No. 24A653

IN THE

Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL, ET AL.,
APPLICANTS,

v.

TEXAS TOP COP SHOP, INCORPORATED, ET AL.

On Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Texas

BRIEF OF U.S. SENATOR THOM TILLIS AND THIRTEEN OTHER MEMBERS OF CONGRESS AS AMICI CURIAE IN OPPOSITION TO A STAY

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QUESTION PRESENTED

Whether the district court's nationwide injunction prohibiting enforcement of the Corporate Transparency Act ("CTA") should be stayed pending the Fifth Circuit's resolution of the Applicants' appeal of that injunction.

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INTEREST OF AMICI CURIAE[1]

As members of the federal legislature, *amici* seek to protect the constitutional rights of their constituents from unwarranted, unauthorized, and invasive reporting requirements that enable the federal government to gather untold volumes of information about the financial lives of, among others, ordinary citizens pursuing the American dream: small business owners. Small businesses—sole proprietorships, professional firms, mom-and-pop shops, self-employed tradesmen, farmers and ranchers, restauranteurs, bed-and-breakfasts, craftsmen, artisans, and countless others—form the backbone of the American economy, undergird local cultures, and employ nearly half of all private-sector American workers.

Small business owners embody the best of American values. The federal government has no cause to invade their private lives and create a government-supervised registry of those working within the law to create their own success. The same is true of the hundreds of thousands of other entities like community organizations, advocacy and education groups, trade associations, family offices, and more, none of whom should be subject to the Act's intrusive and vast disclosure requirements. As *amici* are keenly and uniquely aware, nebulous national security concerns untethered to any specific entity or potential national security risk are an exceptionally

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[1] Under Rule 37.6, no counsel for any party authored this brief, in whole or in part, nor did counsel for any party or either party make a monetary contribution intended to fund this brief in whole or part. No person or entity other than *amici* and counsel for *amici* contributed monetarily to this brief's preparation or submission.

weak justification for imposing a compelled-disclosure regime on most of America's middle class.

Amici include one U.S. Senator and thirteen U.S. Representatives currently serving in the 119th Congress. A full list of the *amici* is included in the Appendix.

SUMMARY OF ARGUMENT

I. Laws that compel the disclosure of private individuals' information to government officials must satisfy exacting scrutiny under the First Amendment. The Government fails to offer reason either to believe its intrusive informational demands escape exacting scrutiny or that their indiscriminate dislcosure requirements satisfy that standard's heavy burden. The CTA is both over- and under-inclusive, and the Government has not shown a fit between the national security objectives that it touts and the demands that the statute places on millions of ordinary, hard-working Americans. In the light of these considerations, the Fifth Circuit appropiately "preserve[d] the constitutional status quo while the merits panel considers the parties' weighty substantive arguments." *Texas Top Cop Shop, Inc. v. Garland*, No. 24-40792, 2024 WL 5224138, at *1 (5th Cir. Dec. 26, 2024).

II. The Government cannot show that it will be irreparably harmed absent a stay. Congress did not see an urgent need for the information at issue when it enacted the CTA in 2021, and the Government has already extended implementation of the statute's deadlines as recently as a few weeks ago. The Government will therefore suffer no irreparable harm while expedited proceedings move apace in the Fifth Circuit.

ARGUMENT

The Court should deny a stay of the district court's injunction because the Government cannot show a likelihood of success on the merits. Specifically, this Court can safely and properly disregard the Government's insufficient national security justifications for the enforcement of the CTA. As this Court has recognized, national security and constitutional liberties can and must coexist. "Established legal doctrine must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. . . . Security subsists, too, in fidelity to freedom's first principles." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (cleaned up).

The CTA is patently unconstitutional, as it infringes on the First Amendment rights of millions of Americans. The district court rightly considered these constitutional flaws in concluding that the plaintiffs showed that the CTA "substantially threaten[s] their constitutional rights," *see Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-CV-478, 2024 WL 5049220, at *15 (E.D. Tex. Dec. 5, 2024), and this Court can—and should—evaluate these concerns anew in deciding whether the Government is entitled to the extraordinary stay it seeks.

To obtain a stay of the district court's injunction from this Court, the Government must show (1) a reasonable probability that this Court will grant certiorari, (2) a likelihood of success on the merits, and (3) a likelihood of irreparable harm, absent a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). As this Court is aware, numerous federal appellate courts are currently considering whether the CTA's disclosure requirements comport with the First Amendment, and federal

district courts have resolved that difficult question in various ways. Thorough percolation of such an important question in the lower courts is both appropriate and consistent with this Court's expectations prior to its review of such an issue. While it seems that this Court will eventually take up the question of whether the CTA's disclosure requirements violate the First Amendment, it is a matter of reasonable dispute whether the Court does so through this vehicle. *See* Sup. Ct. R. 12; *see also* App. for Stay at 12-13. But the Government cannot make either of the two remaining showings—a likelihood of success on the merits and irreparable harm—let alone on the basis of undifferentiated and unexplained national security concerns.

First, the Government cannot show a likelihood of success on the merits. Respondents and other *amici* have ably highlighted many of the CTA's constitutional flaws as well as the myriad ways the Government has failed to overcome those flaws. But *amici*, being direct representatives of the American people and members of the federal government's "First Branch," are particularly well-suited to contribute to this discussion. *Amici* must defend the fundamental, constitutional rights on which the CTA infringes—rights the Framers held essential to any free society and which *amici*'s constituents hold dear. And, because of their unique position as legislators, *amici* are appropriately situated to explain why the Government's reliance on vague national security concerns to support the CTA—and its call for judicial deference to the executive in interpreting that law—should be unavailing.

And second, as for irreparable harm, the Government obviously cannot show an urgent national security need for information about its citizens that it has gone

two hundred and forty-five years without—at least none that rises to the level of the immediately impending, irreparable harm necessary to justify a stay. It is also clear that the Government cannot show that any concrete harms will necessarily proceed from the ordinary delays in the course of litigation given that the Government has never previously compiled the information it seeks. The Government's claimed harm here is neither impending nor irreparable.

I. The CTA Impermissibly Infringes on the First Amendment Rights of Small Business Owners and Other Entities.

A. The CTA is subject to exacting scrutiny under *Bonta*.

"First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Among those freedoms that the Court has long recognized is the "right to associate with others." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). This protected right of association furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.* After all, "freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969).

In *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021)—a case that Congress did not have the benefit of when it enacted the CTA—the Court applied those foundational First Amendment principles to a California law requiring charitable organizations to disclose the identities of their major donors to state

officials. The Court made clear that "compelled disclosure requirements are reviewed under exacting scrutiny." *Id.* at 608. Under this demanding standard, a government-mandated "disclosure regime" must be "narrowly tailored to the government's asserted interest" and that there must be a "substantial relation between the disclosure requirement and a sufficiently important government interest." *Id.* at 607-08. This scrutiny is warranted "given the deterrent effect on the exercise of First Amendment rights that arises" when government officials demand private individuals surrender information to the government. *Id.* at 607 (cleaned up).

This framework accords with the Court's earlier cases invalidating statutes in which government officials attempted to compel disclosure of a person's affiliations. *E.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-02 (1982). As the Court reasoned, when government officials demand information from private parties, "[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 governmental action." *Alabama*, 357 U.S. at 462. This is true even when the government purports to keep the information confidential. As *Bonta* explained, "disclosure requirements can chill association even if there is no disclosure to the general public" of the information disclosed to government officials. 594 U.S. at 616 (cleaned up).

Bonta applies with full force here. The CTA demands that every reporting company must disclose—on pain of civil and criminal penalties—its beneficial

owners to government officials. Those "beneficial owners" include individuals who even "indirectly" "exercise[] substantial control over the entity," even when that control might not be formalized. 31 U.S.C. § 5336(a)(3)(A). There is no meaningful factual or constitutional distinction between the CTA and the state regulation that *Bonta* considered and held unconstitutional. Both require the release of information to government officials that is likely to chill association and therefore suppress constitutionally protected speech. *Bonta*, 594 U.S. at 616. If anything, the CTA is even *more* likely to deter speech because the Government's compilation of beneficial ownership (and applicant) information will be shared by government officials with law-enforcement officials across the world. 31 U.S.C. § 5336(c)(2)(B). Accordingly, the Government must show that the CTA is "narrowly tailored to the government's asserted interest." *Bonta*, 594 U.S. at 608. This it cannot do.

B. The Government's purported national security interests do not outweigh the First Amendment rights of millions of Americans.

Given that the CTA is subject to exacting scrutiny, the government must justify the CTA's intrusion into the lives of millions of Americans under this Court's precedents. It cannot—at least not by pointing to amorphous national security concerns like those advanced in support of the CTA.

This Court recently made clear that the contours of exacting scrutiny stand in far sharper relief. Not only must there "be a substantial relation between the disclosure requirement and a sufficiently important governmental interest," *id.* at 607 (cleaned up), but the disclosure requirement must be "narrowly tailored" to

achieve the governmental objective at hand, *id.* at 608. Even a "legitimate and substantial governmental interest cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 609 (cleaned up).

Here, the Government proposes that the CTA's unprecedented reporting requirements address national security concerns by stymying a variety of financial crimes. That idea is admittedly supported by the "Sense of Congress." William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 6402, 134 Stat. 3388, 4604-05. According to that statement, Congress's passage of the CTA expressed the belief that "malign actors seek to conceal their ownership of" various entities "to facilitate . . . the financing of terrorism, proliferation financing, . . . piracy, . . . and acts of foreign corruption, harming the national security interests of the United States." *Id.* § 6402(3), 134 Stat. at 4604. These concealment efforts, the Government says, "make[] investigations exponentially more difficult and laborious." Defs.' Resp. in Opp. to Pls.' Mot. for Prelim. Injunction, Doc. No. 18 at 13, *Texas Top Cop Shop, Inc. v. Garland*, 4:24-cv-478 (E.D. Tex. filed June 26, 2024).[2] Thus, the argument goes, the CTA is necessary to prevent, for example, cross-border crime and sanctions evasion. *Id.*; *see also id.* at 34.

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[2] Citations to district court filings reflect the page number or "pin cite" generated by the court's electronic filing system and not the filing party's own pagination.

Safeguarding national security can be an important interest; indeed, it can be an interest of the highest order. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010). But an executive official invoking national security alone does not suffice; courts do not "abdicat[e] the judicial role" in the face of the executive asserting such an interest. *Id.* at 34. Rather, courts maintain the "obligation to secure the protection that the Constitution grants." *Id.* While the Court gives "respect" to the Government's conclusions regarding national security and does not "substitute [its] own evaluation" of "serious threats to our Nation and its people," *id.*, this Court need give no deference to the Government's assessment of whether its own law is sufficiently narrowly tailored to achieve the national security objective to which this Court gives deference. What's more, this case implicates the well-established doctrine of exacting scrutiny; it does not, therefore, raise the specter of a new "rule of constitutional law that would inhibit" the Government's ability to control matters of foreign relations and national security. *Contra Trump v. Hawaii*, 585 U.S. 667, 704 (2018) (explaining that such new rules "should be adopted only with the greatest caution").

Even assuming *arguendo* that *some* compelled disclosure of beneficial ownership would have a "substantial relation" to national security interests, that relationship alone cannot overcome exacting scrutiny because the CTA is simultaneously overbroad and underinclusive to achieve the purported objective. *See Bonta*, 594 U.S. at 609. Especially in the First Amendment context, "fit matters." *Id.* (cleaned up). The CTA is doubly poorly tailored. First, the CTA is too wide—it

sweeps in millions of entities and beneficial owners who are law abiding, patriotic, and loyal Americans and against whom the Government has no good-faith basis for asserting its national-security concerns, no matter how legitimate they may be. Second, it is too narrow, exempting numerous individuals and entities from key disclosure definitions, such as the "beneficial owners" of businesses.

First, the CTA's reporting requirements are drastically overbroad; they sweep in millions of Americans who have no involvement with international crime, sanctions evasion, or terrorism. *See* 31 U.S.C. §§ 5336(a)(3), 5336(a)(11). The Government cannot articulate any national security basis to gather associational information about the vast majority of these entities and individuals. Congress could have narrowed the scope of the law substantially to achieve the CTA's stated ends. For example, the CTA could have been drafted to require only disclosure by certain entities, such as those with foreign beneficial owners, those with beneficial owners who have been convicted of financial crimes, and those who do business overseas or have other cross-border dealings.[3] Moreover, whenever the Government has reason to believe that any person or entity is involved in activities harmful to the national

[3] To the extent the Government claims the CTA is necessary to eliminate tax fraud, it is unclear how the CTA achieves that end. Partnerships, LLCs, and other entities not taxed as corporations must file tax returns and Schedule K-1s, which show the portion of income attributable to each partner, member, or owner. *See About Form 1065, U.S. Return of Partnership Income*, Internal Revenue Service (last updated Jan. 7, 2025), https://www.irs.gov/forms-pubs/about-form-1065. In other words, the Internal Revenue Service is apprised annually of the income attributable to any beneficial owner.

security, it has extensive investigative and enforcement powers through which it can request information about beneficial owners.

Second, the CTA is drastically underinclusive to achieve the Government's purported national security ends. The definitions of "beneficial owner" and "reporting company" exclude huge swathes of individuals and entities and are, therefore, targeted only at the citizens most likely to be burdened by the reporting requirements and least likely to be a danger to national security. The CTA calls for the disclosure of the identities of only those individuals who "exercise[] substantial control over the entity" and those who "own[] or control[] not less than 25 percent of the ownership interests of the entity." 31 U.S.C. § 5336(a)(3)(A). In other words, a person could own 24.9 percent of an entity and, so long as that person is a passive investor, the entity would never have to report that person's identity to the Government. Thus, a state-registered partnership between four individuals, each owning 24.9 percent of the entity and engaging a manager owning 0.4 percent of the entity, would never have to report the partners' identities under the CTA. This illustrates, of course, that an immeasurable number of strategies are available for "malign actors" to avoid reporting. Meanwhile, millions of law-abiding citizens who operate mom-and-pop shops or sole proprietorships will have to disclose their associational information for no discernable purpose.

Likewise, the CTA is shockingly underinclusive, assuming that only the smallest entities are capable of involvement in undermining national security. The definition of "reporting companies" excludes certain categories of entities. 31 U.S.C.

§ 5336(a)(11)(B). Most of these categories represent finance-sector entities that are subject to reporting requirements under preexisting financial laws, such as the Securities Exchange Act, the Federal Credit Union Act, the Investment Company Act of 1940, and others. *Id.* But the law also inexplicably excludes any entity with 20 or more employees and more than five million dollars in revenue. *Id.* § 5336(a)(11)(B)(xxi). According to government data, nearly ten percent of small businesses have 20 or more employees in 2024.[4] The Government cannot explain why such a firm should be excluded from reporting its beneficial ownership. Indeed, as legitimate revenue increases, so does the potential for money laundering through revenue exaggeration, for example.[5]

The CTA also exempts those entities that are exempt from taxation under section 501 of the Internal Revenue Code. That includes religious, charitable, and educational organizations, labor and agricultural organizations, recreation clubs, social clubs, beneficiary societies, and many other categories of entities. 26 U.S.C. § 501(c). It is unclear why these entities are exempted, as many crimes can be perpetrated through a tax-exempt entity as easily as through a taxed entity, and "malign actors" could surely take advantage of this exemption easily. *See, e.g.*,

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[4] Rebecca Leppert, *A Look at Small Businesses in the U.S.*, PEW RESEARCH CENTER (Apr. 22, 2024), https://www.pewresearch.org/short-reads/2024/04/22/a-look-at-small-businesses-in-the-us/.

[5] *What Methods Are Used to Launder Money?*, INVESTOPEDIA (June 5, 2024), https://www.investopedia.com/ask/answers/022015/what-methods-are-used-launder-money.asp.

Humanitarian L. Project, 561 U.S. at 31 ("Funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." (cleaned up)).

Indeed, in *Humanitarian Law Project*, this Court rejected similar charity-based reasoning offered in defense of providing material support for terrorism. There, public-interest activists attempted to justify funding two terrorist groups by claiming to support only the charitable, non-terrorist activities in which those groups engaged. 561 U.S. at 28-29. Rejecting this argument, the Court explained that "[w]hether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question" that had already been resolved by Congress. *Id.* at 29. Specifically, Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." *Id.* (cleaned up). It was thus "not difficult to conclude as Congress did that the 'taint' of such violent activities is so great that working in coordination with or at the command of" the groups at issue "serves to legitimize and further their terrorist means" and was rightfully foreclosed by Congress. *Id.* at 30. "Money is fungible," after all, and it was unrealistic to expect foreign groups engaged in *terrorism* to maintain "legitimate financial firewalls" between charitable and terror activities. *Id.* at 31 (cleaned up).

At bottom, the CTA plainly does not meet any fit test, let alone the narrowly tailored standard this Court's exacting scrutiny jurisprudence requires. The law is

both overbroad in its application, thus rendering it not tailored to any governmental purpose at all, and underinclusive to its purpose, thus showing it does not actually achieve that purpose. The law is simultaneously full of holes through which even relatively unsophisticated criminals could easily pass undetected and deeply burdensome to the associational interest of millions of law-abiding Americans. The Government cannot overcome this Court's careful application of First Amendment principles to compelled disclosure regimes. For this reason, the Government also cannot show that it has a likelihood of success on the merits; the district court's injunction is likely to stand, and the CTA is likely to be enjoined permanently.

II. The Government Cannot Show an Impending Irreparable Harm.

The Government claims it has an immediate need for beneficial owner information, lest the national security be jeopardized. When, as here, a stay has been denied by the lower courts, the burden to show that the equities favor a stay is particularly heavy. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1012 (1977) (Marshall, J., in chambers). The irreparable harm inquiry balances the injuries the respective sides might suffer, and the Circuit Court's conclusion regarding that balance "is entitled to weight and should not lightly be disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers). The Fifth Circuit's decision not to grant a stay is patently correct for four reasons, three of which are closely related.

First, the Government has never before, in 245 years since the Constitution was ratified, expressed a great need for this beneficial owner information, let alone

acted to obtain and use it. The Government cannot manufacture urgency where there previously has not been even a need even to act at all. The Nation and its security have withstood nearly two and a half centuries while allowing for anonymous partnerships, LLCs, and professional associations; it likely can manage another few months of litigation under the backdrop of that status quo.

Second, Congress itself identified that the Government had no urgent need for this information. The CTA was passed in January 2021, Pub. L. No. 116–283, 134 Stat. 3388, but no reporting was required until January 2025, four years later, 31 U.S.C. §§ 5336(b)(1)(B), 5336(b)(5); 31 C.F.R. § 1010.380(a)(1)(iii). A few months more waiting will merely facilitate the courts' careful review of the important issues presented in this case. Had Congress specifically intended to express that the reporting deadline were so time-sensitive that they could not admit even of expedited appellate review, it would be expected to "speak clearly" and indicate as much. *Cf., e.g.*, *Henderson v. Shinseki*, 562 U.S. 428, 436-38 (2011) (explaining that Congress would have cast a deadline in different language if it had intended the provision to be jurisdictional).

Third, the Government itself has shown willingness to extend the reporting deadlines. Before the Fifth Circuit merits panel vacated the previously entered stay of the district court's injunction, the Financial Crimes Enforcement Network

extended the January 1, 2025 deadline, by nearly two weeks.[6] If obtaining beneficial ownership information about millions of Americans were actually so urgent as to justify a stay, the Government would not have offered such grace.

Finally, as discussed above, the exceptions to the CTA's reporting requirement are so broad as to betray any claimed need for this Court's immediate review. Those exceptions grant a free pass to, among others, "large" small businesses and non-taxable entities to continue whatever international organized crime enterprise the Government believes will be uncovered by burdening mom-and-pop shops across America.

* * *

In sum, the CTA plainly infringes on the associational rights of millions of Americans, as *Bonta* makes clear, because it forces countless business owners to identify themselves to government officials under penalty of law. Congress passed the CTA without the benefit of *Bonta*'s teaching, but that does not make the law less repugnant to the First Amendment. To overcome exacting scrutiny, the Government must show that the CTA is narrowly tailored to a substantial governmental interest. It cannot point to national security concerns to make that showing, as the CTA is patently not narrowly tailored to that end. Thus, the Government has not

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[6] Louis T. M. Conti, et al., *Corporate Transparency Act Back in Effect, But with Extended Deadlines*, HOLLAND & KNIGHT (Dec. 24, 2024), https://www.hklaw.com/en/insights/publications/2024/12/corporate-transparency-act-back-in-effect-but-with-extended-deadlines.

shown a likelihood of success on the merits of the underlying litigation. Furthermore, the Government cannot show an irreparable harm that flows from any delay in gathering beneficial ownership information. It has never before had or needed that information to keep this Nation safe, and Congress itself knew gathering that information was not urgent. For these reasons, the Government cannot show that it is entitled to a stay of the district court's injunction.

CONCLUSION

The Court should deny a stay of the district court's injunction.

Respectfully submitted.

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TABLE OF APPENDICES

APPENDIX

LIST OF *AMICI CURIAE* MEMBERS OF CONGRESS

One U.S. Senator

Sen. Thom Tillis

Thirteen U.S. Representatives

Rep. Warren Davidson

Rep. Harriet Hageman

Rep. Keith Self

Rep. Andrew Clyde

Rep. Aaron Bean

Rep. Chip Roy

Rep. Michael Guest

Rep. Doug Collins

Rep. Russ Fulcher

Rep. Marlin Stutzman

Rep. Michelle Fischbach

Rep. Dusty Johnson

Rep. Roger Williams