

**In the United States Supreme Court**

MERRICK GARLAND, ET AL.,

*Applicants,*

v.

TEXAS TOP COP SHOP, INC., ET AL.,

*Respondents.*

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**On Appeal from the United States District Court for the  
Eastern District of Texas, Austin No. 0540-4:4:24-CV-478**

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**BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; AMERICAN  
ASSOCIATION OF SENIOR CITIZENS; AMERICAN SECURITIES ASSOCIATION;  
AMERICANS FOR LIMITED GOVERNMENT; CENTER FOR POLITICAL RENEWAL;  
EAGLE FORUM; EAGLE FORUM OF GEORGIA; JOANN FLEMING, EXECUTIVE  
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INSTITUTE; YOUNG AMERICA'S FOUNDATION; AND YOUNG CONSERVATIVES OF  
TEXAS IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST OF AMICI CURIAE<sup>1</sup>

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all people are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”<sup>2</sup> and believes that the governmental structures established by the Constitution are necessary for the preservation of the liberty of the people. Advancing American Freedom files this brief on behalf of its 7,967 members in Texas and its 10,483 members in the Fifth Circuit.

Amici American Association of Senior Citizens; American Securities Association; Americans for Limited Government; Center for Political Renewal; Eagle Forum; Eagle Forum of Georgia; JoAnn Fleming, Executive Director, Grassroots America - We the People PAC; Frontiers of Freedom; Frontline Policy Council; Charlie Gerow; Jay D. Homnick, Senior Fellow, Project Sentinel; International Conference of Evangelical Chaplain Endorsers; International Organization for the Family; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Men and Women for a Representative Democracy

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<sup>1</sup> Counsel for the parties were notified of Advancing American Freedom’s intent to file a brief of amici curiae on January 7, 2025. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> Edwin J. Feulner, Jr, *Conservatives Stalk the House: The Story of the Republican Study Committee* 212 (Green Hill Publishers, Inc. 1983).

in America, Inc.; Mountain States Policy Center; Michael Munger, Pfizer/Pratt University Professor of Political Science, Duke University; National Religious Broadcasters; New Jersey Family Policy Center; North Carolina Institute for Constitutional Law; NSIC Institute; Oklahoma Council of Public Affairs; Melissa Ortiz, Principal & Founder, Capability Consulting; Pennsylvania Eagle Forum; Project 21 Black Leadership Network; Setting Things Right; John Shadegg, Member of Congress, 1995-2010; 60 Plus Association; Stand for Georgia Values Action; Tea Party Patriots Action, Inc.; The Justice Foundation; Tradition, Family, Property, Inc.; Richard Viguerie, Chairman, ConservativeHQ.com; Women for Democracy in America, Inc.; Yankee Institute; Young America's Foundation; and Young Conservatives of Texas believe, as did America's Founders, that compliance with the Constitution's limits on government power is essential for the preservation of American freedom.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The Corporate Transparency Act (“CTA”) “requires a vast array of companies to disclose otherwise private stakeholder information to [the Financial Crimes Enforcement Network (FinCEN)].” App. at 22a (citing 31 U.S.C. § 5336(b)(1)). The information submitted must identify “each beneficial owner of . . . the reporting company . . . by full legal name, date of birth, current . . . residential or business street address, and [a] unique identifying number from an acceptable identification document or FinCen identifier.” *Id.* at 24a (alteration in original) (quoting 31 U.S.C. § 5336(b)(2)). A beneficial owner, with some exceptions, is “an individual who, directly



or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, exercises substantial control over the entity; or who owns or controls not less than [twenty-five] percent of the ownership interests of the entity.” *Id.* (alteration in original) (quoting 31 U.S.C. § 5336(b)(2)).

Congress authorized the mass collection of beneficial ownership information to advance four goals: “(1) ‘transparency . . . concerning corporate structures and insight into the flow of illicit funds through those structures’; (2) ‘discourag[ing] the use of shell corporations as a tool to disguise and move illicit funds’; (3) ‘assist[ing] national security, intelligence, and law enforcement with the pursuit of crimes’; and (4) ‘protect[ing] the national security of the United States.’” *Id.* at 21a-22a (alteration in original) (footnote omitted) (quoting Pub. L. 116–283, div. F, § 6002 (2021), 134 Stat. 4547). These goals are based on the understanding of Congress regarding several issues. These include that “more than 2,000,000 corporations and limited liability companies are being formed under the laws of the States each year,” that most or all states do not collect beneficial owner information for corporations organized therein, and that malign actors use layers of corporate ownership to disguise their criminal activity or activity that undermines national security. Pub. L. 116–283, div. F, title LXIV, § 6402 (1)-(4) (2021), 134 Stat. 4604. Congress claims that beneficial owner information needs to be collected to “set a clear, federal standard for incorporation practices; . . . better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and . . . bring the United States into compliance with

international anti-money laundering and countering the financing of terrorism standards.” *Id.* § 6402(5).

The Constitution confers only limited and enumerated powers on the federal government. One of those powers is to regulate commerce among the states. The original meaning of the clause is clear. Commerce meant trade and among the states meant—well—among the states. A broader reading turns much of the rest of the Constitution, including the Tenth Amendment, on its head. Similarly, the original meaning of the Necessary and Proper Clause conveys to Congress only the power to carry out the powers already granted to it. The mass collection of beneficial owner information is not necessary because it is not plainly adapted to the regulation of interjurisdictional trade and is not proper because it violates the First, Fourth, and Tenth Amendments. Because no enumerated power supports the statute at issue in this case, Respondents are likely to prevail on the merits and the injunction should be upheld.

## ARGUMENT

### **I. The Commerce Clause is a Limited Enumeration of Power, not a Grant of a General Police Power.**

The CTA regulates the non-commercial, wholly intrastate activity of incorporating under state law. The Commerce Clause delegates to Congress power to “regulate Commerce . . . among the several States,” as well as with foreign nations and Indian tribes. U.S. Const. art. I, § 8 cl. 3. The district court rightly found that Respondents are likely to prevail on their claim that the CTA goes beyond the power the Supreme Court has found the Commerce Clause grants Congress in cases like

*Gonzales v. Raich*, 545 U.S. 1 (2005). More fundamentally, the CTA is beyond the power granted to Congress by the Commerce Clause as understood at the time of the founding. While the application of this narrower meaning is not determinative in this case, courts’ “duty to . . . say what the law is,” *Marbury*, 5 U.S. 137, 177 (1803), requires attention to the Constitution’s original meaning.

The text of the Commerce Clause, understood as it was by the ratifying public at the time of its adoption, grants Congress only the ability to regulate interjurisdictional trade. The Commerce Clause grants Congress the power to “regulate Commerce . . . among the several States,” as well as with foreign nations and Indian tribes. U.S. Const. art. I, § 8 cl. 3. “[T]he Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines.” *Gonzales*, 545 U.S. at 57 (Thomas, J., dissenting) (citing *United States v. Lopez*, 514 U.S. 549, 586-89 (1995) (Thomas, J., concurring)). This understanding of “commerce” as trade was common not only to the drafters of the Constitution but to the general public including those who ratified it. *Id.* (citing Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-862 (2003)). Commerce did not include, on the other hand, agriculture and manufacturing, which were wholly intrastate activities. *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (“Commerce, or trade, stood in contrast to the productive activities like manufacturing and agriculture.”). In fact, “the term ‘commerce’ was used in contradistinction to” such “productive activities.” *Lopez*, 514 U.S. at 586.

“Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, the Federalist Papers, and the ratification debates, the term ‘commerce’ is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.” *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 586-87 (Thomas, J., concurring)); (quoting Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112-125 (2001)). For example, “In none of the sixty-three appearances of the term ‘commerce’ in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange.”<sup>3</sup> “[C]ommerce” also had the meaning of “trade” in common usage.<sup>4</sup> Thus, whether used in relation to the drafting and ratification of the Constitution or for public consumption, the word “commerce” was understood at the time of the Founding to refer to “trade,” not all things that today would constitute commercial activity. Thus, there is overwhelming evidence that the power originally granted by the Commerce Clause was the power to regulate interjurisdictional trade.

Not only is the evidence supporting the narrow meaning of the term “commerce” overwhelming, but the historical and constitutional context also demand a narrow interpretation of the power granted by the Clause. The purpose of the federal government was national unity, not national uniformity. “The powers delegated by the proposed constitution to the federal government are few and defined.

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<sup>3</sup> Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 116 (2001).

<sup>4</sup> See, e.g., Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-60 (2003).

Those which are to remain in the state governments are numerous and indefinite.”<sup>5</sup> The Founding generation understood that the powers delegated to the federal government “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.”<sup>6</sup> Hamilton assured the public that “the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can *never* be desirable cares of a general jurisdiction.”<sup>7</sup> Because the CTA regulates wholly intrastate, noncommercial activity, it is not a legitimate exercise of the power granted to Congress by the Commerce Clause.

## **II. The CTA is Not a Necessary and Proper Exercise of the Commerce Clause Power.**

The CTA is neither necessary to, nor a proper means of, the implementation of Congress's power to regulate interstate trade. The Necessary and Proper clause gives Congress the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” U.S. Const. art. 1, § 8, cl. 18. As Justice Thomas has explained, *McCulloch* created a two-part test for compliance with the Necessary and Proper Clause:

First, the law must be directed toward a “legitimate” end, which *McCulloch* defines as one “within the scope of the [C]onstitution”—that

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<sup>5</sup> The Federalist No. 45, at 241 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

<sup>6</sup> *Id.*

<sup>7</sup> The Federalist No. 17, at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (emphasis added).

is, the powers expressly delegated to the Federal Government by some provision in the Constitution . . . Second, there must be a necessary and proper fit between the “means” (the federal law) and the “end” (the enumerated power or powers) it is designed to serve . . . The means Congress selects will be deemed “necessary” if they are “appropriate” and “plainly adapted” to the exercise of an enumerated power, and “proper” if they are not otherwise “prohibited” by the Constitution and not “[in]consistent” with its “letter and spirit.”

*United States v. Comstock*, 560 U.S. 126, 160-61 (2010) (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

First, the CTA is not “within the scope of the [C]onstitution”—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution.” *Id.* at 160 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). As noted in Section I above, Congress was not authorized to enact the CTA under the Commerce Clause.

Second, the CTA is not a necessary or a proper exercise of the Commerce Clause power. “The means Congress selects will be deemed ‘necessary’ if they are ‘appropriate’ and ‘plainly adapted’ to the exercise of an enumerated power.” *Comstock*, 560 U.S. at 160-61 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). A law is plainly adapted if there is an “‘obvious, simple, and direct relation’ between the intrastate [regulation] and the regulation of interstate commerce.” *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring in the judgment)). There is not an “obvious, simple, and direct relation” between the mass collection of beneficial ownership information and the regulation of interstate commerce because it is overbroad in the extreme. The goals of the collection of this information include assisting in the enforcement of anti-money

laundering laws and the prevention of financing of terrorism and other illicit activity. Yet the collection of information applies to millions of innocent Americans with no requirement that there be any form of reasonable cause before the information is collected and stored. That is hardly an obvious, simple, or direct means of regulating interjurisdictional trade.

The relationship between the means and legitimate constitutional ends is further attenuated by the fact that there is no requirement that the corporations engage, or even intend to engage, in any form of interstate commerce. Thus, even organizations like the Libertarian Party of Mississippi (“MSLP”), which is a political organization but does not meet the requirements of the reporting exemption, will be swept up in the reporting requirement. MSLP does not spend money to “promote activities outside the state of Mississippi,” nor does it “engage in any economic activity outside of Mississippi,” app. at 29a, yet under the CTA, it will be required to report its beneficial owner information to FinCEN. The CTA’s beneficial owner information reporting requirement is thus not necessary to the exercise of the Commerce Clause power.

The CTA is also not a proper exercise of the Commerce Clause power by Congress. Regulations are a proper exercise of an enumerated power “if they are not otherwise ‘prohibited’ by the Constitution and not ‘[in]consistent’ with its ‘letter and spirit.’” *Comstock*, 560 U.S. at 160-61 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). First, the CTA is prohibited by the Constitution because it violates the First and Fourth Amendments, requiring the submission of

private information to the government which constitutes compelled speech, undermines the core First Amendment principle of anonymous association, and creates millions of unreasonable, suspicionless, and warrantless searches.

Second, the CTA is inconsistent with the spirit of the Constitution as well as its structure because it seeks to overwrite the power of the States. The Tenth Amendment enshrines in law the principle that the States retain their governmental powers except those granted to the Federal Government by the Constitution and which the Constitution prohibits the States from exercising. U.S. Const. amend. X. “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the State governments are numerous and indefinite.”<sup>8</sup> According to Tench Coxe, writing in the midst of the ratification debates, the power to “incorporate societies for the purposes of religion, learning, policy or profit” were among those reserved to the States.<sup>9</sup> Similarly, the constitutional convention “defeated a motion to authorize the federal government to cut canals and issue corporate charters, apparently for transportation companies.”<sup>10</sup> Yet among the goals of the mass collection of beneficial owner information is to “set a clear, *federal* standard for incorporation practices” and to “bring the United States into compliance with international anti-money laundering and countering the funding of terrorism standards.” Pub. L. 116–283, div. F, title LXIV, § 6402 (5) (2021),

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<sup>8</sup> Madison, *supra* note 5.

<sup>9</sup> Robert G. Natelson, *More News on Powers Reserved Exclusively to the States*, 20 Fed. Soc. Rev. 92, 97 (2019) (quoting 33 *The Documentary History of the Ratification of the Constitution of the United States* 912-13 (John P. Kaminski et al. eds., 1976-2019)).

<sup>10</sup> Robert G. Natelson, *The Enumerated Powers of the States*, 3 Nev. L. Rev. 469, 487-88 (2003) (quoting 2 *The Records of the Federal Convention of 1787*, 616 (Max Farrand ed., 1937)).



134 Stat. 4604. Preventing money laundering and the funding of terrorism are both profoundly important governmental objectives but there is no “importance” exception to the Constitution’s limits on federal power. Because the CTA violates both the letter and the spirit of the Constitution, it is not a proper exercise of the Commerce Clause power by Congress.

Because the CTA is neither a necessary nor a proper exercise of the Commerce Clause power, the Court should uphold the district court’s injunction so that Americans’ private information is secured until the courts have time to fully consider this case.

### **III. The Collection of Data Invites Hacking and Abuse of Both Private and Government Information Databases.**

The government has no authority to demand the information it does in the CTA. The prudence of that limitation is demonstrated in part by the repeated security failures of large databases in both the public and private sectors.

In December 2024, “Chinese state-sponsored hackers breached the U.S. Treasury Department's computer security guardrails” stealing “documents in what Treasury called a ‘major incident.’”<sup>11</sup> Similarly, In 2016, hackers broke into the Securities and Exchange Commission’s Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).<sup>12</sup> EDGAR processes over 1.7 million electronic filings annually, and

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<sup>11</sup> Raphael Satter and A.J. Vicens, *US Treasury says Chinese hackers stole documents in ‘major incident’*, Reuters (Dec. 31, 2024, 2:27 PM) <https://www.reuters.com/technology/cybersecurity/us-treasurys-workstations-hacked-cyberattack-by-china-afp-reports-2024-12-30/>.

<sup>12</sup> Amir Bibawy, *SEC reveals 2016 hack that breached its filing system*, Associated Press (Sep. 20, 2017, 11:37 PM) <https://apnews.com/article/d81daf569c75472bbcba22d2f5ba0f34>.

“traded on at least nonpublic 157 earnings releases,” enriching themselves by over \$4 million.<sup>13</sup> In 2018, a hacker breached 60 million records of US Postal Service user account details even after being warned a year prior.<sup>14</sup> Hackers stole the personal information of 21.5 million current and former federal government employees from Office of Personnel Management files in 2015.<sup>15</sup> 26,000 current and former Defense Intelligence Agency employees experienced a breach of personally identifiable information (PII) in 2023.<sup>16</sup> A British teenager published the contact information of 20,000 FBI agents in 2016.<sup>17</sup> United States Army soldier Chelsea Manning infamously handed over 750,000 classified documents to WikiLeaks.<sup>18</sup> The healthcare information of 4.6 million active duty servicemembers, veterans, and their family members was compromised in a 2011 Tricare breach.<sup>19</sup> GovPayNow.com, which is used by thousands of state and local governments, leaked 14 million records in 2018,

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<sup>13</sup> Craig A. Newman, *A Closer Look: SEC's Edgar Hacking Case*, Patterson Belknap Data Security Law Blog (Feb. 12, 2019) <https://www.pbwt.com/data-security-law-blog/a-closer-look-secs-edgar-hacking-case>.

<sup>14</sup> Paul Bischoff, *A recent history of US Government Breaches – can you trust them with your data?*, Comparitech (Nov. 28, 2023) <https://www.comparitech.com/blog/vpn-privacy/us-government-breaches/>.

<sup>15</sup> *Id.*

<sup>16</sup> David DiMolfetta, *The Pentagon is notifying individuals affected by 2023 email data breach*, Government Executive (Feb. 15, 2024) <https://www.govexec.com/technology/2024/02/pentagon-notifying-individuals-affected-2023-email-data-breach/394184/>.

<sup>17</sup> Mary Kay Mallonee, *Hackers publish contact info of 20,000 FBI employees*, CNN (Feb. 8, 2016, 8:34 PM) <https://edition.cnn.com/2016/02/08/politics/hackers-fbi-employee-info/index.html>.

<sup>18</sup> Bill Hutchinson, *Chelsea Manning speaks of solitary confinement during New Year's Day poetry event*, ABC News (Jan. 2, 2024, 4:29 PM) <https://abcnews.go.com/US/chelsea-manning-speaks-solitary-confinement-new-years-day/story?id=106043233>.

<sup>19</sup> Jim Forsyth, *Records of 4.9 mln stolen from car in Texas data breach*, Reuters (Sep. 29, 2011, 6:00 PM) <https://www.reuters.com/article/us-data-breach-texas-idUSTRE78S5JG20110929/>.

including addresses, phone numbers and partial credit card numbers.<sup>20</sup> Additionally, a hacker exposed 191 million records from a database of American voters in 2015.<sup>21</sup>

The private sector has experienced massive breaches as well. On July 12, 2024, AT&T announced that someone illegally obtained records of phone calls and text messages from almost all its wireless customers,<sup>22</sup> and an April 2024 nationalpublicdata.com breach exposed 2.7 billion records, including names, addresses, dates of birth, phone numbers, and even Social Security numbers.<sup>23</sup>

The CTA's mass collection of data is thus incredibly dangerous. The courts should have the chance to hear this case to completion before Americans are forced to divulge their personal information for bureaucratic convenience.

## CONCLUSION

For the foregoing reasons, this Court should uphold the district court's injunction.

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<sup>20</sup> Bischoff, *supra* note 14.

<sup>21</sup> Thomas Brewster, *191 Million US Voter Registration Records Leaked In Mystery Database*, Forbes (Dec. 28, 2015, 8:50 AM) <https://www.forbes.com/sites/thomasbrewster/2015/12/28/us-voter-database-leak/>.

<sup>22</sup> Jon Haworth and Luke Barr, *AT&T says hacker stole some data from 'nearly all' wireless customers*, ABC News (Jul. 12, 2024, 12:24 PM) <https://abcnews.go.com/US/att-hacker-stole-data-wireless-customers/story?id=111874118>.

<sup>23</sup> Aimee Picchi, *Hackers may have stolen the Social Security numbers of many Americans. Here's what to know.*, CBS News (Aug. 15, 2024, 6:15 PM) <https://www.cbsnews.com/news/social-security-number-leak-npd-breach-what-to-know/>.