No. 24-40792

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

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

BRIEF FOR *AMICI CURIAE* THE PRIVATE INVESTOR COALITION, INC., AND S CORPORATION ASSOCIATION IN OPPOSITION TO APPLICANT'S REQUEST FOR A STAY

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Statement of Interest of Amici[1]

Amici are associations that represent the interests of thousands of law-abiding people and entities who, if the preliminary injunction against the CTA and stay of FinCEN's Reporting Rule are set aside, will be required to report sensitive personal information to FinCEN's criminal law-enforcement database even though the Government does not have any suspicion that they have committed crimes. Many of Amici's members, in reliance on the District Court's injunction, have not yet filed Beneficial Ownership Information ("BOI") reports. Amici have a strong interest in ensuring that the District Court's injunction is maintained.

The first Amicus on this brief, The Private Investor Coalition, Inc. ("PIC"), is a coalition of dozens of single-family offices and many more individual investors and business owners who share a common interest in public-policy issues impacting the single-family-office community. PIC monitors legislative and regulatory developments in Washington and serves as the primary resource for timely information and guidance related to compliance topics specific to single-family offices. Each year, PIC's members form numerous entities—whether LLCs, corporations, or other entities—and will be subject to the CTA's reporting requirements, whether or not these entities and individuals ever engage in commercial transactions.

[1] This brief was not authored in whole or part by counsel for a party, and no one other than amici curiae or their counsel made a monetary contribution to the preparation or submission of the brief.

The second Amicus on this brief, S Corporation Association, represents companies organized as S corporations and the trade associations that have them as members, acting as the "eyes and ears" for America's S corporation community in Washington. Its mission is to protect America's individually and family-owned businesses from excessive taxes and government mandates while working to ensure that America's most popular corporate structure remains competitive in the Twenty-First Century. Many of the Association's members will be required to report sensitive personal information to FinCEN, whether or not those entities engage in commercial transactions and even though those entities are not suspected of wrongdoing.

ARGUMENT

The extraordinary number of Amicus filings in support of the District Court's order in this case underscores the unique constitutional threat the Corporate Transparency Act poses to real people throughout the United States—and the unique need to restrain the Government from enforcing the CTA's new requirements against those Americans until this Court has fully weighed the issues presented. Amici are but two of the associations whose many members will be irreparably harmed if the Government is allowed to extract, either in full or in part, personal information from them for use in a criminal law-enforcement database. This Nation has never before seen a statute like this one passed by Congress,

and this Court can and should ensure that a statute of this kind is never enforced against any citizen either now or in the future.

With the deadline for reporting to FinCEN's criminal law-enforcement database looming—and with millions of affected individuals and entities lacking resources to bring their own lawsuits to enjoin this statute's enforcement—the District Court issued preliminary relief that, consistent with principles of equity and the APA, precluded the Government from enforcing the CTA and its Reporting Rule against anyone until this litigation has been resolved. The plaintiffs have persuasively explained why the factors under *Nken v. Holder*, 556 U.S. 418 (2009), run counter to the Government's request for a stay. This brief offers the following additional perspective on why the Court is likely to uphold the District Court's order and why Amici and other members of the public will be irreparably harmed if the order is stayed or narrowed during the Government's appeal.

I. Plaintiffs are likely to succeed on the merits

The CTA is uniquely unprecedented and uniquely unconstitutional. Stunningly, in an amicus brief filed in the Government's pending appeal of the Northern District of Alabama's final injunction against the CTA's enforcement, Members of Congress "includ[ing] sponsors of the law" characterized it as "a garden-variety" exercise "of Congress's core Article I

authorities." Brief of Senators Sheldon Whitehouse, Ron Wyden, Elizabeth Warren, Jack Reed, and Representative Maxine Waters as Amici Curiae in Support of Defendants-Appellants at 2, *Nat'l Small Business United v. Yellen*, No. 24-10736, 2024 WL 1854186, at *2 (C.A.11 Apr. 22, 2024). The fact that numerous Members of Congress would even think to call this unprecedented statute "garden-variety" underscores that a new and serious legislative encroachment is now before the Court. It also underscores that nationwide preliminary relief will be needed until this statute's invalidity can be finally assessed.

1. The three District Courts that have given substantial attention to this matter have explained in detail why the CTA exceeds Congress's enumerated powers—in the 79-page opinion in this case, in the 34-page opinion issued just in the past week by the Eastern District of Texas in *Smith v. U.S. Department of Treasury*, No. 6:24-cv-00336-JDK, 2025 WL 41924 (Jan. 7, 2025), and in the 53-page opinion issued in March by the Northern District of Alabama, *National Small Business United v. Yellen*, 721 F. Supp. 3d 1260 (N.D. Ala. 2024). The Government's position on this issue has evolved over the course of those cases, and the fact that it is *still* continuing to search for a theory to sustain the CTA shows that there is, in fact, no such theory. The Government's current line, which it has borrowed from the now-vacated order issued by the Fifth Circuit motions panel in this case, is that the CTA passes Commerce Clause muster because it "regulates an economic activity: the 'anonymous ownership and

operation of businesses.'" Appl. 14 (quoting App. 5a). The problems with that theory abound.

a. The first is that the CTA does not regulate the act of owning or operating "businesses." *Id.* The triggering act for regulation is instead, in the statute's words, a person "creat[ing]" or "regist[ering]" a corporate entity that may never engage in business or any other form of commerce, by submitting documents to a State or local official such as a Secretary of State. 31 U.S.C. § 5336(a)(11). That act is not commercial: as the Northern District of Alabama explained in its opinion, "the Government concedes that 'submitt[ing] documents to a Secretary of State' does not 'implicate[] the Commerce Clause.'" *National Small Business United,* 721 F. Supp. 3d at 1282. The CTA, moreover, "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the" act of incorporation "in question affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 561 (1995).

b. Due to these problems, the now-vacated stay order issued by the Fifth Circuit motions panel relied on a rather different proposition: that the Commerce Clause allows regulation not of commercial activity itself, but of entities that, as a class, have the "ability and propensity" to engage in commercial activity. App. 6a. The Government has not repeated that language in its Application to this Court, and with good reason: it is foreclosed by *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 549 (2012). This Court's Commerce Clause precedents uphold

congressional enactments when they regulate actual economic activity, not the "ability and propensity" for it. *See Gonzales v. Raich*, 545 U.S. 1, 7 (2005) (cannabis "cultivat[ion]"); *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964) (restaurants' "refus[al] to serve"); *Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (wheat "production"). On the Fifth Circuit motions panel's theory, Congress could pass a statute requiring disclosures not only from reporting companies, but from every *individual person* in the United States—because every individual person, too, has the "ability and propensity" to engage in commercial transactions. App. 6a.

In justifying a recent rule on Residential Real Estate Transfers—a rule that is not premised on the CTA—FinCEN contrasted this Rule with the CTA and acknowledged that the CTA's "ability and propensity" approach marks a different and more expansive view of congressional power than what our constitutional order normally envisions:

> *In contrast to the beneficial ownership requirements outlined in the CTA*, this proposed rule is a tailored reporting requirement that would capture a particular class of *activity* that Treasury deems high-risk and that warrants reporting on a *transaction-specific* basis.

Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 Fed. Reg. 12,424, 12,447 (Feb. 16, 2024) (emphasis added). FinCEN further explained that the Residential Real Estate Transfer rule was needed because the CTA's reporting requirements are triggered by an entity's existence, not its conduct:

> While beneficial ownership information collected under the CTA may be available, that information concerns *the ownership composition* of a given entity *at a given point in time*. As such reporting does not dynamically extend to include information *on the market transactions* of the beneficially owned legal entity, it *would not alert law enforcement officials focused on reducing money laundering that [a transaction] had been conducted*.

Id. (emphasis added).

As FinCEN's statements acknowledge, the CTA does not target commercial activity or commercial information. It targets "entit[ies]" and their "owner[s]" instead. *Id.* Likewise, the CTA does not collect this sensitive personal information for the purposes of regulating "transactions." *Id.* It instead does so, by FinCEN's admission, for criminal "law enforcement" purposes—purposes that are unjustified as to the overwhelming majority of law-abiding citizens forced to comply with this statute. *Id.* These considerations take the CTA outside the Commerce power.

2. It also is telling that the Government has avoided addressing the CTA's corresponding incompatibility with the Fourth Amendment, which is striking in light of FinCEN's concession that it is gathering this information for criminal "law-enforcement purposes." *Id.*

It is true enough that, as the Government suggests, the three District Courts that have now enjoined the CTA's enforcement "did not reach those claims." Appl. 20. But that happened only because, as the Government elsewhere acknowledges, those courts found it "unnecessary" to address Fourth Amendment jurisprudence due to their rulings that the

CTA is beyond Congress's enumerated powers. Appl. 7. The Government's assertion in this Court that the CTA is justified by the Necessary and Proper Clause, however, puts the Fourth Amendment problem in full view. The Government now contends that the CTA's reporting requirements are within the ambit of the Necessary and Proper Clause because they would "help the President execute federal law by enabling the Executive Branch to trace the flow of illicit funds and detect and prosecute financial crimes." Appl. 18.

That is a stark admission that the CTA is designed to circumvent the Fourth Amendment. FinCEN has announced that if "an individual who qualifies as a beneficial owner or a company applicant . . . refuse[s] to provide information" to a reporting company knowing that the entity "would not be able to provide complete beneficial ownership information to FinCEN without it," then FinCEN will consider that person "subject to civil and/or criminal penalties" under the CTA. Financial Crimes Enforcement Network, Department of the Treasury, Small Entity Compliance Guide, v.1.2 ¶1.3, at 15 (Dec. 2024) https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf. Because the CTA thus requires individuals to disclose sensitive personal information to the Government without a warrant, probable cause, or even reasonable suspicion for criminal law-enforcement purposes—and

because it does so under threat of imprisonment—the CTA works a paradigmatic Fourth Amendment violation. *See Brown v. Texas*, 443 U.S. 47, 49, 52 (1979).

FinCEN has not been coy about the fact that the CTA is designed to obtain information for criminal investigations and prosecutions while working an end-run around the warrant requirement. The agency's then-Director testified to Congress that the CTA was needed because identifying beneficial owners "often requires," among other things, "grand jury subpoenas, surveillance operations," and—critically—"search warrants," which he complained "takes an enormous amount of time" and "wastes resources." Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, at 59504 (Sept. 30, 2022). But what he referred to as "waste[]" is the process the Fourth Amendment mandates to protect personal liberty—requiring the Government to invest the "time" and "resources" needed to obtain warrants, and to have, at the very least, reasonable suspicion that wrongdoing has occurred before it forces citizens to disclose private information for criminal law-enforcement purposes. *Id.* The CTA casts all that aside for the sake of administrative ease.

The Government's principal response is that "Congress has often required private individuals and entities to provide information to the government." Appl. 20. But none of the precedents cited by the Government require disclosure, as the CTA does, of information that is to be used for the express purposes of *criminal investigation and prosecution.*

As this Court has explained, "where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing," the special-needs exception to the Fourth Amendment does not apply, and "reasonableness generally requires the obtaining of a judicial warrant." *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). The millions of Fourth Amendment violations that will ensue if the CTA and its Reporting Rule are enforced during the Government's appeal—and the fact that the Fifth Circuit will be free to consider these Fourth Amendment issues when it assesses the CTA's validity—stand as additional grounds to leave the District Court's decision in place.

II. The equities disfavor a stay

The equities here are extraordinary. If any enactments justify a nationwide halt to their enforcement, it is the CTA and its Reporting Rule—which purport to apply to individuals across the country, are outside Congress's powers, and will coerce privacy incursions on persons and entities that lack the resources to file lawsuits of their own. If the District Court's order is narrowed during the Government's appeal, then the Government would force millions of people to provide sensitive information for criminal law-enforcement purposes in the face of three separate and well-reasoned district-court rulings finding the CTA unconstitutional. The District Court in this case thus acted well within its discretion when it pre-

cluded the Government from inequitably enforcing the CTA and Reporting Rule against these millions of people during the course of this litigation.

The Government only proves the point when it attempts to minimize the monetary harm any individual person will suffer if the Reporting Rule goes into effect, claiming that for smaller entities, "the time needed for compliance is equivalent to '$85.14.'" Appl. 30. That assertion ignores the reality that, taking the affected individuals as a whole, "FinCEN estimates that the total cost of filing BOI reports is approximately $22.7 billion in the first year." Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498, 59,585–86 (Sept. 30, 2022). But even if it is fair to say that the monetary costs of compliance for any individual will be relatively low, that consideration *supports*, rather than undermines, the nationwide scope of the District Court's order. The very reason the Government has not faced a lawsuit from every person the CTA affects is that the monetary costs of litigation, on a case-by-case basis, greatly exceed the monetary costs of any given individual's compliance with the CTA's forced-disclosure scheme.

The District Court's injunction properly precludes the Government from leveraging these monetary realities and coercing the citizenry into these unwarranted disclosures. The Government's Application makes no mention of the privacy harms associated with the compelled disclosures,

but they are real and irreparable. And while the motions panel erroneously deemed these privacy incursions "immaterial," the very reason the CTA exceeds the Commerce power—as well as the Fourth Amendment—is that it does not regulate commercial conduct at all, but rather the mere fact that these entities exist. *See supra* at 4-7. Ultimately, the CTA's regulatory target is not these entities' commercial conduct, but instead the privacy of the *people* who own these entities.

The Government has been forthright about the reality that this statute is really designed to regulate people by invading their privacy. FinCEN has said that the law seeks to "support[] law enforcement efforts" by "requir[ing] many small businesses to report basic information to the Federal government about *the real people* who ultimately own or control them." Financial Crimes Enforcement Network, *READOUT: FinCEN Deputy Director's Travel to Houston, TX Area for Beneficial Ownership Outreach Events with Members of Congress*, https://www.fincen.gov/news/news-releases/readout-fincen-deputy-directors-travel-houston-tx-area-beneficial-ownership (last visited Dec. 26, 2024) (emphasis added), https://perma.cc/KVX6-2HMA. Defending the CTA in the Eleventh Circuit, the Government asserted that the statute is specifically designed to "identify *the human beings* behind the corporate form." Reply Brief for the United States, *Nat'l Small Business United v. Yellen*, No. 24-10736, 2024 WL 2890219, at *4 (June 3, 2024) (emphasis added).

The associated privacy risks are unprecedented. Other kinds of personal information people give the Government are protected by the Privacy Act of 1974, which generally precludes the Government from using information collected for one reason for incompatible purposes. *See* 5 U.S.C. § 552a. Personal information given to federally regulated financial institutions is likewise protected under the Right to Financial Privacy Act of 1978, which generally requires the Government to obtain a warrant, subpoena, or other form of process before it can access a citizen's personal information without their consent. *See* 12 U.S.C. § 3401 *et seq.* Tax information collected by the Government is protected under the Internal Revenue Code, which generally requires a court order before the IRS may share information with non-tax enforcement agencies. *See* 26 U.S.C. § 6103.

The CTA provides no similar panoply of protections, and this concern by itself justifies preliminary relief of nationwide scope. If the District Court's order is stayed as the Government's Application requests, Amici's members and millions of other citizens and businesses will be forced to hand over private information for a criminal-investigation database. The privacy bell will be incapable of being un-rung.

CONCLUSION

This Court should deny the Government's application in full.

Respectfully submitted,

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