IN THE
SUPREME COURT OF THE UNITED STATES

No. 24A653

MERRICK GARLAND, ATTORNEY GENERAL, *et al.*,
Applicants,

v.

TEXAS TOP COP SHOP, *et al.*,
Respondents

On Application for a Stay Pending Appeal before the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF AMERICA'S FUTURE, GUN OWNERS OF AMERICA, INC., GOA TEXAS, GUN OWNERS FOUNDATION, U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN OPPOSITION TO APPLICATION FOR A STAY OF INJUNCTION

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae, America's Future, Gun Owners of America, Inc. (including its state affiliate GOA Texas), Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income taxation under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code ("IRC"). Each organization participates actively in the public policy process, and has filed numerous *amicus curiae* briefs in federal and state courts, defending U.S. citizens' rights against government overreach. These *amici* filed an *amicus* brief in *Hotze v. U.S. Dep't of Treasury*, No. 2:24-cv-210 (USDC-N.D.Tex.), also challenging the constitutionality of the Corporate Transparency Act. *See* Brief *Amicus Curiae* of America's Future, *et al.*, in Support of Plaintiffs' Motion for Summary Judgment (Nov. 18, 2024).

STATEMENT OF THE CASE

On December 23, 2020, President Trump vetoed the $740 billion National Defense Authorization Act ("NDAA"). On December 28, 2020, the House of Representatives voted to override his veto, and, in a rare New Year's Day session, the Senate did so as well.[2] The 2021 NDAA marked the only Trump veto which was

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* H.R. 6395, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (Jan. 1, 2021).

overridden. Buried in the 1,500-page NDAA bill was a 21-page subsection labeled the Corporate Transparency Act ("CTA").

The CTA requires all "beneficial owners" of business entities with less than 20 employees and annual revenue of less than $5 million to submit personal identifying information to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). 31 U.S.C. § 5336(b)(2)(A). This information must include "full legal name, date of birth, current ... residential or business street address, and 'unique identifying number from an acceptable identification document,'" such as an unexpired passport or government-issued identification card or driver's license. *Id.* A "beneficial owner" is defined as "an individual who ... (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity." 31 U.S.C. § 5336(a)(3). This would necessarily include single-member LLCs and privately held corporations.

Congress granted certain exemptions, such as to accounting firms — but not law firms — and for nonprofit organizations exempt from taxation under Internal Revenue Code § 501(c) — but not other nonprofit organizations.

The CTA treats a failure to report as a serious felony. Any "beneficial owner" who willfully fails to report the information to FinCEN is subject to a civil penalty of up to $500 per day, a separate fine up to $10,000, and two years' imprisonment, or both. 31 U.S.C. § 5336(h)(1), (3)(A).

On September 30, 2022, FinCEN issued its Final Rule implementing the CTA, which took effect on January 1, 2024 for newly formed entities and was to take effect for existing entities on January 1, 2025, but has since been postponed.[3]

Respondents sought injunctive relief based on a variety of theories but the district court focused on the claim that Congress lacked authority to enact the CTA. *See* Appendix to the Application for Stay ("Appendix") at 13a. On December 3, 2024, the district court granted the Respondents' motion for a preliminary injunction. *See* Appendix at 19a. A Fifth Circuit motions panel stayed the injunction (Appendix at 3a), but that stay was vacated by the merits panel (Appendix at 1a).

The constitutionality of the CTA has been challenged in other federal district courts. A challenge brought in the Northern District of Alabama resulted in Judge Liles C. Burke enjoining the CTA as applied to the plaintiffs in that action. There, the court addressed and found wanting all three of the government's asserted sources of constitutional authority: the foreign affairs powers, the Commerce Clause authority, and as a necessary and proper exercise of Congress' taxing power. *See National Small Business United v. Yellen*, 2024 U.S. Dist. LEXIS 36205 (N.D. Ala. Mar. 1, 2024). That injunction is now pending on appeal in the Eleventh Circuit. In another challenge in the Northern District of Texas, these *amici* filed their *amicus* brief.

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[3] *See* "Beneficial Ownership Information Reporting Requirements," 87 *Fed. Reg.* 59498 (Sept. 30, 2022); 31 C.F.R. pt. 1010.

SUMMARY OF ARGUMENT

These *amici* urge this Court to deny the Government's application for a stay pending appeal, filed in the waning days of the Biden Administration. This *amicus* brief seeks to provide the Court with additional information about the curious history of the enactment of the CTA, the unconstitutionality of the CTA under different views of the Commerce Clause, and the Necessary and Proper Clause, explaining the risk that the CTA presents as a trap for Americans to have their Second Amendment rights stolen, as well as the risk to Americans posed by CTA information being in the hands of an increasingly weaponized government.

ARGUMENT

I. THE CTA IS ENTITLED TO LITTLE OR NO PRESUMPTION OF CONSTITUTIONALITY.

The Application for Stay argues for a "strong presumption" that laws passed by Congress should stay in effect during judicial review, and that this practice "reflects the 'presumption of constitutionality' which attaches to every Act of Congress." Application at 10-11. Circumstances demonstrate many reasons that no such presumption should apply to the CTA.

There was a day that Congress cared deeply about the constitutionality of the laws that it passed, as floor debates over the Constitution demonstrated deep understanding rivaling the quality of today's oral arguments before this Court. University of Chicago Law Professor David P. Currie's four-volume history of The Constitution in Congress demonstrates the Congress' felt responsibility to enact

only laws it believed constitutional over a period of over 70 years.[4] Sadly, in recent years, Congress has enacted many laws of dubious constitutionality, hoping either that they will not be challenged or that the federal courts will clean up any constitutional problems at a later time.[5] This is such a time.

There are many reasons for Congressional neglect of constitutional limitations on its power and protections for its People. Congress lacks a federal "one subject" restriction of the sort that is in 43 state constitutions.[6] The length, breath, and sheer complexity of many bills is such that Senator Rand Paul felt it necessary to introduce "The Read the Bills Act," S.3360, first in the 112th Congress and in each succeeding Congress, to require that members of Congress certify they have actually read a bill before voting for it. With most Senators being content with the lack of accountability to voters permitted by the *status quo*, where the legislator

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[4] *See* D.P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 (U. Chicago Press: 1999); The Constitution in Congress: The Jeffersonians, 1801-1829 (U. Chicago Press: 2001); The Constitution in Congress: Democrats and Whigs, 1829-1861 (U. Chicago Press: 2013); The Constitution in Congress: Descent into the Malestrom, 1829-1861 (U. Chicago Press: 2007).

[5] Indeed, Presidents sign bills into law while acknowledging doubts about the constitutionality of those laws. For example, President George W. Bush issued over 160 signing statements with legislation that he signed into law, many of which included statements questioning whether those laws comport with the Constitution. *See*, *e.g.,* Statement on Signing the Bipartisan Campaign Reform Act of 2002 (Mar. 27, 2002) ("Certain provisions present serious constitutional concerns.... I expect that the courts will resolve these legitimate legal questions as appropriate under the law.").

[6] *See, e.g.,* Constitution of State of Texas, Art. III, Sect. 35.

can hide behind the "must pass" nature of telephone-book-like bills, Senator Paul's bills seeking reform have never been reported out of Committee.

CTA was a bill that Congress was unable to pass on a stand-alone basis, inserted into a "must-pass" bill, considered on an expedited schedule, on New Year's Day, approved over a Presidential veto, with no meaningful Congressional scrutiny, responding to none of the questions about the need for and operation of the bill raised by the Minority, ignoring all the arguments raised against the bill by the Minority, imposing a burden on small businesses to create duplicative records for no demonstrated reason, and imposing costs on the private sector in an unknown amount. This was a perfect way for such an unpopular and unnecessary bill to be adopted without the accountability of Congress to the People.

The Government often relies on a principle governing judicial review that statutes are entitled to a presumption of constitutionality (*see* Application for Stay at 10-12) which developed when Congress was mindful of its Constitutional limitations. Particularly based on the manner in which the CTA was enacted, that statute should be entitled to, at best, the weakest possible presumption of constitutionality.

In fact, enactment of the CTA violated most of the precepts that should undergird the enactment of a law in a constitutional republic. In all likelihood, the only individuals who were aware of the provision being in the NDAA bill were committee staff, some of the leadership, and probably the sponsor of the bill. Many bad laws are enacted in this manner — 1,500 page "must pass" bills covering

multiple topics enacted by an overwhelming number of members of the House and Senate, enabling individual Congressmen to escape accountability to the People for imposing such burdens on Americans.

The CTA had its origin in a bill introduced by former Representative Carolyn B. Maloney (D-NY),[7] who introduced it as H.R. 2513, Corporate Transparency Act of 2019, on May 3, 2019, which passed the House on October 22, 2019,[8] but which was not approved by the Senate.

Although it has long been "an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares" (*CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987)), the CTA aims to establish "a clear, Federal standard for incorporation practices." 31 U.S.C. § 5336 note (5)(A). As a result, much opposition arose to this bill. Former Representative Patrick McHenry (R-NC), then-ranking member of the House Financial Services Committee, asserted:

> This would be **the first consumer-facing intelligence bureau that we would have in the federal government**. This bill would require small business owners and small business investors to submit their personal information to a new federal database without adequate privacy protections. This new federal database will be accessible to law enforcement without a warrant and without a subpoena, a disturbing violation of due process.... **This has the fewest civil liberties protections of any federal intelligence bureau database. It is a lower standard of accountability than what**

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[7] In the same year that the CTA was enacted, Maloney lost a primary while seeking her party's nomination for re-election.

[8] H.R. 2513, Corporate Transparency Act of 2019 (116th Congress).

> **Congress provides in the PATRIOT Act, which largely targets foreign actors**. [165 Cong. Rec. H 8316-17 (emphasis added).]

McHenry continued:

> [t]he whole mindset here is absolutely wrong. We ... have an intelligence bureau that is going to go out to the public and [require] information directly from the public. We don't do that with NSA to look at your cell phone records. In fact, we require the NSA to go before court in order to look at a cell phone database. [165 Cong. Rec. H 8325.]

Representative Andy Barr (R-KY) stated, "This bill ... presents unacceptable due process concerns for millions of small business owners whose sensitive personally identifiable information will be collected and stored in a new Federal database accessible **without a warrant** or a Federal subpoena." He added, "H.R. 2513 would require small business owners or officers to report personally identifiable information such as name, Social Security number, and drivers license number to a newly created Federal Government database.... Law enforcement can access the database **without due process**." *Id.* at 8318 (emphasis added).

These and other questions about and problems with the bill were raised by Republicans in filing minority views on the bill.[9] The National Federation of Independent Businesses ("NFIB") explained that the Maloney bill imposed burdens on small businesses which do not have "access to teams of lawyers, accountants,

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[9] The dissenting Republicans on the House Committee whose concerns were disregarded were: Lance Gooden; Scott Tipton; Bryan Steil; Denver Riggleman; Tom Emmer; Warren Davidson; Alexander X. Mooney; Ann Wagner; Bill Posey; Trey Hollingsworth; Anthony Gonzalez; John W. Rose; French Hill; Patrick T. McHenry; Andy Barr; and Steve Stivers.

and compliance experts to gather beneficial ownership information and report it to the government...." *Id*. at 8322. Additionally, NFIB asserted that "[t]he supposed justification for this bill is the burden associated with implementing the CDD [Customer Due Diligence] rule [imposed on financial institutions]. However, CDD will continue to co-exist," and the CTA's new burden fails to replace that rule, thus "[t]he result could be a duplicative regulatory burden on millions of small businesses...."[10]

The Congressional Budget Office estimate of the magnitude of the law's burden on private business was lacking, providing almost no information to Congress on which to evaluate that factor. *Id*. The CTA, as passed, neither addressed the obvious problem set out in the Maloney bill, nor did it address "how H.R. 2513 will protect against sophisticated money launders that can circumvent the beneficial ownership filing requirements by forming a business trust or partnership, both of which are exempted...." *Id*. Lastly, the need for "H.R. 2513 is based on anecdote rather than data. To date, and despite multiple requests from the Ranking Member of the Committee and other Financial Services Committee Republicans, the Treasury Department, FinCEN, and the Department of Justice have failed to provide adequate data to demonstrate the need for the legislation." *Id*. All of these criticisms — and more — apply to the CTA as enacted.

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[10] House Financial Services Committee Report, "Corporate Transparency Act of 2019," Rep. 116-227 (Oct. 8, 2019) at 41.

Further, the statute is vague as to its application to certain types of organizations, including: (i) incorporated churches which refuse to seek or take advantage of IRC § 501(c)(3) status to avoid being bound by the Johnson Amendment restricting their advocacy (26 U.S.C. § 501(c)(3)); (ii) organizations filing an IRS Form 8976 (Notice of Intent to Operate under section 501(c)(4)) but not filing an IRS Form 1024 seeking IRS recognition; and (iii) incorporated educational organizations which do not have IRC § 501(c)(3) status.

Moreover, there is a Catch-22 provision buried in the statute. For all nonprofits without IRC § 501(c) status, and particularly for many churches, the concept of the organization having a "beneficial owner" is completely inapplicable. Indeed, such nonprofits have no owners, but rather are administered as a trust by fiduciaries in pursuit of the organization's nonprofit objective. Any such fiduciary seeking to protect himself from the onerous CTA sanctions would therefore be required to make an assertion of ownership which could run afoul of state law. On the other hand, failure to assert beneficial ownership through mandated reports, even if in violation of state law, would make the fiduciary subject to prosecution under the CTA.

The statute, 31 U.S.C. § 5336, was supported by a "Sense of Congress" which included broad and unsupported assertions which assert federal authority on the supposed "failure" of states to require information about "the beneficial owners of the corporations, limited liability companies," thereby facilitating all manner of criminal activity, including "money laundering, the financing of terrorism,

proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security...." Pub. L. No. 116-283, Sec. 6402(3). The absence of state regulation does not empower the federal government to assert a new power over state corporations.

Just as the practical problems were ignored, the serious Constitutional flaws in this law were likewise ignored by Congress. This Court, must carefully consider the limitations on the constitutional powers of Congress that thus far have been so obviously disregarded by both the House and Senate.

II. THE CTA DOES NOT CONSTITUTE A PROPER EXERCISE OF THE COMMERCE POWER AND IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE.

The Application for Stay cites the factors this Court considers when determining whether to stay a district court's injunction pending review. *See* Application at 10. These *Amici* focus on likelihood of success on the merits, and the Government's view that enactment of the Corporate Transparency Act is justified under the Commerce Clause and the Necessary and Proper Clause. *See id*. at 13-25. Neither of those clauses justify the reporting requirement that the CTA imposes.

A. CTA Fails under the Methodology for Evaluating the Scope of the Commerce Clause Established by Chief Justice Marshall.

The Government's Commerce Clause justification relies on a line of cases starting with *Wickard v. Filburn*, 317 U.S. 111 (1942), wherein this Court

authorized Congress's regulation of activity which "substantially affects interstate commerce":

> The Commerce Clause, as relevant here, authorizes Congress to regulate "intrastate economic activity" that, "viewed in the aggregate," "substantially affects interstate commerce...." That principle amply supports the CTA. [Application for Stay at 13-14.]

The Government claims that "'anonymous ownership and operation of businesses' ... in the aggregate, substantially affects interstate commerce by facilitating 'illicit activity' such as 'money laundering,' 'human and drug trafficking,' and 'securities fraud.'" *Id*. at 14. The Government primarily relied on the congressional findings to support this claim. *See id*.

Two hundred years ago, in *Gibbons v. Ogden*, Chief Justice John Marshall set out the steps to be followed in analyzing enumerated powers cases:

> We know of no rule for construing the extent of such powers, other than is given [i] by the language of the instrument which confers them, [ii] taken in connexion with the purposes for which they were conferred. [*Gibbons v. Ogden*, 22 U.S. 1, 189 (1824).]

By "language of the instrument," Marshall should be understood as have meant that the relevant text of the Constitution which states simply: "Congress shall have the Power ... To regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. The focus of attention in *Gibbons* was on defining the words "commerce," "among the states," and "regulate." There, the Court concluded that licensing steamboats engaged in coastal trade aligned with the subject matter of the Commerce Clause. *Gibbons* at 189-97.

When the language of a statute (subject matter) aligns with the language of an enumerated power (subject), the Court should analyze it as an enumerated powers case rather than as a Necessary and Proper Clause case. Because the federal statute in *Gibbons* regulated subject matter that constituted interstate commerce, it was a pure enumerated powers case. The object of the statute must align with the object of an enumerated power. Whether a challenge to a statute is (i) an enumerated powers case or (ii) a necessary and proper case, the key question to answer is "what is the object of the statute?"

The object of the Commerce Clause, stated generally, is to establish a free and common market among the several states. Congress is limited to regulating the subject of interstate commerce to advance the object of ensuring free trade among the states.[11] Concurring in *Gibbons*, Justice Johnson identified the object as being the elimination of trade barriers between the states: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons* at 231 (Johnson, J., concurring).

Applying Marshall's test, it is clear that the CTA fails both the subject component and the object component. The CTA requires certain classes of people,

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[11] James Madison wrote: "A very material object of this power [*i.e.,* the Commerce Clause] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter." G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001), No. 42 at 218. Madison further noted that the commerce clause is among a class of powers "which provide for the harmony and proper intercourse among the States." *Id.*

including the respondents in this case, who file organizational documents with their respective secretaries of state to provide specific identifying information to FinCen. This filing activity that the CTA regulates is neither commercial nor interstate in nature, and thus is not a proper subject matter for Congress to regulate. Furthermore, the CTA fails the object test as it does nothing to remove barriers to free trade or promote harmonious commercial relations among the several states.

B. Marshall's Necessary and Proper Clause Analysis.

Because the CTA fails to regulate the subject of interstate commerce it should be treated as a Necessary and Proper Clause case. But even under this Clause the object test is critical. As Marshall famously wrote "Let the end [object] be legitimate, let it be within the scope of the constitution...." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

Since the CTA does not satisfy the object test of the Commerce Clause, the Government must demonstrate that it is "plainly adapted" to furthering the end or object of one of the other powers enumerated in the Constitution. Because the CTA does not further the object of any enumerated power, the federal government's reliance on the Necessary and Proper Clause is nothing more than a pretext for exercising the police powers reserved to the states.

C. An Alternative Commerce Clause Approach.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court "identified three broad categories of activity that Congress may regulate under its commerce power." *Id.* at 558. These categories, with corresponding tests, are (i) channels of

interstate commerce, (ii) instrumentalities of interstate commerce, and (iii) activities having substantial effects on interstate commerce. In another recent challenge to CTA, the district court in *National Small Business United* persuasively addressed the constitutionality of the CTA under three categories.

1. Channels of Commerce Cases.

The test that the Supreme Court applies in channels cases focuses almost exclusively on the subject of the Commerce Clause — is the regulated activity "commerce" and is it "interstate"? This test is based on the principle that Congress may prohibit interstate commercial activity that it believes is harmful.

The leading case applying the prohibition principle is *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903). There, the Court ruled that Congress could criminalize the transportation of lottery tickets through interstate commerce. *See id.* at 344-45. This satisfied the subject matter test because the statute regulated commercial activity that crossed state lines. However, the object of the statute was not to foster interstate commerce but to prohibit it. The object was to criminalize immoral conduct, which falls within the police powers reserved to the states. *Id.* at 356-57. Nevertheless, the Court upheld the statute.

The activity regulated under the CTA is the filing of articles of incorporation or similar documents with a state agency. The CTA fails under the channels of commerce test because the activity that the statute regulates is neither commercial nor interstate in nature. Additionally, as explained *supra*, some of the

organizations required to disclose information are not engaged in commercial activity and may never engage in interstate activity.

2. Instrumentalities of Commerce Cases.

The instrumentalities test is based on the principle that Congress can protect people, goods, vehicles, and even electronic transmissions involved in interstate commerce that may be endangered even by intrastate activity. The classic example is *Southern Railway Co. v. United States*, 222 U.S. 20 (1911), which upheld a statute requiring intrastate activities to comply with federal safety standards to protect commerce moving interstate. Because the CTA on its face is not designed to protect interstate commerce from threats posed by intrastate activities this test is not implicated.

3. Substantial Effects Cases.

The substantial effects test grants Congress the most expansive power of any of the Commerce Clause tests. As expansive as that power is, the CTA still manages to exceed the scope of Congress's regulatory power.

The substantial effects test was most famously stated in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Having done away with the object component in *Champion*, the Court then eliminated the subject component as well. No longer was Congress limited to regulating the subject matter of interstate commerce; it was free to regulate any activity that in the aggregate had a substantial effect on interstate commerce. Congress was thus allowed to regulate Filburn's intrastate, noncommercial production and personal consumption of wheat grown on his own

farm. Implicitly, the power to regulate was no longer limited by any object other than what Congress might think contributes to the general welfare, or in other words would be good for America. The substantial effects test threatened to change the nature of the federal government from one of enumerated powers into one of general powers.

Eventually recognizing the danger to the Republic, the Supreme Court reformulated the substantial effects test in *Lopez*. The *Lopez* Court quoted portions of Marshall's opinion in *Gibbons v. Ogden*, which carefully defined the subject matter of the Commerce Clause — "commerce" and "among the states." *Lopez* at 553. Nevertheless, the Court then ignored the importance of the subject component. As reformulated in *Lopez*, the substantial effects test allows Congress to regulate only economic activity that in the aggregate has a substantial effect on interstate commerce. *Id*. at 560-61. In effect, the Court modified the subject component of the commerce power but failed to focus on the object of the Commerce Clause.

The Court in *Lopez* ruled that the possession of a gun in a school zone was not economic in nature and therefore struck the statute as exceeding Congress's power to regulate under the Commerce Clause. Similarly, on its face, the CTA fails to regulate economic activity and therefore exceeds Congress's power to regulate under the Commerce Clause. The *Lopez* Court suggested that Congress would be able to regulate non-economic activity pursuant to the Commerce Clause if the non-economic activity was an essential part of a comprehensive regulatory scheme that

was economic in nature. *See Lopez* at 561-63. That approach does not save the statute in this case because the CTA, of which disclosure requirements are a part, is not economic in nature nor is the National Defense Authorization Act, of which the CTA is a part, an economic regulatory scheme.

D. Necessary and Proper Clause

In this case, the government relies primarily on the substantial effects test in arguing that Congress enacted the CTA pursuant to its power to regulate interstate commerce. If the CTA were a valid exercise of Congress's commerce power or any other enumerated power, it would not be necessary for the Government to appeal to the Necessary and Proper Clause. The Court recognized in *Lopez* that the substantial effects test threatens to undermine the enumerated powers doctrine. *Id* at 566. The Government's unfocused invocation of the Necessary and Proper Clause threatens to obliterate the enumerated powers doctrine.

As Chief Justice Marshall explained in *McCulloch v. Maryland*, for an Act of Congress to be lawful under the Necessary and Proper Clause it must satisfy two conditions. First, the Act must be a means that is "plainly adapted" to furthering the object or purpose of an enumerated power. Second, it must be a means that is "not prohibited." *Id* at 421. The Government has taken a kitchen sink approach in naming enumerated and unenumerated powers, in addition to the commerce power, that it asserts the CTA serves as a means of furthering. *See* Application at 17-20.

The major weakness in the Government's argument is that, just as it has failed to identify the object of the commerce power that it claims the CTA furthers, it fails to identify the object or purpose of any of the other enumerated powers that it claims the CTA furthers. Without identifying the objects or purposes of that wide array of powers, it is impossible to assess whether the CTA is "plainly adapted" to furthering them. Furthermore, the Government has failed to address the question of whether CTA constitutes legislative means that are prohibited under the First and Fourth Amendments. This failure provides a further reason to conclude that the Government would not be successful on the merits of the case.

The Government has not identified the object or purpose of any of the enumerated or unenumerated powers that it invokes, but implicit in its reasoning is that Congress may enact any law that it believes is good for America. If accepted, its reasoning would wipe away even the few vestiges of federalism and the doctrine of enumerated powers that were salvaged in the Court's decisions in *Lopez* and *NFIB v. Sebelius*, 567 U.S. 519 (2012).

III. THE CTA JEOPARDIZES THE SECOND AMENDMENT RIGHTS OF AMERICANS.

The sponsor of the 2019 bill which became the CTA, Representative Carolyn Maloney (D-NY), was one of the most committed leaders of the anti-gun movement in Congress.[12] For that reason, it is not unreasonable to have concern that there

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[12] *See* M. Garofalo, "Leaders of the anti-gun movement: Six politicians who refuse to stay silent," *Salon* (Jan. 9, 2019).

could be an anti-gun agenda lurking behind her sponsorship of this bill. Those convicted of federal felonies lose the right to possess weapons. *See* 18 U.S.C. § 922(g)(1) and (9). Once a federal felony conviction is incurred, the possibility of ever regaining gun rights is negligible. According to the Department of Justice:

> Although 18 U.S.C. § 925(c) provides that the Attorney General may grant relief from federal firearms disabilities ... there currently is no means to obtain relief through this mechanism. Since Fiscal Year 1992, Congress has prohibited the Bureau of Alcohol, Tobacco, Firearms and Explosive ... from spending any appropriated funds to investigate or act upon applications for such relief. Accordingly, at this time a presidential pardon is the only means by which a person convicted of a federal felony may obtain this relief.[13]

Representative Maxine Waters (D-CA) conceded during debate on the CTA, "approximately 78% of all businesses in the US are non-employer firms, meaning there is only one person in the enterprise." 165 Cong. Rec. H8321 (2019). Accordingly, millions of Americans risk a permanent loss of their Second Amendment rights — not to mention two-year prison terms — for the simple failure to register their personal information with "an intelligence bureau people haven't [even] heard of," under a brand new filing requirement most small business owners are likely unaware of, as Rep. McHenry noted during the floor debate. 165 Cong. Rec. H8325.

Even more concerning was a recent report by the House Judiciary Committee that revealed FBI whistleblower evidence that, early in the Biden Administration,

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[13] U.S. Department of Justice, Office of the Pardon Attorney, "Frequently Asked Questions."

the FBI and the Department of Treasury's FinCEN division targeted purchasers of firearms for scrutiny as potential "violent extremists." According to the report:

> FinCEN also distributed materials to financial institutions instructing them on how to use Merchant Category Codes (MCCs) to search through transactions to detect potential criminals or "extremists." These MCCs use keywords to comb through transactions, such as "small arms" purchases or recreational stores such as "Cabela's," "Bass Pro Shop," and "Dick's Sporting Goods." Americans doing nothing other than shopping or exercising their Second Amendment rights were being tracked by financial institutions and federal law enforcement. Despite these transactions having no criminal nexus, FinCEN seems to have adopted a characterization of these Americans as potential threat actors and subject to surveillance.[14]

FinCEN suggested a number of firearms sellers whose names could be paired with MCCs for firearms purchasers, to flag possible "violent extremists," including Dick's Sporting Goods, Gander Mountain, Bass Pro Shops, Cabela's, Backcountry World, Targetsportsusa.com, AR15.com, and Midway USA. *Id.* at 27.

Amici's concern that the anti-gun FinCEN should not be entrusted with a highly sensitive list of "beneficial owners" is amply supported by FinCEN's own demonstrated hostility to the Second Amendment. The CTA is an existential threat to the Second Amendment rights of millions of small business owners about to fall victim to the CTA's "trap for the unwary" if the filing deadline is allowed to be reinstated by this Court.

IV. THIS COURT HAS BARRED STATES FROM OMNIBUS DATA COLLECTION THAT COULD CHILL FIRST AMENDMENT SPEECH

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[14] House Judiciary Committee, "Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans," at 2-3 (Mar. 6, 2024).

AND ASSOCIATION, AND THAT PRINCIPLE SHOULD APPLY TO THE FEDERAL GOVERNMENT.

A. The Supreme Court Has Ruled Against State Omnibus Data Collection from Nonprofits to Protect Speech and Associational Rights.

An earlier attempt at the wholesale collection of private, primarily corporate information was ruled recently to violate the associational rights of Americans by this Court. In what the *Wall Street Journal* termed as an early use of "lawfare against political opponents,"[15] then California Attorney General Kamala Harris began enforcing a long-ignored aspect of state law requiring charities raising funds in California to file with the state their IRS Form 990 Schedule B's revealing "the names and addresses of donors who have contributed more than $5,000 in a particular tax year...." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 602 (2021) ("*AFPF*"). That *Journal* editorial summarized the case nicely: "[s]he demanded [nonprofits] hand to the state their federal IRS Form 990 Schedule B in the name of discovering 'self dealing' or 'improper loans,' [but] the real purpose was to learn the names of conservative donors and chill future political giving — that is, political speech."

The California law applied only to a small fraction of those subject to CTA disclosure, as "over 100,000 charities are currently registered in the State, and roughly 60,000 renew their registrations each year." *Id.* The Court reviewed its

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[15] Editorial Board, "Harris and the First Amendment: The Supreme Court rebuked her use of lawfare in California," *Wall Street Journal* (Aug. 4. 2024).

observation in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), that: "[i]t 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 [other] forms of government action." *AFPF* at 606. The Court did not accept the Government's purported rationale, asserting that: "California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement." *Id*. at 614. The Court found "a dramatic mismatch ... between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end" *Id*. at 612. Additionally, the Court did not find persuasive the argument that disclosure was benign because it would be only to the Government, because "disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'" *Id*. at 616. This Court concluded that: "[t]he risk of chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'" *Id*. at 618-19 (citation omitted).[16]

The principles articulated in *AFPF* apply to both for-profit and nonprofit corporations, as both types of corporations regularly engage in political advocacy and other protected types of speech which may be considered objectionable by government. Regardless of which political party may be in control of the federal

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[16] *See also amicus* brief filed by some of these *amici*: Brief *Amicus Curiae* of Free Speech Coalition, *Americans for Prosperity Foundation v. Becerra*, U.S. Supreme Court Nos. 19-251 & 19-255 (Mar. 1, 2021).

government, the database revealing the associational activities of Americans that the Treasury Department seeks to develop should not be permitted to be created.

B. The Federal Government Has a Track Record of the Weaponized Use of Information Against Political Opponents of the Party in Power.

The threat that the government database created under CTA could be misused is real. The recent history of abuses waged by the federal government against dissenting Americans has been of such magnitude that the House of Representatives felt obliged to create a Select Subcommittee on the Weaponization of the Federal Government under the House Judiciary Committee. *See* House Select Committee on Weaponization, Hearings, 2023-24. Numerous hearings have revealed the massive weaponization of the federal government, particularly the Department of Justice, against Americans. *See, e.g.,* "Weaponization Subcommittee Report: Documents Show No Legitimate Law-Enforcement Basis for Garland's Anti-Parent Memo" (Mar. 21, 2023); "New Report Details the Extent of the FBI's Weaponization of Law Enforcement Against Traditional Catholics" (Dec. 4, 2023).

In a challenge to the collection of certain personal data by the Census Bureau, another federal district court in Texas recounted the danger of entrusting vast amounts of personal data to the federal government. The Court described such data as having been:

> used during the Second World War to identify Americans with Japanese ancestry [who] were then placed in internment camps for the duration of the war. This is a startling example of how census data, collected for proper purposes, has been illegally used by the

> government for improper purposes. [*Morales v. Daley*, 116 F. Supp. 2d 801, 811 (S.D. Tex. 2000).]

That court also discussed the risk that such data could be compromised inadvertently: "in the era of the World Wide Web, with computer 'glitches' and human error that can instantaneously disseminate private information literally all over the world, the citizen can have a justifiable wariness about the secrecy of the information he gives." *Id*. at 811, n.5.

The CTA itself recognizes the highly sensitive nature of the information which is required to be provided to the government. *See* 31 U.S.C. § 5336(c)(2)(A), (c)(3), (c)(4), (c)(8), (h)(5). The law seeks to prevent disclosure to the public, but allows sharing of this information broadly inside Government. Based on recent experience, there is good reason to believe that Americans have as much, or more, to fear from disclosure of this information to the Government than they do with disclosure to the public at large.

CONCLUSION

For the foregoing reasons, the Application for a Stay of the Injunction pending appeal should be denied.

Respectfully submitted,

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