No. 24A653

In the Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

TEXAS TOP COP SHOP, ET AL., RESPONDENTS

BRIEF OF *AMICI CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ASSOCIATED GENERAL CONTRACTORS OF NEW YORK STATE, LLC, THE BUSINESS COUNCIL OF NEW YORK STATE, INC., NATIONAL ROOFING CONTRACTORS ASSOCIATION, SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, AND NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION IN SUPPORT OF RESPONDENTS' OPPOSITION TO APPLICANTS' EMERGENCY APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

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INTEREST OF THE AMICI CURIAE[1]

The Associated General Contractors of America, Inc. ("AGC of America") is the nation's largest and most diverse trade association in the commercial construction industry, now representing more than 28,000 member companies, which include general contractors, specialty contractors, and service providers and suppliers to the industry through a nationwide network of chapters in all 50 states, the District of Columbia, and Puerto Rico. AGC of America represents both union- and open-shop employers engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. AGC of America works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate citizens. AGC of America represents the interest of its members in matters before Congress, the Executive Branch, and the courts.

Associated General Contractors of New York State, LLC ("AGC NYS", together with AGC of America, "AGC") is a chapter of AGC of America, which represents over 28,000 general contractors, subcontractors, and specialty contractors in the

[1] This brief was not authored in whole or in part by counsel for a party, and no other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. The *amici curiae* and its counsel have not represented the parties to this appeal in another proceeding involving similar issues. AGC of America has, however, along with other business groups coordinated by the National Federation of Independent Business Legal Center jointly filed an *amicus* brief in the Eleventh Circuit in support of small business plaintiffs in the *National Small Business Association* case, arguing that the CTA is unconstitutional because it regulates beyond Congress' legislative powers.

construction industry. AGC NYS is a private, non-profit trade association representing approximately 250 construction managers and general contractors, running the gamet, from massive entities to local 'Mom-and-Pop' businesses, as well as 85 subcontractors and 300 associate members conducting business throughout the State of New York.

AGC NYS members are responsible for performing the majority of New York's private-and-public-sector contracts for the construction of highways, buildings, and heavy industrial and municipal utility facilities.

AGC's activities for its members encompass government representation, legal advocacy, education, workforce development and training relating to the construction industry. As part of its legal advocacy, AGC regularly participates as *amicus curiae* in both state and federal jurisdictions throughout the country in support of its members and affiliates where the issues for consideration are of national and statewide significance to the construction industry.

The Business Council of New York State, Inc. ("TBC"), is the leading business organization in New York State, representing the interests of large and small firms throughout the state. TBC's membership is made up of more than 3,000 member companies, local chambers of commerce and professional and trade associations. Though 76 percent of TBC's members are small businesses, it also represents some of the largest and most important corporations in the world. Combined, TBC members employ more than 1.2 million New Yorkers.

TBC serves as an advocate for employers in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs. TBC also helps its members cut costs and provides important benefits to their employees with group insurance programs that offer competitive costs and high-quality service. TBC's team also serves as an information resource center for its members, providing an array of news and updates, webinars, seminars, networking, and individualized regulatory and legislative assistance.

The National Roofing Contractors Association ("NRCA") is one of the construction industry's most respected trade associations and the voice of roofing professionals and leading authority in the roofing industry for information, education, technology and advocacy. Since 1886, the NRCA has been the home for generations of entrepreneurial craftsmen and enterprises who shelter and protect America's families and businesses and each other.

The NRCA's nearly 4,000 members represent all segments of the roofing industry, including contractors; manufacturers; distributors; architects; consultants; engineers; building owners; and city, state and government agencies. NRCA members are typically small, privately held companies with the average member employing 45 people and attaining sales of $4.5 million per year. The U.S. roofing industry is an essential $100 billion sector with nearly one million employees that provides critical materials and services to ensure home and business safety.

The Sheet Metal and Air Conditioning Contractors' National Association ("SMACNA") is the leading association for sheet metal and HVAC contractors in the

construction industry. SMACNA has 3,500 members nationwide with chapters in every state as well as international chapters in Canada, Brazil and Australia. SMACNA members are union employers who complete projects for public and private owners & developers.

SMACNA works to ensure the success of the HVAC industry through advocacy work at local, state and federal levels. We are heavily engaged in labor matters and support harmonious labor relations in the industry. In addition, SMACNA is a standards setting body and it is the leading developer of HVAC and architectural construction standards in the world. SMACNA's construction standards are used on all of the most complex construction projects in the United States.

The National Electrical Contractors Association ("NECA") is a national trade association and the leading voice of the $240 billion electrical contracting industry that brings power, light, and communication technology to buildings and communities across the United States. NECA contractors are the technical professionals responsible for the most innovative and safest electrical construction in the United States. NECA collectively represents over 4,000 electrical contractor members served by 117 local chapters across the country.

Founded in 1901, NECA continues to build on a legacy of protecting the public and making innovation possible. NECA contractors strive to be solution-providers for their customers, and their industry expertise benefits everyone working on an electrical construction project.

SUMMARY OF THE ARGUMENT

On January 1, 2021, Congress enacted the Corporate Transparency Act ("CTA"), 31 U.S.C. § 5336, which was a federal attempt to regulate in an area of traditional state control. The CTA mandated that any "reporting company" file with the Financial Crimes Enforcement Network ("FinCEN") reports of all its "beneficial ownership information." 31 U.S.C. § 5336(b)(1)(A). The CTA defines the term "beneficial owner" as "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, exercise substantial control over the entity." 31 U.S.C. § 5336(a)(3)(A). While the CTA itself does not define "substantial control," the final rule implementing the CTA, the "Reporting Rule", does under 31 C.F.R. § 1010.380(d)(1).

Respondents herein commenced an action in the United States District Court for the Eastern District of Texas, Sherman Division (the "District Court"), seeking an injunction prohibiting Applicants from enforcing the CTA and its accompanying Reporting Rule and a declaratory judgment invalidating the CTA and the Reporting Rule.

On or about December 5, 2024, the District Court granted Respondent's motion for a preliminary injunction (the "Amended Memorandum Opinion and Order"). The District Court denied Applicants' motion to stay the preliminary injunction pending appeal and proceeded to seek an emergency stay pending appeal with the United States Court of Appeals for the Fifth Circuit. On December 23, 2024, the motions panel of the Fifth Circuit granted Applicants' emergency motion for a stay of the

injunction pending appeal, but days later, on December 26, 2024, the merits panel vacated the motions panel's order and reinstated the District Court's nationwide injunction pending an expedited appeal.

Now, Applicants request the same relief from this Court and seek an emergency stay of the District Court's Amended Memorandum Opinion and Order issuing the nationwide preliminary injunction. Applicants ask this Court to go further and take the extraordinary step to also conclude that district courts do not have the authority to issue nationwide, or universal, injunctions. These contentions are without merit and, for the foregoing reasons, Applicants' emergency application should be denied.

ARGUMENT

To obtain a stay of a district court's injunction pending the disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that this Court would grant certiorari; (2) a likelihood of success on the merits; and (3) a likelihood of irreparable harm in the absence of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

I. Applicants Fail to Show a Likelihood of Success on the Merits

A. The CTA is Unconstitutional – The Substantial Effects Test Necessitates Economic Activity

Congress's authority to regulate under the Commerce Clause is broad yet constrained. Specifically, its regulation must address activities that are inherently economic, involving the production, distribution, or exchange of goods or services. Over decades of Supreme Court jurisprudence, this principle has remained

consistent: economic activity is the bedrock of the substantial effects test. The CTA falls short, as it attempts to regulate the administrative act of entity formation, which is fundamentally noneconomic.

B. Supreme Court Precedent Requires Economic Activity

Decisions validating congressional action under the Commerce Clause consistently center on economic activities. In *United States v. Darby*, 312 U.S. 100 (1941), the Court upheld the Fair Labor Standards Act because it regulated the production of goods for interstate commerce. Similarly, in *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress's control over wheat production as a fungible commodity was deemed essential to stabilizing the national market.

More recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the regulation of locally grown marijuana was upheld because it involved the production and consumption of a commodity in a national market. The Court distinguished such cases from *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), where Congress's attempts to regulate firearm possession and gender-motivated violence failed due to their lack of economic underpinnings. The guiding thread is clear: the activity being regulated must be economic.

C. Noneconomic Activities Cannot Sustain Commerce Clause Regulation

When Congress has attempted to regulate noneconomic activities, the Court has invalidated those efforts. In *Lopez*, the Gun-Free School Zones Act was struck down because firearm possession, though concerning, was not inherently economic.

Likewise, in *Morrison*, the Violence Against Women Act's civil remedy provision was invalidated, as gender-motivated violence was deemed noneconomic.

The principle that Congress's Commerce Clause power does not extend to regulating commercial activities that compel individuals to become active in commerce was reaffirmed in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). In *Sebelius*, the Court rejected the individual mandate's premise that future participation in the healthcare market justified immediate regulation, underscoring that Congress's authority must target preexisting economic activity.

D. The CTA Regulates Noneconomic Activity

The CTA's regulatory focus is the administrative act of entity incorporation, not economic transactions. Under the Act, individuals filing for incorporation must disclose personal information, irrespective of whether the entity engages in economic activity. This focus places the CTA outside the bounds of Commerce Clause authority.

Unlike prior cases where Congress regulated activities directly tied to goods or services, the CTA's provisions are divorced from economic transactions. In *Darby* and *Wickard*, the laws addressed production and distribution in interstate markets. By contrast, the CTA's reporting requirements are triggered solely by filing incorporation documents with state offices, an act devoid of inherent economic impact.

The Act's provisions lack the foundational elements of economic regulation, such as the involvement of a fungible commodity. Cases like *Wickard* and *Raich* involved wheat and marijuana, respectively - commodities whose production affected national markets. The CTA, however, regulates noneconomic administrative functions and fails to establish any connection to market dynamics or goods.

E. Speculative Future Activity Cannot Justify Regulation

Applicants claim that the CTA addresses illicit financial activities such as money laundering and terrorist financing. However, the Act's provisions do not directly regulate financial transactions or economic misconduct. Instead, they impose reporting requirements based solely on incorporation, making speculative connections to future conduct insufficient to justify the Act under the Commerce Clause.

In *Sebelius*, the Court rejected the idea that Congress could regulate based on anticipated future activity. The Commerce Clause requires an existing economic nexus, and speculative projections about post-incorporation economic activity cannot legitimize the CTA's regulatory reach.

The Act's penalties target failures in reporting beneficial ownership, not financial crimes such as money laundering. This distinction underscores the Act's administrative scope. Unlike the Consumer Credit Protection Act reviewed in *Perez v. United States*, 402 U.S. 146 (1971), which directly regulated extortionate credit transactions, the CTA's regulatory framework does not address economic activity or misconduct.

II. Applicants Fail to Show a Likelihood of Irreparable Harm in the Absence of a Stay

All of the equitable considerations in this dispute favor maintaining the status quo with the nationwide preliminary injunction in place pending the appeal before the Fifth Circuit. Although consistently downplayed by Applicants, the financial burden to businesses will be significant. As FinCEN recognized, the CTA and its Reporting Rule "will have a significant economic impact on a substantial number of small entities." Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59550. Specifically, "FinCEN estimates that there will be approximately 32.6 million existing reporting companies and 5 million new reporting companies formed each year." *Id.* at 59585. "Assuming that all reporting companies are small businesses, the burden hours for filing [beneficial ownership information] reports would be 126.3 million in the first year of the reporting requirement (as existing small businesses come into compliance with the rule) and 35 million in the years after. FinCEN estimates that the total cost of filing [beneficial ownership information] reports is approximately $22.7 billion in the first year and $5.6 billion in the years after." *Id.* at 59585-86. These costs arise for filing initial reports, reviewing information, and complying with ongoing duties to update them when information changes *Id.*

Were the Court to grant Applicants' emergency application for a stay, it would require all businesses, including the members of the *amici curiae* herein, to comply with the CTA and the Reporting Rules. These costs would be nonrecoverable if the CTA were later deemed unconstitutional. As the Court is aware, "the nonrecoverable

costs of complying with a putatively invalid regulation typically constitute irreparable harm." *Rest. Law Ctr. V. United States DOL*, 66 F.4th 593, 597 (5th Cir. 2023). Based upon this fact alone, Applicants fail to satisfy the third prong, since a stay would require businesses to pay these unrecoverable costs to comply, even if the CTA is later deemed unconstitutional. Conversely, even though the burden is not on Respondents here, and as the merits panel of the Fifth Circuit concluded, there is no harm in maintaining the status quo until this determination is made in connection with the CTA's constitutionality.

If the CTA is later found to be unconstitutional, another nonrecoverable harm associated with granting Applicants' application for a stay is the data submitted to FinCEN itself. As AGC of America noted in its comment letter to FinCEN during the rulemaking process,[2] while AGC expects FinCEN to take precautions to ensure that its database of BOI is secure, any database—especially one that can be accessed by nearly 18,000 distinct jurisdictions—will face security vulnerabilities. In recent years, high profile breaches of sensitive federal databases, such as the 2015 exfiltration of personnel files from the Office of Personnel Management, the 2020 "SolarWinds" hack of multiple federal Department and Agencies, and the high profile—and unlawful—release of thousands of Suspicious Activity Reports from FinCEN itself,[3] reinforce the view that no database is fully secure, and that the BOI database will become a prime target of hackers and/or government employees

[2] https://www.regulations.gov/comment/FINCEN-2021-0005-0404
[3] https://www.fincen.gov/news/news-releases/statement-fincen-regarding-unlawfully-disclosed-suspicious-activity-reports

"blinded by [their] own apparent sense of self-righteousness[4]" as the Department of Justice said in its sentencing motion of Natalie Mayflower Sours Edwards, who unlawfully disclosed the Suspicious Activity Reports collected by FinCEN.

In addition to these nonrecoverable costs, the administrative burden created by the CTA and the impending deadline to file will create institutional chaos. Complying with the CTA is not as simple as providing "readily accessible" information as Applicants have suggested. As described above, there is considerable ambiguity with regard to the identification of "beneficial owners" and the analysis requires expertise from both attorneys and accountants. This determination takes time and money and is a significant undertaking for all of the estimated 32.6 million small entities like Respondents and the members of the *amici curiae* herein. This fact is even acknowledged by FinCEN, who recognizes that entities face different regulatory burdens depending on their beneficial ownership structure, with "simple," "intermediate" and "complex" structures facing differing obligations, with the burden on each filer to file initial reports as $85.14, $1,350, and $2,614.87 respectively, and the burden to update the reports for each filer as $37.84, $299.33, and $560.81. 87 Fed. Reg. at 95974, 95976.

The implications for non-compliance must also be addressed. The willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information, may result in civil and criminal penalties. When the CTA was passed, it

[4] https://www.documentcloud.org/documents/20694929-82-main/

provided for civil penalties of up to $500 for each day that the violation continues. As of 2024, the civil penalty has been adjusted to up to $591 per day to account for inflation and will continue to be adjusted for inflation each year pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. In addition, the CTA also provides for criminal penalties of imprisonment for up to two years and/or a fine of up to $10,000.

Both individuals and corporate entities can be held liable for willful violations including actually filing (or attempting to file) false information with FinCEN, providing the filer with false information to report, or willfully failing to report complete or updated beneficial ownership information.

Individuals who may be subject to civil and/or criminal penalties include individuals who willfully file a false or fraudulent beneficial ownership report on a company's behalf, senior officers of an entity that fails to file a required beneficial ownership information report and individuals who willfully cause a reporting company's failure to submit complete or updated beneficial ownership information to FinCEN.

Accordingly, the public interest strongly favors denying Applicants' application for a stay due to the significant administrative burden, non-recoverable costs, and the potentially significant financial and criminal penalties associated with the implementation of the CTA. A stay would impose immediate and irreparable harm on millions of businesses, particularly small businesses, forcing them to expend considerable resources on compliance efforts with uncertain legal outcomes. These

costs, including legal fees and the time invested in gathering and verifying information, are non-recoverable, representing a significant waste of resources if the CTA is eventually overturned. Furthermore, the substantial daily penalties for non-compliance create a chilling effect, potentially stifling economic activity and disproportionately affecting vulnerable businesses. Forcing businesses to comply with an uncertain and challenged law will undermine public confidence and hinder the ability of businesses to plan effectively, thus harming the overall economic climate. The public interest is served by denying the stay and maintaining the status quo until the CTA's constitutionality is decided, preventing the unnecessary expenditure of resources and mitigating the potential for widespread harm.

Finally, the procedural roller coaster of this dispute and uncertainty regarding the reporting deadline favors adherence to the District Court's nationwide preliminary injunction. Reinstating the reporting deadline now would impose a significant and undue burden on businesses. Following the court injunction, both FinCEN's own guidance and subsequent news reports indicated that the filing deadline was no longer in effect. Then, the Fifth Circuit motions panel granted Applicant's stay and reinstituted the January 1, 2025, reporting deadline. Subsequently, FinCEN, recognizing the unfairness, extended the reporting deadline to January 13, 2024. Finally, the Fifth Circuit merits panel vacated the motions' panel order and reinstated the nationwide preliminary injunction. To put it bluntly, all businesses, not just the named Respondents here, need clarity and clarity here

would not be for this Court to grant a stay of the nationwide preliminary injunction, thus leaving all businesses in limbo yet again.

Reviving the filing deadline again, with an uncertain but impending deadline, will trigger a chaotic rush for compliance. Businesses that rely on professional legal or accounting assistance to navigate the reporting process would face particular difficulty, as they will likely struggle to secure the necessary help on such short notice immediately after a holiday period. This last-minute scramble would not only strain businesses operationally but also exponentially amplify the compliance burden, especially for smaller companies that lack in-house expertise or resources. The abrupt shift risks widespread confusion and noncompliance, undermining the goal of orderly and efficient reporting. Accordingly, Applicants' application for a stay should be denied.

III. The District Court's Nationwide Preliminary Injunction is an Appropriate Remedy that is Not Ripe for this Court's Determination on an Emergency Basis

Applicants contend that at a minimum the Court should narrow the District Court's nationwide injunction and even propositions this Court to treat its emergency application for a stay as a petition for a writ of certiorari before judgment presenting the questions whether the District Court erred in entering preliminary relief on a universal basis. The complicated and complex issue regarding the propriety of nationwide, or universal, injunctions should not be decided on Applicant's emergency application here.

This Court has not decided the propriety of universal or nationwide injunctions. *Labrador v. Poe*, 144 S. Ct. 921, 937 (2024) (Jackson, J., dissenting). As Justice Jackson recognizes, "whether federal courts have the power to issue 'universal injunctions' is 'an important question that could warrant our review in the future,' not a foregone conclusion dictated by our precedent." *Id. see also, e.g., Griffin* v. *HM Florida-ORL, LLC*, 601 U. S. ___, ___, 144 S. Ct. 1, 217 L. Ed. 2d 227, 228 (2023) (Kavanaugh, J., statement respecting denial of application for stay); *Department of Homeland Security* v. *New York*, 589 U. S. ___, ___, 140 S. Ct. 599, 206 L. Ed. 2d 115, 117 (2020) (Gorsuch, J., concurring in grant of stay) (framing "underlying equitable and constitutional questions raised by . . . nationwide injunctions" as ones "we might at an appropriate juncture take up").

As Justice Jackson concedes, history does not provide a clear or easily discernible answer to the issue at hand. *Poe*, 144 S. Ct. at 937 (Jackson, J., dissenting). Indeed, there is support for the contention that nationwide injunctions are a valid exercise of judicial authority. For example, A. Frost argues for a view of "universal injunctions" that aligns with Article III and American courts' traditional equitable powers. *See A. Frost, In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1080–1090 (2018).

To be sure, the questions surrounding "universal injunctions" remain contentious and complex and it would not be prudent to resolve them in an emergency posture, especially in a case where the issue has not been squarely raised. *See, e.g., Poe*, 144 S. Ct. at 937 (Jackson, J., dissenting). The Court currently lacks full

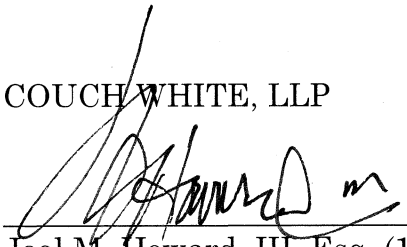
adversarial briefing specifically on this universal injunction issue, the benefits of oral argument, and a final opinion from the Court of Appeals. *See, Id.* As the Court is aware, the bounds and propriety of nationwide injunctions is not straightforward and resolution as to this complex issue should not be undertaken in this expedited framework.

CONCLUSION

Respectfully, given the foregoing, this Court should deny Applicants' application seeking a stay of the Amended Memorandum Opinion and Order.

Dated: January 10, 2025
Albany, New York

Respectfully submitted,



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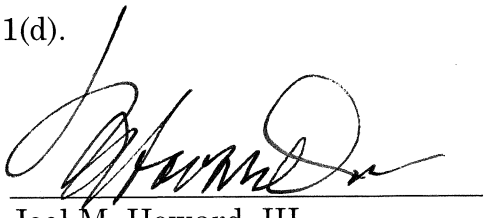
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I, Joel M. Howard, III, a member of the Bar of this Court, certify this brief contains 3,897 words, excluding parts of the brief that are exempted by Supreme Court Rule 33.1(d).

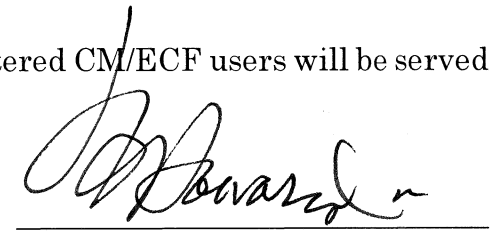


Joel M. Howard, III

Dated: January 10, 2025

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2025, I electronically filed the above Brief of Amicus of Associated General Contractors of America, Inc., Associated General Contractors of New York State, LLC, The Business Council of New York State, Inc., National Roofing Contractors Association, Sheet Metal and Air Conditioning Contractors' Association, and National Electrical Contractors Association in support of Respondents' opposition to Applicants Emergency Motion For Stay Pending Appeal with the Clerk of the Court for the Supreme Court of The United States by using the CM/ECF system. Participants in the case are registered CM/ECF users will be served by the CM/ECF system.



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Dated: January 10, 2025