No. 24A653

IN THE

Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES,

Applicants,

v.

TEXAS TOP COPY SHOP, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL RETAIL FEDERATION, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND RESTAURANT LAW CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Retail Federation (the "NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. The NRF empowers the industry that powers the economy. Retailers represent the nation's largest private sector employer, contributing $5.3 trillion to the annual GDP and supporting more than one in four U.S. jobs – 55 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies.

The National Association of Convenience Stores (the "NACS") is an international trade association that represents both the convenience and fuel retailing industries with more than 1,300 retail and 1,600 supplier company members. The United States convenience industry has more than 152,000 stores across the country, employs 2.74 million people, and had more than $859 billion in sales in 2023 ($532 billion of which were fuel sales). The industry, however, is truly an industry of small businesses with more than 60 percent of convenience stores having single-store operators and more than 95% of the industry operating as independent businesses.

[1] This brief was authored in whole by NRF, NACS, and Law Center's outside counsel and funded entirely by the NRF, NACS, and Law Center.

The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. The Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry.

While the NRF, NACS, and the Law Center are tax-exempt organizations under section 501(c) of the International Revenue Code and are exempt from the Corporate Transparency Act ("CTA" or the "Act") and the corresponding Reporting Rule, a large portion of their members (the "Members") will be required to comply with the Act if deemed constitutional and enforceable. The Members would be required to meet their reporting obligations as soon as the Government's Motion is granted.[2] The Members therefore have an interest in this matter and in particular, supporting denial of the Government's Motion in favor of the District Court's preliminary injunction.[3]

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[2] The compliance deadline was originally scheduled for January 1, 2025, which has since passed. In light of the activity in this case, FinCEN announced "reporting companies are not currently required to file beneficial ownership information with FinCEN and are not subject to liability if they fail to do so ***while the order remains in force***." FinCEN, *Beneficial Ownership Information* (available at: https://fincen.gov/boi) (last visited January 10, 2025) (referring to the District Court's preliminary injunction order that the Government seeks to stay) (emphasis added).

[3] No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fifth Circuit merits panel's order vacating a stay of the preliminary injunction entered by the District Court (enjoining enforcement of the CTA, 31 U.S.C. § 5336 and the Reporting Rule, 31 C.F.R. § 1010.380 to preserve the constitutional status quo until the Fifth Circuit has reached the merits of the appeal) and deny Appellants' application to stay the preliminary injunction because Respondents satisfied the conditions to warrant preliminary injunctive relief and staying the injunction would have irreversible negative repercussions for small businesses throughout the nation.

ARGUMENT

A stay is treated as an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016). To prevail in an application for a stay, "an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495, 210 L. Ed. 2d 1014 (2021) (quoting *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)); *see also Dep't of Educ. v. Louisiana*, 603 U.S. 866, 868, 144 S. Ct. 2507, 2510 (2024) (explaining the burden is on the Government as applicant to show, among other things, a likelihood of success on its argument and that the equities favor a stay). Because the Government cannot satisfy these requirements, its Application should be denied. *See, e.g., Louisiana*, 603

U.S. at 868 (denying application for partial stay pending appeal where the Government had not provided the Court a sufficient basis to disturb the lower court's interim conclusions and the Fifth Circuit had "already expedited is consideration of the case").

I. THE GOVERNMENT IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL

The District Court's decision "is entitled to a presumption of validity." *Williams v. Zbaraz*, 442 U.S. 1309, 1311, 99 S. Ct. 2095, 2097, 60 L. Ed. 2d 1033 (1979). In its 80-page opinion granting Respondents-Appellees' Motion for Preliminary Injunction, the District Court thoughtfully examined the arguments of both sides, ultimately determining that Respondents had met their burden to support granting a preliminary injunction. As a threshold matter, the District Court examined the legal standing of each Plaintiff, concluding that each Plaintiff met its Article III standing requirements. (Appx at 40a). The District Court proceeded to evaluate the four fundamental elements for obtaining injunctive relief: the threat of harm from the CTA (*id.* at 41a – 50a), the likelihood of Plaintiffs' success on the merits (*id.* at 50a – 91a), whether the threatened harm outweighed any damage from an injunction (i.e., balancing the equities) (*id.* at 91a – 92a), and if such relief would harm the public (*id.*). *See A.T.N. Indus., Inc. v. Gross*, 632 F. App'x 185, 191 (5th Cir. 2015) (setting forth the prerequisites for granting an injunction). In the course of its analysis, the District Court gave the Government every benefit of the doubt and considered the likely outcome "even if" any given argument favored the Government.

To wit, the "Court open[ed] each door" but concluded the "CTA finds no solace behind any door." (Appx at 55).

The court correctly concluded that the facts and case law overwhelmingly supported Respondents' position that the CTA and Reporting Rule are likely unconstitutional and that a preliminary injunction is warranted. (Appx at 13a). By comparison, while the Government insists the "Act's reporting requirements are important" (App. at 2), it still has not articulated "what *activity* the CTA regulates", nor presented a viable argument that the "CTA derives from one of Congress's enumerated powers and is a proper exercise of that power." (Appx. at 13). The District Court rejected the Government's position that the "anonymous ownership and operation of business" gives rise to a regulated economic activity (App. at 14) because the CTA does not regulate operation at all and instead seeks to regulate an entity's existence. (Appx. at 61a). Absent an underlying economic activity, the CTA simply does not fall under any power "to regulate interstate and foreign commerce." (App. at 3). Likewise, although it tries, the Government has yet to identify a single enumerated power or aggregate powers to bring the CTA within the purview of the Necessary and Proper Clause. (App. at 17; Appx. at 82a). For example, the Government attempts to rely on Congress's power to "collect taxes" (App. at 3), but the CTA "does not impose any tax, whatsoever." (Appx. at 89a). Given the District Court's well-reasoned opinion and finding that Plaintiffs demonstrated a likelihood of success on the merits, while the Government has not, the Government is not likely to prevail on its appeal.

II. THE GOVERNMENT CANNOT DEMONSTRATE IRREPARABLE HARM IF THE INJUNCTION IS NOT STAYED

The Government will not suffer irremediable harm absent a stay. Government enforcement authorities are not being denied any information it has previously had access to by way of the injunction. Nor is it being deprived of its existing tools and resources to combat financial crime. *See, e.g., Louisiana by & through Murrill v. United States Dep't of Educ.*, No. 24-30399, 2024 WL 3452887, at *3 (5th Cir. July 17, 2024) (finding that the injunction pending appeal did not prevent the government from enforcing existing or longstanding regulations to prevent the conduct covered by the agency's enjoined rule). At most, if the District Court ultimately determined the CTA was constitutional and dissolved the injunction, FinCEN would simply have access to the ownership information at a later date. *See id.* (concluding that the government "can hardly be said to be injured by putting off the enforcement of a Rule it took three years to promulgate after multiple delays"); *see also Danco Lab'ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1076, 215 L. Ed. 2d 667 (2023) (Alito, J., dissenting) (determining "the applicants are not entitled to a stay because they have not shown that they are likely to suffer irreparable harm in the interim"). There is therefore no true "disruption" to the Government.

III. IMMEDIATE, IRREPARABLE HARM TO RESPONDENTS AND THE PUBLIC IS AT STAKE IF THE INJUNCTION IS STAYED

Eliminating the District Court's preliminary injunction would result in consequences to *amici's* members that cannot be reversed. If the Government's Application is granted, Respondents and companies subject to the CTA and Reporting

Rule will be required to comply with the reporting obligations *as soon as* the District Court's order is stayed[4] or otherwise face the potential civil penalties up to $10,000 or imprisonment of up to two years. Small businesses who have deferred their compliance obligations in light of the injunction could therefore be confronted with potential imprisonment for simply taking no action.

The Act itself creates new obligations for reporting companies that come at a cost. Such costs include the financial burden and time to prepare the requisite beneficial ownership information ("BOI") submission and the retention of professional advice to aid in the submission, to which Respondents attested in their respective Declarations in support of the injunction. Even if Respondents ultimately prevailed on the merits of its action while the injunction is stayed, those would be sunk costs never to be repaid. *See Louisiana v. Biden*, 55 F. 4th 1017, 1034 (5th Cir. 2022) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs[.]") (citation omitted); *see also Murrill*, 2024 WL 3452887, at *2 ("Irreparable harm is demonstrable by significant, unrecoverable compliance costs."). The Government acknowledges these expected time expenditures, compliance costs, and legal expenses, but maintains such costs are minimal. (App. at 4). Yet, the legislative record demonstrates that by FinCEN's

[4] As noted *supra*, FinCEN has not established a date certain for compliance and instead instructed "reporting companies are not currently required to file beneficial ownership information with FinCEN and are not subject to liability if they fail to do so while the [District Court's preliminary injunction] order ***remains in force***." FinCEN, *Beneficial Ownership Information* (available at: https://fincen.gov/boi) (last visited January 10, 2025).

own estimation, the financial impact of the Act is significant. *See* 87 Fed. Reg. at 59585-86 ("FinCEN estimates that the total cost of filing BOI reports is approximately $22.7 billion in the first year and $5.6 billion in the years after.").

Like Respondents, Members will also suffer immediate harm if the injunction is stayed as they would be forced to satisfy the reporting requirements *immediately* (or within 30 days of creation if a new entity) or be deemed noncompliant. *See* FinCEN, *Beneficial Ownership Information* (available at: https://fincen.gov/boi) (last visited January 10, 2025) (suspending mandatory CTA compliance only while the District Court's order "remains in force"). This is a tall ask, especially for small businesses with limited personnel and resources. There are a number of steps involved to meet compliance before Members (individually, "Company") even reach preparing and filing BOI reports, including but not limited to:

1. Identify individuals to monitor CTA regulations and notify Company management of any relevant changes.
2. Adopt Company policy regarding CTA compliance.
3. Develop CTA-related training.
4. Review Company's organization chart and other records to ensure they are up to date.
5. Determine whether the Company is a "reporting company".
6. Determine if any exemptions apply and memorialize exemption analysis.
7. Collect reporting information on the reporting companies.
8. Determine all reportable beneficial owners for reporting companies.
9. Collect reporting information on beneficial owners; obtain FinCEN Identifier number for each reportable beneficial owner.

10. Identify Company Applicants for reporting companies and collect reporting information on them; obtain FinCEN ID numbers.

11. Request all reportable beneficial owners (including control persons) and Company Applicants obtain FinCEN Identifiers (FinCEN ID).

Each of the foregoing steps takes considerable time and attention. For example, Members need to determine who is the "applicant", the individual responsible for filing the organizing documents with the state, and obtain the applicant's personal information. *See* 31 U.S.C. §§ 5336(a)(2), (b)(2)(a). The Company also may have to obtain a FinCEN ID number for the applicant, which involves a separate process of creating an account and submitting personal information to FinCEN in order for FinCEN to issue a number. *Id.* § (a)(6). As another example, Members must make a determination as to who qualifies as a beneficial owner, gathering the requisite personal information as to each one. This determination is not straight-forward because it is not self-evident who a beneficial owner is, as it includes, for example, those who exercise "substantial control" over the Company. *See* 31 C.F.R. § 1010.380(d)(1)(i).

Compliance with the CTA is also not a one-time exercise. After filing a BOI report, Members are expected to implement a compliance process to monitor and report any changes or inaccuracies in BOI reports. They are required to file updates if any information about the reporting company or beneficial owners and control persons changes after the initial BOI filing is made. Likewise, they are required to file a corrected report if the Company discovers any inaccuracy. And if an exemption applies, Members must continue to monitor that such exemption continues to apply, because it must file a BOI report within 30 calendar days after the date the exemption

no longer applies. Just the same, any reporting company that becomes exempt must update its BOI report within 30 calendar days of the date it meets the exemption criteria. These additional recordkeeping obligations further illustrate the harm Members face. *Career Colleges & Sch. of Texas v. United States Dep't of Educ.*, 98 F.4th 220, 235 (5th Cir. 2024) (recognizing "enhanced recordkeeping requirements inflict a kind of irreparable harm that warrants the issuance of a preliminary injunction").

The CTA also impacts Members' best practices for data security and general company operations. In light of the BOI data, Members must develop a secure process for collecting and storing personal information of beneficial owners and company applicants. Relatedly, they have to review applicable privacy policies to confirm whether disclosure to comply with law is permitted and amend policies as necessary. Members also have to consider all existing company documents, agreements, and policies to determine whether CTA provisions need to be added (e.g., Shareholders Agreements, Director and Officer Agreements). The compliance work continues well after the BOI is first reported.

Critically, noncompliance is not without risk because failures to satisfy reporting obligations may result in a civil penalty or imprisonment. 31 U.S.C. §§ (h)(1) – (3). Failing to comply could result in a civil fine of up to $500 a day, totaling up to $10,000 and criminal penalties of imprisonment for up to two (2) years. 31 U.S.C. § 5336(h)(1) – (3). This potential outcome serves as another basis for the injunctive relief granted by the District Court. *See, e.g., Nat'l Rifle Ass'n of Am., Inc.*

v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 728 F. Supp. 3d 394, 410 (N.D. Tex. 2024) (finding that "members facing criminal penalties and fines for noncompliance during the pendency of this lawsuit" satisfied the irreparable harm requirement).

Compliance with the CTA also comes at the cost of Respondents' and Members' constitutional rights. Respondents challenge the constitutionality of the Act on three grounds: (i) it exceeds Congress' enumerated powers; (ii) it violates Respondents' First Amendment rights to free speech and association; and (iii) it violates Respondents' Fourth Amendment rights to privacy. (*See* Appx at 32a, (summarizing Respondents' arguments in Plaintiffs' Motion for Preliminary Injunction)), the second and third considerations of which give rise to irreversible harm.

If Respondents and Members are required to comply as soon as a stay is entered and the District Court's order no longer "remains in force", they will be required to reveal private information about their respective companies *immediately*. Such information includes the identity of each "beneficial owner", including legal name, date of birth, residential or business address, and identifying number from an acceptable identification document (e.g., passport). 31 U.S.C. §§ 5336(b)(1)(A), (b)(2)(A). FinCEN can retain the information for at least five years after the reporting company terminates. *Id.,* §§ 5336(c)(1), (2)(B). FinCEN may also disclose the information to other Federal agencies and foreign entities under certain circumstances. *Id.,* § (c)(2)(B). This is significant because the preliminary injunction is the only measure to insulate unnecessary disclosure of Members' beneficial

ownership information to not only FinCEN (for an extended period) but also third parties.

Like the Respondents, Members have a protected interest in any intended anonymity of their beneficial owners. Demanding such information infringes Members' right to free, and anonymous, speech and association under the First Amendment. *See X Corp. v. Media Matters for Am.*, 120 F.4th 190, 196 (5th Cir. 2024) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury… [and] the public interest is better served by avoiding even the risk of a chilling effect on association.") (quotations omitted). Likewise, demanding such information violates Members' Fourth Amendment rights to privacy. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (explaining how the "right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief"). Without the preliminary injunction, Members' constitutional rights are threatened.

IV. A NATIONWIDE INJUNCTION SERVES THE PUBLIC'S INTEREST TO PRESERVE THE STATUS QUO AND PREVENT NATIONWIDE CONFUSION

The crux of injunctive relief is to preserve the status quo. *See Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) ("The purpose of a preliminary injunction is to preserve the status quo and thus prevent irreparable harm until the respective rights of the parties can be ascertained…"). The nationwide injunction serves that purpose, as opposed to a selective result that varies arbitrarily by venue. *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), as revised

(Nov. 25, 2015) ("It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction.") (collecting cases). The status quo here is simply a pre-CTA era, which is history as we all know it. *See Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (explaining courts can grant "interim relief" to "preserve the status quo *ante*"). That is, the company-ownership information FinCEN seeks by way of the CTA and that Respondents and the Members desire to maintain confidential are preserved as such, while eliminating the significant time and cost of compliance until final adjudication by the Court.

CONCLUSION

For all the foregoing reasons, this Court should deny the Government's Application for a stay of the injunction.

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Respectfully submitted,

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