasonable construction" of this provision can miraculously render §§ 5178(a)(1)(B) and 5601(6) revenue-generating, as required by the constitution to sustain them as a tax. *Hooper*, 155 U.S. at 657. The provision at issue here contemplates *no* enforcement officer with discretion to judge whether such a "residential" premises could nonetheless be adequately constructed to "afford adequate security to the revenue" by preventing the disguise or withholding of non-tax-paid product. *Compare* § 5178(a)(1)(B) ("No distilled spirits plant for the production of distilled spirits shall be located in [or connected to] any dwelling house.") *with* § 5178(a)(1)(A) ("The Secretary shall prescribe such regulations relating to the [distilled spirits plant] as he deems necessary to . . . afford adequate security to the revenue."). Stills at home for hooch are: Simply. Not. Allowed.

Thus, Congress did nothing more than statutorily ferment a crime—without any reference to taxation, exaction, protection of revenue, or sums owed to the government. That plasters sections 5601(6) and 5178(a)(1)(B) as "not a tax." The government argues that it is a proper use of the taxing power to "prevent[] concealment of stills and 'frauds on the revenue' [by prohibiting] distilling operations in certain locations." ECF No. 30 at 21. But that conflates the enumerated taxing power with the incidental powers contained in the necessary and proper clause—which is a distinct inquiry. *See* Part II(b). What matters here is simple: notwithstanding its placement in the internal revenue code, *NFIB*, 567 U.S., at 563-65, and a facially tangential connection to taxes imposed on spirits, *Drexel Furniture*, 259 U.S. at 36-37, Section 5178(a)(1)(B), enforced by a criminal penalty in Section 5601(6), lacks "the essential feature of any tax." *NFIB*, 567 U.S. at 564. Because "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury," *id.* at 574, it follows that any law that does not require one to pay money into the treasury is not a exercise of the taxing power.

But that is not the government's last call, because Congress may still take necessary and proper actions to effectuate otherwise valid power. U.S. CONST., art. I, § 8, cl. 1; *NFIB*, 567 U.S. at 559 ("As our jurisprudence [has] developed, we have been very deferential to Congress's determination that a regulation is 'necessary.'"). Without dispute that the Constitution vests in Congress the plenary "[p]ower to Lay and Collect Taxes, Duties, Imposts, and Excises," *see id.*, the dispositive question is whether the provisions at issue are necessary and proper to execute taxes laid on distilled spirits.

B. The Necessary and Proper Clause

The Necessary and Proper Clause empowers Congress "[t]o make all Laws" that are "necessary and proper" to "carry[] into Execution" any enumerated power. U.S. CONST. art. I, § 8, cl. 18. Thus, Congress has broad power to enact statutes "incidental to the [enumerated power], and conducive to its beneficial exercise." *McCulloch v. Maryland*, 4 Wheat. 316, 418 (1819). But by its terms, the Clause does not confer any substantive or independent power beyond those enumerated. *Id.* at 411, 421.

Simply put, the Clause does "not give Congress *cart blanche*." *United States v. Comstock*, 560 U.S. 126, 158 (2010) (Alito, J., concurring) (citing *McCulloch*, 4 Wheat. at 415). But, while "necessary" does not mean "*absolutely* necessary," it does require "an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress." *Id.* And "appropriate" or "conducive" does not just mean "convenient for the end Congress has in mind." *McCulloch*, 4 Wheat. at 367.

The Constitution requires the law be "necessary for the *accomplishment* [or, in the words of the Constitution, the 'Execution'] of that end." *Id.*

The "necessary and proper" standard has had a long and finicky application. But the Constitution's text is clear. And the textual supremacy of the Constitution is essential to the order of our system of government. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 174 (1803) (Congress cannot give the Supreme Court appellate jurisdiction where the Constitution states that is shall be original, nor original jurisdiction where the Constitution states that it shall be appellate).

But the dominant application of the Clause remains Marshall's *McCulloch* interpretation: "Let the end be legitimate, let it be within the scope of the Constitution, [and] all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch*, 4 Wheat. at 421.

But *McCulloch* also recognized, "as all must admit, that the powers of the government are limited." *Id.* And Marshall later opined that the means Congress chooses to execute its enumerated powers:

> must have both [necessary and proper] qualities. It must be, not merely convenient—fit—adapted—proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end . . . the word "necessary" is said to be a synonyme [sic] of "needful." But both these words are defined as "indispensably requisite;" and, most certainly, this is the sense in which the word "necessary" is used in the constitution. To give it a more lax

> sense, would be to alter the whole character of the government as a sovereignty of limited powers.

Id. at 367. Thus, even where a law is necessary—that is, appropriate, needful, or requisite, *see id.*—it may still be "improper" if it is "not 'consistent with the letter and spirit of the Constitution.'" *NFIB*, 567 U.S. at 559 (quoting *McCulloch*, 4 Wheat. at 421)). Thus, a law that necessary may still be *improper* when it violates the principles of a limited federal government.[7]

That said, he ultimately concluded that the power to pass laws necessary and proper to execute another power "is a political power; it is a matter of legislative discretion . . . the more or less of necessity never can enter as an ingredient into judicial decision." *Id.* at 386-87. Accordingly, the Court held that the Necessary and Proper Clause "must [] intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed." *Id.* at 324-25. And a national bank was such an appropriate means.

But many courts have only required a "reasonable" or "rational" relationship to an existing tax regime to uphold an incidental Congressional act. *See, e.g., Felsenheld v. United States*, 186 U.S. 126 (1902). In *Felsenheld*, the Supreme Court considered whether a law forbidding the placement of any foreign article inside cigarette packages was a valid use of the taxing power. *Id.* at 127. There, a cigarette manufacturer inserted a cou-

[7] For an insightful discussion of the original understanding of the limits of federal power as enabled by the Necessary and Proper Clause, see Steven Gow Calabresi, Elise Kostial, & Gary Lawson, "What *McCulloch v. Maryland* Got Wrong: The Original Meaning of 'Necessary' Is Not 'Useful,' 'Convenient,' or 'Rational,'" 75 BAYLOR L. REV. 1 (2023).

pon into each package, rewarding the purchaser with various prizes. *Id.* at 128-29. When the government seized over 1,400 packages containing these coupons, the plaintiff sued, alleging that the law was beyond Congress's taxing power. *Id.* at 127-130. Ultimately, the Court held that it was just fine for Congress to use its taxing power "to prescribe that a package of any article which it subjects to tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to tax." *Id.* at 134. Relevant here, the *Felsenheld* Court also held that "in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe *any rule or regulation* which is not itself unreasonable." *Id.* at 132. Indeed, such rules and regulations may even be arbitrary, but still constitutional. *Id.* at 133; *see also Foreman v. United States*, 255 F. 621, 623 (4th Cir. 1918) (upholding a conviction under a criminal statute enacted as a revenue provision because Congress may make any reasonable rule or regulation "although its effect on the revenue be only remote or incidental").

Courts have extended this reasonableness standard to regulations ancillary to alcohol taxes. So far, several statutes regulating alcohol products have been upheld as incidental to Congress's power to tax spirits. *See Stilinovic v. United States*, 336 F.2d 862, 864-65 (8th Cir. 1964) (prohibiting the refilling of distilled liquor bottles that have been stamped "tax paid" with another distilled liquid was reasonable); *Goldstein v. Miller*, 488 F. Supp. 156, 170 (D. Md. 1980), *aff'd*, 649 F.2d 863 (4th Cir. 1981) (Congress's prescription that distilled spirits could only be sold in certain sizes of bottles was reasonable to assist the government in assessing taxes owed on liquor); *United States v. Goldberg*, 225 F.2d 180, 188 (8th Cir.

1955) (regulations pertaining to labelling bottles for packaging distilled spirits, including a tax-paid stamp, was reasonable to assist the government in protecting revenue because it would allow investigators to more easily determine whether the bottle's contents were those accurately described on the label).

But the government's reliance on *Felsenheld's* "rule or regulation" holding is misplaced because it's progency involved cases where the "rule or regulation" was integrally connected to the procedures for executing the tax at issue.[8] Accordingly, the government applies *Felsenheld* out of context. The government insists that *Felsenheld* is binding here because the crime of possessing a still on residential property "[prevents] the concealment of stills and frauds on the revenue" by hiding containers of spirits. ECF No. 30 at 21 (internal quotations omitted). Thus, "any rule or regulation" assists the protection of revenue where it is rationally connected to that revenue and is "not in itself unreasonable." *Id.* at 20 (quoting *Felsenheld*, 186 U.S. at 132). But *Felsenheld* did not ordain any rule or regulation associated with a

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[8] *See Felsenheld,* 186 at 127 (requiring tobacco manufacturers to subtract packaging weight from its final products to *ascertain the taxable dry weight* of the tobacco); *Foreman*, 255 F. at 622 (criminalizing misrepresentations on an Internal Revenue Service form required to be executed at the moment a provider *sells* narcotics); *Stilinovic*, 336 F.2d at 864-65 (regulation prohibiting the *refilling* of distilled spirits bottles *after stamping them "tax-paid."*); *Goldstein*, 488 F. Supp. at 170 (upholding the requirement that spirits be bottled in a certain range of sizes because Congress *measures spirits taxes by proof gallon*); *Goldberg*, 225 F.2d at 188 (upholding *labelling* requirements on spirits bottles to assist the government in ensuring that "the whiskey in the container [corresponds] with that described and that on which the tax as evidenced by the stamp was paid.").

tax regime in the literal sense. Rather, *Felsenheld* determined how Congress can act when it needs to collect someone's money—which we now know is the absolute limit of the taxing power. *NFIB*, 567 U.S. at 574. *Those* regulatory provisions need only be reasonable to be sustained.

Here, Congress regulated behavior separate from the logistics of liquor taxes. *See CIC Servs., LLC v. IRS*, 593 U.S. 209, 218 (2021) ("assessment or collection" is likened to the *execution* of a specific tax obligation). The government admits that the distilled-spirits tax does not attach until "the substance is in existence . . . [and operates as a first lien] from the time the spirits are in existence as such until the tax is paid." ECF No. 30 at 11 (quoting 26 U.S.C. §§ 5001(b); 5004(a)(1)).

Congress always retains power to criminalize the violation of laws authorized by its enumerated powers. *See Comstock*, 560 U.S. at 137. Without it, federal laws would have little to no effect. But the valid incidental power to punish defrauding the government, *see, e.g., Stilinovic*, 336 F.2d at 864-65, or making false statements under oath, *see, e.g.,* 48 U.S.C. § 1001, does not mean Congress can prohibit *every* behavior which may *result* in fraud—especially if it is not within Congress's incidental power. *Marbury*, 1 Cranch at 174 (Congress cannot transcend the text of the Constitution); *McCulloch*, 4 Wheat. at 367.

On this point, the government argues that no court has recognized a liberty interest in making booze at home. Simply put, home-distilling is not long recognized at common law as essential to the orderly pursuit of happiness. ECF No. 30 at 1221 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). But the government's cited cases miss the maker's mark. *See Catanese v. City of Trussville*, 2021 WL 24624 (N.D. Ala. Jan. 4, 2021) (no liberty interest in a liquor license); *Robinson v. District of Columbia*, 234 F. Supp. 3d 14 (D.D.C. 2017) (no national history of a liberty interest in possessing an unsealed container of alcohol in public); *United States v. Behren*, 65 F. Supp. 3d. 1140 (D. Colo. 2014) (no liberty interest allowing the violation of a supervised release condition prohibiting the possession or consumption of alcohol in a child pornography conviction). While courts have not explicitly recognized a liberty interest in home-distilling, that is not the relevant inquiry. Rather, the question is whether Congress exceeded its power in enacting a statute. *See* Part I(a) (abridging protected rights is distinct from exceeding enumerated power). Congress's incidental powers under the necessary and proper clause are not a "whatever-it-takes-to-solve-a-national-problem" power. *See* John T. Valauri, "*Originalism and the Necessary and Proper Clause*," 39 OHIO N.U. L. REV. 773, 788 (2013) (citing *NFIB*, 567 U.S. at 659 (Scalia, J. dissenting)). So, Congress cannot do whatever it likes until it bumps into one's rights; it can only do what the Constitution says it can.

Since Congress's taxing power is authoritative only from the time a tax liability arises to the point at which it is paid, *NFIB*, 567 U.S. at 574, "the taxing power does not give Congress the same degree of control over individual behavior [as the commerce power]." *Id.* So, it follows that Congress cannot rely on a "reasonable" or "rational" connection to an existing tax to regulate *every* individual behavior occurring before that tax obligation becomes effective. Thus, the applicable standard is not whether §§ 5178(a)(1)(B) and 5601(6) have a "reasonable connection" to revenue, but whether they are needful and "plainly adapted" to executing Congress's taxes on spirits. *McCulloch*, 4 Wheat. at 324-25, 421. Applied here, the Court concludes that §§ 5601(6) and 5178(a)(1)(B) fail this standard.

First, the provisions at issue punish individuals Congress cannot reach. The power to tax is a positive one. U.S. CONST., art. I, § 8 cl. 1. Congress has the power to *lay* and *collect* taxes. *Id.* And Congress has the power to punish those who defraud the government in the process of paying them. *Comstock*, 560 U.S. at 137. But §§ 5601(6) and 5178(b)(1)(A) criminalize conduct of persons not subject to the tax, because the tax liability exists only "from the time the spirits are in existence until such tax is paid." ECF No. 30 at 11 (quoting 26 U.S.C. § 5004(a)(1)). Thus, these provisions are not "needful" nor "proper" to "carry [the taxing power] into execution," U.S. CONST., art. 1, § 8, cl. 18; *McCulloch*, 4 Wheat. at 367, because Congress cannot criminalize the conduct of a person to whom its enumerated taxing power does not yet apply. *NFIB*, 567 U.S. at 557 ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent.").

Second, these provisions are not plainly adapted to executing the taxing power because they are not meaningfully connected to the modus operandi of spirits taxes. *Id*. Indeed, the plain text of the challenged provisions makes no reference to any mechanism or process that operates to protect revenue. Sections 5601(6) and 5178(a)(1)(B) only prohibit the certain placement of stills, while other provisions touch the product to be taxed. *See, e.g.,* 26 U.S.C. § 5178(a)(2)(B) (requiring that distilling systems be so constructed as to prevent the removal of distilled spirits before it can be measured by the still's gauge, therefore accurately reporting a volume of spirits to be taxed); *Id.* § 5178(a)(2)(C) (allowing the Secretary of the Treasury to require still operators to notify the government if they change or add to a distilling apparatus "as [the Secretary] may deem necessary to facilitate inspection and [secure] the revenue").

In fact, Congress alternatively considered taxing stills themselves when these provisions were debated in 1867. ECF No. 31-1 at 8 (Report of the Select Committee on Internal Revenue Frauds). And the Committee on Internal Revenue Fraud recommended that Congress reform the mechanism of spirits taxation "as to lay the tax on distilled spirits on the *capacity of the distillery* . . . and by adopting this plan [] secure the collection of the revenue, avoid all the various temptations and opportunities for fraud [by concealing the spirits produced.]" *Id.*

If Congress had chosen that method, then criminalizing the "location of distilled spirits plants" would likely be fair game, because §§ 5178(a)(1)(B) and 5601(6) would be necessarily intertwined with the taxed good. If that were the case, these statutes would almost certainly be necessary and proper to assessing and collecting taxes, because the stills themselves—measured by capacity—would be subject to the tax. The government would not need to argue that these statutes "protect the revenue from fraud," because there would be an essential link between the tax and its collection. Congress could prohibit stills in a myriad of places, like it can mandate the package size of other taxable commodities. But Congress did not choose that method. Instead, Congress chose to keep the proof gallon as the measurement of tax. *See* 26 U.S.C. § 5001. And Congress has criminally prohibited the simple possession of the apparatus used to produce that taxable commodity. It does so with a criminal provision that, by its own text, makes no meaningful connection to the mechanisms by which those taxes are assessed and collected.

Accordingly, the Court concludes that this arrangement is not "plainly adapted" to the execution of Congress's power to lay and collect taxes, because the prohibition is not "suitable and fitted . . . to the end proposed." *McCulloch*, 4 Wheat. at 324-25, 421. Indeed, this current arrangement is exemplary of the "distinction between those means which are incidental to the particular power, which follow as a corollary from it, and those which may be arbitrarily assumed as convenient to the execution of the power." *McCulloch*, 4 Wheat. at 365. While prohibiting the possession of an at-home still meant to distill beverage alcohol might be *convenient* to protect tax revenue on spirits, it is not a sufficiently clear corollary to the positive power of laying and collecting taxes. Accordingly, neither the Taxing Power nor the Necessary and Proper clause authorize 26 U.S.C. §§ 5178(b)(1)(A) or 5601(6) as enacted.

* * *

It should be stressed that this Opinion does not touch the countless other statutory provisions regarding the distilled spirits tax scheme. Congress may well require a still's premises to be bonded and registered, bottling in specific sizes, or approval from the Tax and Trade Bureau before distilling, along with the government's ability to inspect distilling premises—residential or not. The Court assumes without deciding that those provisions are properly reasonable as required by *Felsenheld* and its progeny. But they are not before the Court here.

III. The Commerce Power

Plaintiffs next contend that §§ 5601(a)(6) and 5178(a)(1)(B) cannot be sustained under Congress's commerce power either, because they do not serve a comprehensive interstate market regulation. ECF No. 17-1 at 11. On the contrary, the government contends that the Commerce Clause justifies these provisions because distilling spirits at home for personal consumption is a commercial activity that substantially affects interstate commerce in the aggregate. ECF No. 30 at 26. For the reasons below, the Court concludes that §§ 5601(a)(6) and 5178(a)(1)(B) are not authorized by Congress's power to regulate local economic activity under the Commerce Clause.

Article I, section 8 of the Constitution grants Congress the power to "regulate commerce . . . among the several States." U.S. CONST., art. I, § 8, cl. 3. Like the taxing power, this grants Congress "broad authority under the clause." *NFIB*, 567 U.S. at 549. Under this authority, Congress can reach as far as local commercial "activities that 'have a substantial effect on interstate commerce,'" *id.* (quoting *United States v. Darby*, 312 U.S. 100, 118-19 (1941)), and even further to non-commercial activities "that [effect commerce] only when aggregated with similar activities of others." *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)). But, contrasted with the taxing power, *see* Part II(b), the commerce power gives Congress more leeway to directly control individual behavior. *NFIB*, 567 U.S. at 574.

The commerce power has been well-established to allow Congress to regulate three things: (1) the channels of interstate commerce; (2) the instrumentalities of, and things and persons in interstate commerce; and (3) activities with a substantial effect on interstate commerce. *United States v. Morrison*, 529 U.S. 598, 608 (2000). The channels of interstate commerce are "interstate transportation routes through which persons and goods move," *Morrison*, 529 U.S. at 613 n.5, and "extends beyond the regulation of highways, railroads, air routes, navigable rivers, fiber-optic cables and the like." *Groome Res., Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 203 (5th Cir. 2000). And the instrumentalities of commerce are the "planes, trains, and automobiles" of commerce, along with those persons associated with them. *See, e.g., United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (the instrumentalities of commerce are generally held to be the people and things themselves moving in commerce, and the people who make commerce possible).

At issue here is the "substantial effects" doctrine, which allows Congress to reach purely local and non-economic activity that substantially affects commerce in the aggregate. *NFIB*, 567 U.S. at 549. Because this doctrine gives Congress the longest reach, it requires the most prerequisites to pass constitutional muster. It is generally settled that a regulation of local, non-commercial behavior falls within Congress's commerce power when it: (1) substantially affects interstate commerce in the aggregate, *Wickard*, 317 U.S. at 128-29; (2) serves a comprehensive statute that regulates commercial activity on its face, *Gonzalez v. Raich*, 545 U.S. 1, 19 (2005); and (3) is necessary to make that broader commercial regulation effective. *Id.* at 23-26.

Even so, Congress's reach under this doctrine is not limitless. Indeed, "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions." *NFIB*, 567 U.S at 549. So, where regulating a purely local activity does not serve a broader, overarching statutory scheme, Congress cannot not reach it. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

For brevity's sake, the Court assumes without deciding that the at-home distillation of beverage alcohol affects interstate commerce in the aggregate. Accordingly, and congruent with the thrust of the Parties' arguments, the Court will focus on whether the prohibition serves a comprehensive market regulation and is needed to make that regulation effective. *Raich*, 545 U.S. at 19, 23-26.

A. The prohibition does not serve a comprehensive statute that regulates commerce on its face.

The government argues that Congress's authority to regulate at-home distilling is identical to prohibiting at-home cultivation of marijuana because "marijuana that is grown and possessed for personal use is never more than an instant from the interstate market." ECF No. 30 at 28 (quoting *Raich*, 545 U.S. at 40 (Scalia, J., concurring)). This is simply wrong, because it skips the requirement that Congress must first have an established, comprehensive regulatory regime in place.

Raich concerned the Comprehensive Drug Abuse Prevention and Control Act of 1970, *Raich*, 545 U.S. at 1, which completely banned all production and distribution of controlled substances unless expressly exempted by its own text. *Id.* The Act was the product of a long history of regulating the labeling and adulteration of drugs distributed in interstate commerce; and it was the culmination of a nationwide effort to execute President Nixon's "War on Drugs." *Id.* at 10. The Act further consolidated existing drug laws into one authoritative statutory regime. *Id.* And it provided mechanisms for the government to control legitimate channels of distributing narcotics, prevent their diversion into illicit channels, and strengthen law enforcement capability to cut down illegal drug trafficking. *Id.* So, when California attempted to allow local cultivation of medicinal marijuana, the Supreme Court held that California, acting alone, could not statutorily "excise concededly valid applications of a comprehensive statutory scheme." *Id.* at 3.

Likewise, in *Wickard*, the Supreme Court ruled against Farmer Filburn's attempt to cultivate wheat for his own consumption for a similar reason. *Wickard*, 317 U.S. at 127-28. The comprehensive statutory regime at issue there was the Agricultural Adjustment Act of 1938. *Id.* at 115. In the wake of the Great Depression, the AAA was implemented to "control the volume moving in interstate and foreign commerce in order to avoid surplusages and shortages and the consequently abnormally low or high wheat prices." *Id.* In short, it was *complete control* of agricultural commodities by Congress. It allowed the Secretary of Agriculture to ascertain and prescribe yearly allotments that an individual farmer would be allowed to produce, and even allowed direct loans and payments to individual farmers in certain circumstances. *Id.* Accordingly, the Court put Filburn's challenge out to pasture, because "Congress may properly have considered that wheat consumed on the farm where grown[,] if wholly outside the scheme of regulation[,] would have a substantial effect in defeating and obstructing its purpose to *stimulate trade* therein at increased prices." *Id.* at 128-29 (emphasis added).

Here, the interstate spirits market is policed by the Federal Alcohol Administration Act. 27 U.S.C. §§ 201 et seq. While the Act is a statutory scheme that governs commerce on its face, the Court concludes that it is not the *comprehensive* kind that justifies Congressional regulation of local behavior, like in *Wickard* and *Raich.* To be sure, the Act is "comprehensive" in the sense that it addresses just about every facet of the *interstate* alcohol market. It requires alcohol "businesses" to have permits, 27 U.S.C. §§ 203, 204; regulates bulk sales and bottling, *id.* § 206; and defines and prohibits unfair competition in interstate commerce. *Id.* § 205. And subchapter II of the Act prescribes various labelling requirements for alcohol products, mindful that "the American public should be informed about the health hazards that may result from the . . . abuse of alcoholic beverages." *Id.* § 213.

But the Act is not a "comprehensive" regulation of commerce of the kind that allows Congressional intervention in *every* related local activity. This is because the Act does not directly regulate the supply and demand of alcohol, does not make Congress a production manager over each distillery to inflate prices, and is not part of a federal directive to either promote or eliminate a national marketplace for alcohol. *Compare* 27 U.S.C. § 201 et seq.; *Wickard*, 317 U.S. at 128-29; *Raich*, 545 U.S. at 1. In short, the Act is not a "comprehensive" scheme of regulation because there are many aspects of the alcohol industry that Congress has left untouched. For example, the Act does not mandate the quantity of spirits that a distillery may produce. It is silent on a label's design and aesthetics absent a required warning label. And it despite providing parameters for fair competition, it does not influence how much market share a producer may obtain. There is simply no similar degree of control over the "production, distribution, and consumption" of alcohol as there was for wheat in *Wickard* or controlled substances in *Raich*.

B. Even if the Act were comprehensive, the prohibition is not necessary to effectuate it.

The Supreme Court's reasoning in *Lopez* and *Morrison* is illustrative on this point. In *Lopez*, Congress attempted to make it "a federal offense for any individual knowingly to possess [a] firearm at a place the individual knows or has reasonable cause to believe is a school zone." *Lopez*, 514 U.S. at 549. In justifying its action, the government argued that the possession of a firearm in or near a school may result in violent crime, and that violent crime affects the national economy. *Id.* at 563-64. But the Supreme Court rejected that contention, namely because the text of the statute "contain[ed] no jurisdictional element which would ensure . . . that the firearm possession in question affects interstate commerce." *Id.* at 561. As the Court explained:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise . . . [it] is not an essential part of larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id.

Likewise, in *Morrison*, Congress attempted to create a private right of action for victims of "a crime of violence motivated by gender." *Morrison*, 529 U.S. at 605. As in *Lopez*, the government sought to sustain the law because gender-motivated violence substantially affected interstate commerce. *Id.* at 609. But the Supreme Court, relying on *Lopez*, disagreed. Indeed, the Court similarly held that a blanket right of action for criminal behavior, devoid of any textual but-for causation connecting that behavior to commerce, would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615. "The regulation and punishment of intrastate [crime] that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* at 618 (citing *Cohens v. Virginia*, 6 Wheat. 264, 426 (1821)).

The statutory provisions at issue here are similar. Taken together, 26 U.S.C. §§ 5601(6) and 5178(a)(1)(B) form a crime of possession, solicitation, and aiding and abetting. Section 5178(a)(1)(B) prohibits the location of a

> distilled spirits plant [or for simplicity, a "still"] . . . in any dwelling house, in any shed, yard, or inclosure [sic] connected with any dwelling house, or on board any vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed, or on premises where any other business is carried on [except where authorized elsewhere].

26 U.S.C. § 5178(a)(1)(B). And section 5601(6) makes it a federal offense for anyone who "uses, possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists

therein, or causes or procures the same to be done, in any [location prohibited by § 5178(a)(1)(B)." *Id.* § 5601(6).

Beginning and ending with the text, neither of these provisions connect the prohibited behavior to interstate commerce. And no reasonable construction of the statutes can insert language that does. *Hooper*, 155 U.S. at 657. Like *Lopez* prohibited the knowing possession of a firearm at or near a school, §§ 5601(6) and 5178(a)(1)(B) prohibit the possession of a still with the intent to produce beverage alcohol in or near a residence, boat, vessel, or any site of business. 26 U.S.C. §§ 5601(6), 5178(a)(1)(B). The statute does not, for instance, prohibit the possession of a still with intent to imbibe *where the still's components travelled in interstate commerce*. *Compare* 18 U.S.C. § 922, et seq. Nor does it prohibit the possession of a still with intent to produce beverage alcohol *for distribution in interstate commerce. Id.* While the statutes may *anticipate* that one who distills liquor at home may attempt to distribute it in violation of some other federal law, the text remains the text. These provisions are simply "criminal statute[s] that by [their] terms" have no commerce-clause jurisdictional hook to bring the behavior Congress seeks to regulate within its authority. *Lopez*, 514 U.S. at 561.

Accordingly, the Commerce Clause does not authorize 26 U.S.C. §§ 5601(6) or 5178(a)(1)(B) as enacted.

IV. Plaintiffs' request for a permanent injunction.

Having concluded that §§ 5601(6) and 5178(a)(1)(B) are unconstitutional, the Court lastly turns to Plaintiffs' request for a permanent injunction.

Plaintiffs are not automatically entitled to an injunction merely because they win a declaratory judgment. *See Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933) ("[A]n injunction is not a remedy which issues as of course.") Declaratory judgments and injunctions are separate remedies with distinct standards. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (collecting cases).

Thus, to obtain injunctive relief, these Plaintiffs must demonstrate that:

> (1) [they] have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006).

First, Plaintiffs have suffered irreparable harm because the loss of constitutional freedoms, "for even minimal periods of time . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This is so because constitutional harms are those that "cannot be undone by money damages" or are "especially difficult" to compute. *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328. 338 (5th Cir. 1981). While the government contends that no "right to distill" has been recognized, that's not the Plaintiffs' injury. Rather, their injury is being subjected to the enforcement of a federal law that Congress had no power to enact. And there is no monetary standard which could compute those damages. Indeed, not even a declaratory judgment that these provisions are unconstitutional will afford adequate relief to Plaintiffs absent the Court's injunction against their enforcement. That's the point of the whole suit.

Second, and for the same reasons, Plaintiffs' have demonstrated that there is no adequate legal remedy for their injury. *eBay*, 547 U.S. at 391. Courts often analyze the "irreparable harm" and "inadequate legal remedy" requirements for injunctive relief together because "equity has always acted *only* when legal remedies are inadequate." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959). Because there is no adequate monetary standard to compute Plaintiffs' damages here, and the Court's declaratory judgment alone will not stop the enforcement of unconstitutional statutes, Plaintiffs have demonstrated that there is no legal remedy that would redress their injury.

Third and *fourth*, Plaintiffs must show that the balance of hardships and the public interest weigh in favor of injunctive relief. *eBay*, 547 U.S. at 391. These factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, the Court focuses on whether the Parties' and the public's interest in an injunction outweighs the government's interest in maintaining a statute roughly 130 years old.

"The provisions of the Constitution are not time-worn adages or hollow shibboleths . . . they are the rules of government." *Trop v. Dulles*, 356 U.S. 86, 103-04 (1958). And Plaintiffs have met their burden to demonstrate that a currently enforced statute has no constitutional backing. In other words, they've shown that Congress and the TTB have not been playing by the rules of government. And the judicial responsibility to "enforce the paramount commands of the Constitution" is not removed simply because an agency has been playing by the wrong rules for a long time. *Id.* at 104. ("We cannot push back the limits of the Constitution merely to accommodate challenged legislation.") When the courts fail their responsibility to enforce the Constitution, "[its words] become little more than good advice." *Id.*

Because "[t]here is generally no public interest in the perpetuation of unlawful agency action," *Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)), and Plaintiffs have demonstrated the lack of constitutional authority for the statutes at issue, the Court finds that the balance of equities between the Parties and the public's interest in enjoining unconstitutional laws outweighs the government's interest in keeping them on the books. To the extent that the government retains a reliance interest in the continuity of the prohibition at issue, it is a de minimis one, because these provisions do not raise revenue for the government, nor are plainly adapted to protecting other revenue. *See* Part II. Accordingly, Plaintiffs' motion for a permanent injunction is **GRANTED.**

CONCLUSION

The judiciary has long been hesitant to abrogate the actions of Congress absent the clearest abuse of its power. *United States v. Harris*, 106 U.S. 629, 635 (1883) ("This presumption [that Congress will pass no act not within its power] should prevail unless the lack of constitutional authority . . . is clearly demonstrated."). Indeed, the invalidation of an act by the people's representatives ought to be one of the most reluctant decisions of a federal judge. *See, e.g., Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (holding that, when given the choice between reading a statute as violative of the Constitution or not, the judiciary's plain duty is to adopt the reading that saves the act); *Hooper*, 155 U.S. at 657 ("Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

But "[the Court's] deference in matters of policy cannot, however, become abdication in matters of law." *NFIB*, 567 U.S. at 538. Indeed, the Constitution is *written* to prevent societal amnesia of the defined limits it places on this government *of and by* the people. *See Marbury*, 1 Cranch at 176. That is where the judiciary must declare when its coequal branches overstep their Constitutional authority. Congress has done so here.

Accordingly, having advanced Plaintiffs' motion to the merits, the Court **GRANTS** Plaintiffs' request for relief (ECF No. 17) and **DECLARES** that 26 U.S.C. § 5601(6) and 26 U.S.C. § 5178(a)(1)(B) are **UNCONSTITUTIONAL**.

The United States Government is hereby **PERMANENTLY ENJOINED** from enforcing 26 U.S.C. § 5178(a)(1)(B); 26 U.S.C. § 5601(6); or any regulation promulgated thereunder, against Individual Plaintiff Scott McNutt, Associational Plaintiff Hobby Distillers Association, or the Association's members. But the Court **DISMISSES** Individual Plaintiffs Thomas Cowdrey, John Prince, and Rick Morris for lack of standing.

However, the Court hereby **STAYS** the applicability of this Opinion and Order for **fourteen days from the date of this Order** to allow the federal government to seek emergency relief at the appellate level, should they choose to do so.

SO ORDERED on this **10th day of July 2024.**

/s/ <u>MARK T. PITTMAN</u>
MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10760

SCOTT MCNUTT, PLAINTIFF-APPELLEE

RICK MORRISS; HOBBY DISTILLERS ASSOCIATION; THOMAS O. COWDREY, III; JOHN PRINCE, III, PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE; ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, A BUREAU OF THE U.S. DEPARTMENT OF THE TREASURY, DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Filed: June 9, 2026

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CV-1221

ON PETITION FOR REHEARING EN BANC

Before JONES and GRAVES, *Circuit Judges*, and RODRIGUEZ, *District Judge*.*

PER CURIAM:

* District Judge for the Southern District of Texas, sitting by designation.

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5th CIR. R.40), the petition for rehearing en banc is DENIED.

APPENDIX D

1. U.S. Const. art. I, § 8, cl. 1 provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. U.S. Const., art. I, § 8, cl. 18 provides:

The Congress shall have Power * * * 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.

3. 26 U.S.C. 5001 provides in pertinent part:

Imposition, rate, and attachment of tax

(a) Rate of tax

(1) General

There is hereby imposed on all distilled spirits produced in or imported into the United States a tax at the rate of $13.50 on each proof gallon and a proportionate tax at the like rate on all fractional parts of a proof gallon.

* * * * *

(b) Time of attachment on distilled spirits

The tax shall attach to distilled spirits as soon as this substance is in existence as such, whether it be subsequently separated as pure or impure spirits, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

* * * * *

4. 26 U.S.C. 5178 provides:

Premises of distilled spirits plants

(a) Location, construction, and arrangement

(1) General

(A) The premises of a distilled spirits plant shall be as described in the application required by section 5171(c). The Secretary shall prescribe such regulations relating to the location, construction, arrangement, and protection of distilled spirits plants as he deems necessary to facilitate inspection and afford adequate security to the revenue.

(B) No distilled spirits plant for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or inclosure connected with any dwelling house, or on board any vessel or boat, or on premises where beer or wine is made or produced, or liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under subsection (b)).

(C) Notwithstanding any other provision of this chapter relating to distilled spirits plants the Secretary may approve the location, construction, arrangement, and method of operation of any establishment which was qualified to operate on the date preceding the effective date of this section if he deems that such location, construction, arrangement, and method of operation will afford adequate security to the revenue.

(2) Production operations

(A) Any person establishing a distilled spirits plant may, as described in his application for registration, produce distilled spirits from any source or substance.

(B) The distilling system shall be continuous and shall be so designed and constructed and so connected as to prevent the unauthorized removal of distilled spirits before their production gauge.

(C) The Secretary is authorized to order and require—

(i) such identification of, changes of, and additions to, distilling apparatus, connecting pipes, pumps, tanks, and any machinery connected with or used in or on the premises, and

(ii) such fastenings, locks, and seals to be part of any of the stills, tubs, pipes, tanks, and other equipment, as he may deem necessary to facilitate inspection and afford adequate security to the revenue.

(3) Warehousing operations

(A) Any person establishing a distilled spirits plant for the production of distilled spirits may, as described in the application for registration, warehouse bulk distilled spirits on the bonded premises of such plant.

(B) Distilled spirits plants for the bonded warehousing of bulk distilled spirits elsewhere than as described in subparagraph (A) may be established at the discretion of the Secretary by proprietors referred to in subparagraph (A) or by other persons under such regulations as the Secretary shall prescribe.

(4) Processing operations

Any person establishing a distilled spirits plant may, as described in the application for registration, process distilled spirits on the bonded premises of such plant.

(b) Use of premises for other businesses

The Secretary may authorize the carrying on of such other businesses (not specifically prohibited by section 5601(a)(6)) on premises of distilled spirits plants, as he finds will not jeopardize the revenue. Such other businesses shall not be carried on until an application to carry on such business has been made to and approved by the Secretary.

(c) Cross references

(1) For provisions authorizing the Secretary to require installation of meters, tanks, and other apparatus, see section 5552.

(2) For penalty for distilling on prohibited premises, see section 5601(a)(6).

(3) For provisions relating to the bottling of distilled spirits labeled as alcohol, see section 5235.

(4) For provisions relating to the unauthorized use of distilled spirits in any manufacturing process, see section 5601(a)(9).

5. 26 U.S.C. 5203 provides:

Entry and examination of premises

(a) Keeping premises accessible

Every proprietor of a distilled spirits plant shall furnish the Secretary such keys as may be required for internal revenue officers to gain access to the premises and any structures thereon, and such premises shall always be kept accessible to any officer having such keys.

(b) Right of entry and examination

It shall be lawful for any internal revenue officer at all times, as well by night as by day, to enter any distilled spirits plant, or any other premises where distilled spirits operations are carried on, or structure or place used in connection therewith for storage or other purposes; to make examination of the materials, equipment, and facilities thereon; and make such gauges and inventories as he deems necessary. Whenever any officer, having demanded admittance, and having declared his name and office, is not admitted into such premises by the proprietor or other person having charge thereof, it shall be lawful for such officer, at all times, as well by night as by day, to use such force as is necessary for him to gain entry to such premises.

(c) Furnishing facilities and assistance

On the demand of any internal revenue officer or agent, every proprietor of a distilled spirits plant shall furnish the necessary facilities and assistance to enable the officer or agent to gauge the spirits in any container or to examine any apparatus, equipment, containers, or materials on such premises. Such proprietor shall also, on demand of such officer or agent, open all doors, and open for examination all boxes, packages, and all casks, barrels, and other vessels on such premises.

(d) Authority to break up grounds or walls

It shall be lawful for any internal revenue officer, and any person acting in his aid, to break up the ground on any part of a distilled spirits plant or any other premises where distilled spirits operations are carried on, or any ground adjoining or near to such plant or premises, or any wall or partition thereof, or belonging thereto, or other place, to search for any pipe, cock, private conveyance, or utensil; and, upon finding any such pipe or conveyance leading therefrom or thereto, to break up any ground, house, wall, or other place through or into which such pipe or other conveyance leads, and to break or cut away such pipe or other conveyance, and turn any cock, or to examine whether such pipe or other conveyance conveys or conceals any distilled spirits, mash, wort, or beer, or other liquor, from the sight or view of the officer, so as to prevent or hinder him from taking a true account thereof.

(e) Penalty

For penalty for violation of this section, see section 5687.

6. 26 U.S.C. 5601 provides:

Criminal penalties

(a) Offenses

Any person who-

(1) Unregistered stills

has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or

(2) Failure to file application

engages in the business of a distiller or processor without having filed application for and received notice of registration, as required by section 5171(c); or

(3) False or fraudulent application

engages, or intends to engage, in the business of distiller, warehouseman, or processor of distilled spirits, and files a false or fraudulent application under section 5171; or

(4) Failure or refusal of distiller, warehouseman, or processor to give bond

carries on the business of a distiller, warehouseman, or processor without having given bond as required by law; or

(5) False, forged, or fraudulent bond

engages, or intends to engage, in the business of distiller, warehouseman, or processor of distilled spirits, and gives any false, forged, or fraudulent bond, under subchapter B; or

(6) Distilling on prohibited premises

uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists therein, or causes or procures the same to be done, in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house (except as authorized under section 5178(a)(1)(C)), or on board any vessel or boat, or on any premises where beer or wine is made or produced, or where liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under section 5178(b)); or

(7) Unlawful production, removal, or use of material fit for production of distilled spirits

except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; or

(8) Unlawful production of distilled spirits

not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material; or

(9) Unauthorized use of distilled spirits in manufacturing processes

except as otherwise provided in this chapter, uses distilled spirits in any process of manufacture unless such spirits—

(A) have been produced in the United States by a distiller authorized by law to produce distilled spirits and withdrawn in compliance with law; or

(B) have been imported (or otherwise brought into the United States) and withdrawn in compliance with law; or

(10) Unlawful processing

engages in or carries on the business of a processor—

(A) with intent to defraud the United States of any tax on the distilled spirits processed by him; or

(B) with intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits; or

(11) Unlawful purchase, receipt, or processing of distilled spirits

purchases, receives, or processes any distilled spirits, knowing or having reasonable grounds to believe that any tax due on such spirits has not been paid or determined as required by law; or

(12) Unlawful removal or concealment of distilled spirits

removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or from any instrument of transportation, or conceals spirits so removed; or

(13) Creation of fictitious proof

adds, or causes to be added, any ingredient or substance (other than ingredients or substances authorized by law to be added) to any distilled spirits before the tax is paid thereon, or determined as provided by law, for the purpose of creating fictitious proof; or

(14) Distilling after notice of suspension

after the time fixed in the notice given under section 5221(a) to suspend operations as a distiller, carries on the business of a distiller on the premises covered by the notice of suspension, or has mash, wort, or beer on such premises, or on any premises connected therewith, or has in his possession or under his control any mash, wort, or beer, with intent to distill the same on such premises; or

(15) Unauthorized withdrawal, use, sale, or distribution of distilled spirits for fuel use

withdraws, uses, sells, or otherwise disposes of distilled spirits produced under section 5181 for other than fuel use;

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) Presumptions

Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or processor was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).