No. 24A653

IN THE

Supreme Court of the United States

MERRICK GARLAND, Attorney General
of the United States, ET AL.,

Petitioners,

v.

TEXAS TOP COP SHOP, INC. ET AL.,

Respondents.

ON APPLICATION FOR STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Rules

INTEREST OF AMICUS CURIAE[1]

The **Competitive Enterprise Institute** (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, it has done so through policy analysis, commentary, and litigation.

SUMMARY OF ARGUMENT

The Corporate Transparency Act (CTA) significantly undermines corporate anonymity. This Court has recognized that such compelled disclosure causes irreparable harm, because courts will be unable to unring the bell of compelled disclosure.

The potential for unauthorized leaks, such as the 2015 data breach from the Office of Personnel Management, demonstrates the government's inability to guarantee the security of sensitive information. The repercussions of such disclosures can be devastating, exposing individuals and entities to harassment and intimidation. Overbroad disclosure requirements risk deterring corporate and organizational activities, stifling freedom of association, and chilling free speech,

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, its members, or its counsel made such a monetary contribution. All parties were timely notified under Rules 37.2 and 30.1.

particularly for advocacy groups like one of the Plaintiffs, the Libertarian Party of Mississippi.

The CTA exceeds Congress's constitutional authority, violating principles established under the Commerce Clause. The government's broad interpretation of economic activity is contrary to *Gonzales v. Raich* (2005). The harms the government asserts are based on predicted future behavior, which is an approach that this Court rejected in *NFIB v. Sebelius* (2012).

The risk of substantial harm and lack of any plausible argument for the measure's constitutionality justify affirming the district court's preliminary injunction.

ARGUMENT

I. IRREPARABLE BURDEN: ENDING CORPORATE ANONYMITY IS A BELL THAT CANNOT BE UNRUNG

The Corporate Transparency Act effectively destroys corporate anonymity. Pet. App. 20a ("The CTA ends a feature of corporate formation as designed by various States—anonymity.") This mandated loss of anonymity imposes grave and irreparable harm, not only upon the Plaintiffs but also upon countless private corporations impacted.

This Court has long recognized that forced disclosure of private information causes irreparable harm. In *Maness v. Meyers* (1975), the Court noted that compelled

disclosure of private information causes "irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released." *Maness v. Meyers,* 419 U.S. 449, 460 (1975) . Once corporations have disclosed information, the harm to anonymity is permanent and irreversible. Because the Court cannot order people to forget what they now know, there is little this Court can do to reverse that breach of anonymity.

Even when the government pledges to protect disclosed information, the reality is that unauthorized leaks are disturbingly common. For instance, in *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021), although donor data was supposed to be disclosed only to the government, thousands of the organization's donors were disclosed on the government's website. *Id.* at 604. Although the breach was unintentional, that disclosure underscores the inherent vulnerability of sensitive data to unauthorized disclosure once it has been collected. Similarly, the 2015 breach of the Office of Personnel Management's database, which exposed the private information of millions of federal employees, further demonstrates the government's inability to guarantee the privacy of even its own employees' records.

The consequences of disclosure can be devastating. In *AFPF*, the organization received "threats, harassing calls, intimidating and obscene emails, and even pornographic letters." *Id.* Allowing disclosure of private information about corporate control would enable such harassment campaigns to intimidate companies into

changing policies. Another inherent possibility is creating a chilling effect on corporate operations, because businesses may alter policies or self-censor to avoid such intimidation.

Furthermore, it is reasonable to anticipate that the First Amendment associative rights of many organizations will be harmed through disclosure of their identity, at least with respect to expressive associations like one of the Plaintiffs, the Libertarian Party of Mississippi. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

Moreover, the Act's broad application even includes many churches which are not classified as 501(c)(3) organizations and therefore do not qualify for exemptions. Such disclosures could deter religious participation, suppress dissenting voices, and stifle the free exercise of religion. The same applies to media companies, whose disclosure of ownership could have a chilling effect on their editorial independence when writing critical stories about the government. The dangers of junking anonymity are extensive and profound.

The potential harm of the CTA is magnified by its scope. The Act applies to nearly every small private company in the United States, including businesses, religious institutions, and advocacy organizations.

The burdens imposed by the Act extend beyond privacy concerns to include substantial financial and administrative costs. The aggregate costs in time and money that compliance with this statute requires deserve consideration. It is a massive drain on the resources of small businesses all over the country. Meanwhile large operating businesses are exempt from those burdens. 31 CFR § 1010.380(c)(2)(xxi) (creating an exception for those businesses with more than 20 full-time employees, a physical office in the United States, and more than $5 million in gross receipts). This can lead to a destructive, anti-competition, anti-consumer dynamic that ultimately diminishes the number of market participants.

This Court should consider the extensive and irreversible consequences of the CTA and weigh them against any purported governmental interests. The harms—both individual and collective—are too great to ignore. Accordingly, the Court should act to protect the rights of the plaintiffs and other similarly situated entities by preliminarily enjoining the enforcement of the CTA.

II. THE GOVERNMENT IS LIKELY TO LOSE ON THE MERITS

The government is likely to lose on the merits. Its Commerce Clause arguments are directly contrary to this Court's precedent. The government's Commerce Clause argument is, in effect, a retread of its failed argument in *NFIB v. Sebelius* (2012); furthermore, its commerce power analysis relies on a definition of "economic" that has been foreclosed in *Gonzales v. Raich* (2005). Furthermore, the government's other arguments don't even appear to be a serious attempt to justify the statute. This Court should not permit assertions of authority that have failed in the past to continue causing harm until litigation concludes.

There are three problems with the government's Commerce Clause arguments. *First*, the government conflates what corporations could do with what they actually do. The government describes corporations as having "legal authority to conduct economic transactions in its own name, including by making contracts, borrowing money, incurring liabilities, and transferring real and personal property.'" Pet. 15. While many corporations are capable of these activities, they are hardly activities inherent in all corporations. These distinctions are relevant because the statute applies even to businesses that engage in none of these transactions.

Similarly, the government erroneously argues that "A central purpose of the formation of such entities is to engage in economic activity." Pet. 15. For many corporations, the government's claim is demonstrably false. For instance, many

churches are incorporated entities that have no economic purpose whatsoever. Treating all corporations as inherently an economic activity ignores the diversity of corporate purposes and structures.

Second, the government incorrectly understands the scope of "economic activities" that fall within its authority under the Commerce Clause. The government's broad definition of "economic activities" cannot be reconciled with this Court's definition of that concept in *Gonzales v. Raich* (2005). After describing the "activities by the [Controlled Substances Act as] quintessentially economic," this Court defined "economic" under the Commerce Clause as: " 'Economics' refers to 'the production, distribution, and consumption of commodities.' " *Gonzales v. Raich*, 545 U.S. 1, 26 (2005). Establishing a new business, registering a business, or just owning some shares does not meet this Court's definition of economic activity in *Raich;* it therefore cannot be considered economic activity under binding precedent.

Third, no corporation engages in any economic activities at the moment of creation or registration. The government argues that corporations will engage in economic activities in the future, but this species of argument has already been rejected by this Court in *NFIB v. Sebelius* (2012): "The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent." *NFIB v. Sebelius*, 567 U.S. 519, 557 (2012). The government must wait until a corporation engages in regulable activities before

asserting its authority; it cannot preemptively regulate based on prophesized future behavior.

These deficiencies are particularly evident in the case of the Libertarian Party of Mississippi, one of the Plaintiffs. This nonprofit advocacy membership organization operates solely within Mississippi. Its activities consist of accepting donations and using that money to advocate its views; it operates in a way that is not too dissimilar from a church. There is nothing inherently commercial or economic about Plaintiffs' activities, and there is no basis for the federal government to regulate Plaintiffs' private internal affairs.

Of course it is true that some entities may engage in economic activities that are potentially regulable by the federal government. But in order to stay within constitutional bounds, the government must enact a statute that targets those activities. The Corporate Transparency Act fails to do so. It does not, as the government claims, "compl[y] with the Constitution as applied to entities" such as Plaintiffs, and that is because its breadth prevents it from being validly enacted under federal authority.

Citizens are obligated to follow statutes that Congress has the authority to enact and that are signed into law. Because the Corporate Transparency Act exceeds Congress's authority, it was never validly enacted. When a statute is fundamentally

flawed in its enactment, no application of the statute can be valid as applied to any citizen.

The government's attempt to invoke the Foreign Commerce Clause fares no better. This statute regulates local businesses at the moment of their creation or merely because they exist, with no required connection to foreign commerce. The government has provided no explanation of how the statute is relevant to foreign trade (just as it failed to explain how the statute is relevant to interstate commerce). Consequently, the government's reliance on the Foreign Commerce Clause is equally misplaced.

These deficiencies make it clear that the government's Commerce Clause arguments cannot support success on the merits.

III. DELAY OF EFFECTIVE DATE IS STATUTORILY AUTHORIZED

The government argues that "[a]t a minimum, the Court should grant a partial stay, narrowing the vastly overbroad injunction to cover only respondents." Pet. 31. That would be inconsistent with the will of Congress as expressed in the Administrative Procedure Act.

The Corporate Transparency Act does not specify that reporting of existing entities is required on January 1, 2025. That date was chosen by regulations issued by the Department of the Treasury. 87 FR 59592 (creating 31 C.F.R.

§ 1010.380(a)(1)(iii) "Any domestic reporting company created before January 1, 2024 and any entity that became a foreign reporting company before January 1, 2024 shall file a report not later than January 1, 2025."). As such, the Administrative Procedure Act authorizes the district court to "postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. This is in alignment with the authority of the Court to "hold unlawful and set aside agency action." 5 U.S.C. § 706(2). Such setting aside agency action by this Court has repeatedly applied to nonparties. Likewise, the delay of the effective date should apply to nonparties to ensure effective relief of the facial challenge.

While the validity and scope of universal injunctions of statutes is an important topic, it is not one that should be considered in a rushed preliminary proceeding with serious irreparable harm at stake when delay of an agency rule setting the date of compliance is all that is at issue. Such delay is statutorily authorized and independent of the issues the government raises.

CONCLUSION

For the foregoing reason, this Court should affirm the district court's preliminary injunction.

Respectfully submitted,

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