No. 24A653

IN THE SUPREME COURT OF THE UNITED STATES

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Applicants

v.

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

Respondents

RESPONDENTS' APPENDIX

ON INTERLOCUTORY APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
4:24-CV-478
HON. AMOS L. MAZZANT
AND ON REVIEW FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

January 9, 2025

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

TEXAS TOP COP SHOP, INC.; DATA COMM FOR BUSINESS, INC.; RUSSELL STRAAYER; MUSTARDSEED LIVESTOCK, LLC; LIBERTARIAN PARTY OF MISSISSIPPI; and NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., *Plaintiffs*, v. MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES; JANET L. YELLEN, SECRETARY OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; ANDREA GACKI, DIRECTOR OF THE FINANCIAL CRIMES ENFORCEMENT NETWORK; FINANCIAL CRIMES ENFORCEMENT NETWORK, *Defendants*.	Case No: 4:24-cv-478 **COMPLAINT**

INTRODUCTION

Corporate formation, whether employed by a profit-making corporation, a small partnership, or an advocacy association, is a critical aspect of modern American law. "The corporate form is now the foundation of the modern market economy. Its benefits are well appreciated: permanent capital grants an autonomous and indefinite life, and a capacity for long-term investment." Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J.L. ECON. & ORG. 193, 225 (2017).

The corporate form also serves critical social goals. "Political speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (citation omitted). Indeed, modern advocacy invariably relies on the corporate form to magnify its impact on public discourse. *See id.* And other aspects of the corporate form, including "identity shielding[,] is foundational to the very existence of many business enterprises that benefit society at large, including the supply of desirable products and services for consumers. Identity shielding particularly has a potential to unlock innovation because it may encourage the flow of capital and human collaboration for enterprises that may foster critical perspective about the status quo. Anonymity in the financing of business enterprises is also intimately connected to personal autonomy, such as safeguarding personal reputations and, in some cases, the physical safety of business owners." William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425, 1433–34 (Apr. 2022).

As important as these corporate functions are to a free and flourishing society, it is a unique feature of our federalist system that the national government has no constitutional authority over general corporate formation. Instead, the several States have competed amongst themselves in their creation and supervision of corporate forms. "Throughout the history of American law, the definition and supervision of business entities has been the task of the states. At the Constitutional Convention, during the Progressive Era, and at the height of the New Deal, the federal government debated whether to enter the corporate area itself and every time declined." Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1037–38 (1986).

At the founding, corporations were almost always "agencies of government . . . for the furtherance of community purposes." Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 55–56 (1993). As corporate forms began to evolve and the use of private corporations grew, often through state-chartered enterprises engaged in transportation and finance, the States maintained exclusive control over governance and formation. Brian Phillips Murphy, *Building the Empire State: Political Economy in the Early Republic* 12 (2015).

It is unsurprising, therefore, that the Framers both implicitly understood that the federal constitution lacked any control over state corporate law and even explicitly rejected a call for such authority. At the 1787 Constitutional Convention, James Madison proposed to grant Congress an enumerated power to charter federal corporations. Madison sought a general power "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." 2 *The Records of the Federal Convention of 1787* 615 (Max Farrand ed., 1911) (Madison's notes). Rufus King of Massachusetts and George Mason of Virginia immediately protested that the States would not stand for it. *See id.* at 615–16. Madison's enlargement of congressional authority was soundly rejected and did not even get a vote. *See id.* at 616. Thus, "[t]he delegates were aware that leaving business regulation primarily to the individual states might cause friction within the overall American economy. They were more reluctant, however, to allow concentrations of economic power, which they visualized as a government-sponsored monopoly, and therefore chose this course." Boyer, *supra* at 1041.

The national government was delegated certain enumerated powers that may be used to regulate specific activities of individuals and corporations that are created under state law—for instance, when such entities issue securities in interstate commerce or generate income subject to

federal tax. But the national government lacks any general power over corporate governance or control over how corporations operate. Indeed, this understanding has continued well into the modern era, with federal law forming an "overlay" on corporate conduct that deals "with the transfer of interests in those business entities" in interstate commerce, but never addressing corporate formation or governance itself. *See id.* at 1056. "The era of Populism, Theodore Roosevelt, and Woodrow Wilson, which produced the Sherman and Clayton Acts, the Pure Food and Drug Act, and the Federal Trade Commission, considered the matter, but ultimately chose to leave corporation law under state authority." *Id*. at 1050. Or, as the Supreme Court put it: "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987).

And yet, buried within almost 1500 pages of statutory text as a part of an end-of-the-year budget bill, the Corporate Transparency Act (CTA or Act) threatens to upend these time-honored principles. The Act seeks to federalize the internal affairs of tens of millions of entities, whether they constitute for-profit commercial enterprises, political advocacy organizations, or even religious groups, while compelling invasive disclosures to federal regulators for the express purpose of criminal investigation. By so doing, the Act threatens cherished privacy and associational interests in those entities, upsets the careful balance between state and federal actors, and imposes chilling criminal consequences for millions of presumptively innocent people.

In short, the Act is an unconstitutional affront to the individual rights of Americans. This Court should therefore enter a declaratory judgment and permanent injunction prohibiting defendants from enforcing the Act and vacating its implementing regulations.

PARTIES

1. Texas Top Cop Shop, Inc., is a Texas corporation, registered with the Texas Secretary of State, with all operations and its principal place of business in Conroe, Texas.

2. Plaintiff Data Comm for Business, Inc. (Data Comm), is a Delaware corporation with operations in Illinois and Texas. Data Comm is registered to do business as a foreign corporation with the Illinois Secretary of State. Data Comm's principal place of business is in Collin County, Texas.

3. Plaintiff Russell Straayer is an individual residing in Collin County, Texas.

4. Plaintiff Mustardseed Livestock, LLC (Mustardseed), is a Wyoming limited liability company registered with the Wyoming Secretary of State. Mustardseed's principal place of business is Lingle, Wyoming, and each of its members reside in Wyoming.

5. Plaintiff Libertarian Party of Mississippi (MSLP) is a non-profit corporation organized under the laws of Mississippi and registered to do business with the Mississippi Secretary of State. MSLP's principal place of business is in Biloxi, Mississippi.

6. Plaintiff National Federation of Independent Business, Inc. (NFIB) is the nation's leading small business advocacy organization. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. It represents approximately 300,000 independent business owners located throughout the United States and in a wide variety of industries. NFIB is a nonprofit corporation headquartered in Tennessee.

7. Plaintiffs Texas Top Cop Shop and Data Comm are members of NFIB.

8. Defendant Merrick Garland is the Attorney General of the United States and is sued in his official capacity as the chief law enforcement officer of the United States.

9. AG Garland is responsible for the uniform administration and enforcement of federal criminal law in the United States, including the offenses created by the CTA.

10. Defendant Janet L. Yellen is the United States Secretary of the Treasury and is sued in her official capacity as the head of the U.S. Department of the Treasury.

11. Defendant U.S. Department of the Treasury is an executive agency of the United States tasked with administration and enforcement of the CTA and its implementing regulations.

12. Defendant Andrea Gacki is the Director of the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, and is sued in her official capacity as head of FinCEN.

13. Defendant Financial Crimes Enforcement Network is a bureau of a federal agency tasked with administration and enforcement of the CTA and its implementing regulations.

14. Throughout this Complaint, Defendants are referred to jointly as the United States or Treasury except where otherwise specified.

JURISDICTION AND VENUE

15. This Court has jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

16. This Court has the authority to grant an injunction and declaratory judgment in this matter pursuant to 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. §§ 705, 706(2).

17. Venue for this action properly lies in this district pursuant to 5 U.S.C. § 703 and 28 U.S.C. §§ 1391(b)(2), (e)(1), because a defendant resides in this district, certain plaintiffs reside in this judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district and in this division.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

A. The Corporate Transparency Act

18. On January 1, 2021, the Corporate Transparency Act (CTA or Act) was enacted as Section 6401 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283.

19. Section 6402(5) of the NDAA provided the "sense of Congress that" "Federal legislation providing for the collection of beneficial ownership information for corporations, limited liability companies, or other similar entities formed under the laws of the States is needed to— (A) set a clear, Federal standard for incorporation practices; (B) protect vital Unites (sic) States national security interests; (C) protect interstate and foreign commerce; (D) better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and (E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."

20. Section 6403 created new "beneficial ownership information reporting requirements" codified at 31 U.S.C. § 5336.

21. "In accordance with regulations prescribed by the Secretary of the Treasury," the CTA provided that "each reporting company shall submit to FinCEN a report" "identify[ing] each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by" "full legal name," "date of birth," "current, as of the date on which the report is delivered, residential or business street address," and "unique identifying number from an acceptable identification document" or "FinCEN identifier." 31 U.S.C. §§ 5336(b)(1)(A), (b)(2)(A).

22. "Acceptable identification" is a nonexpired passport, or an identification document issued by a U.S. state, local government, or Indian Tribe, or a U.S. state driver's license. *Id.* at § (a)(1).

23. For "existing entities," *i.e.*, "any reporting company that has been formed or registered before the effective date of the regulations prescribed under" the CTA, their reports must be filed in "accordance with regulations prescribed by the Secretary of the Treasury," and not later than 2 years after the effective date of regulations prescribed by the Secretary. *Id.* at § (b)(1)(B).

24. "In accordance with regulations prescribed by the Secretary of the Treasury, any reporting company that has been formed or registered after the effective date of the regulations promulgated under this subsection shall, at the time of formation or registration, submit to FinCEN" relevant reports. *Id.* at § (b)(1)(C).

25. Reporting companies must file "updated report[s] for changes in beneficial ownership" in "accordance with regulations prescribed by the Secretary of the Treasury," "and not later than 1 year after the date on which there is a change" in relevant information. *Id.* at § (b)(1)(D).

26. An entity's "applicant" is the person who filed relevant organizing documents with the state secretary, and this person must also be identified in the FinCEN report regardless of whether he or she is also a "beneficial owner" of the entity. *See id.* §§ (a)(2), (b)(2)(A).

27. "The term 'reporting company'—[] means a corporation, limited liability company, or other similar entity that is—(i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe[.]" *Id.* at § (a)(11)(A).

28. However, the CTA statutorily exempts 23 types of entities from this definition, including:

a. issuers of securities,

b. government entities,

c. banks,

d. credit unions,

e. bank holding companies,

f. money transmitting businesses,

g. brokers or dealers of securities,

h. securities exchanges or clearing agencies,

i. any other entity registered with the Securities and Exchange Commission,

j. registered investment companies,

k. investment advisers,

l. insurance companies,

m. insurance producers,

n. entities registered with the Commodity Futures Trading Commission,

o. public accounting firms,

p. public utilities,

q. financial market utilities,

r. pooled investment vehicles,

s. organizations with an active tax-exempt status under section 501(c) or 527(a) of the Internal Revenue Code, or trusts described in section 4947(a) of the Internal Revenue Code,

t. certain holding companies related to those tax-exempt entities,

u. any entity that "employs more than 20 employees on a full-time basis in the United States," had "more than $5,000,000 in gross receipts or sales in the aggregate," in

its last tax year and "has an operating presence at a physical office within the United States,"

v. entities that own or control exempt entities, and

w. dormant entities – those "in existence for over 1 year," "not engaged in active business," "not owned, directly or indirectly, by a foreign person" "that has not, in the preceding 12-month period, experienced a change in ownership or sent or received funds in an amount greater than $1,000 (including all funds sent to or received from any source through a financial account or accounts in which the entity, or an affiliate of the entity, maintains an interest)" and "that does not otherwise hold any kind or type of assets, including an ownership interest in any corporation, limited liability company, or other similar entity." 31 U.S.C. §§ 5336(a)(11)(B)(i)-(xxiii).

29. The CTA also delegates to the Secretary of the Treasury the discretion to exempt additional classes of entities when filing requirements "would not serve the public interest" and "would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes." *Id.* at § (a)(11)(B)(xxiv).

30. The term "beneficial owner" in the Act—"means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity[.]" *Id.* at § (a)(3).

31. The Act's coverage is both wildly over- and under-inclusive of the entities that are arguably important to serve the Act's stated purposes. It is over-inclusive because the Act's coverage

formula is extraordinarily broad with respect to the approximate 32.6 million existing small entities that it captures in its dragnet. And yet, the Act is under-inclusive of large corporations and especially financial institutions that would seem to be prime targets for those engaging in knowing or unwitting money laundering—given that these institutions succeeded in securing exemptions from coverage when the Act was added to the NDAA legislation.

32. And yet, no further exemptions have been granted under the constitutionally questionable delegation of lawmaking power to determine who is and is not subject to potential criminal liability. Thus, the Act covers countless millions of small entities, with or without commercial or international trade activities, that bear proportionally higher compliance costs than larger corporations (assuming they are even aware of the Act's existence).

33. Once reports are filed, FinCEN must retain the information for "not fewer than 5 years after the date on which the reporting company terminates," and "may disclose" the information upon request "from a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity" or "from a State, local, or Tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation." 31 U.S.C. §§ 5336(c)(1), (2)(B).

34. FinCEN may also disclose beneficial ownership information upon certain requests from foreign entities, "financial institution[s] subject to customer due diligence requirements," or "a Federal functional regulator or other appropriate regulatory agency." *Id.* at § (c)(2)(B).

35. Willful failures "to report complete or updated beneficial ownership information," or willfully "provid[ing], or attempt[ing] to provide, false or fraudulent beneficial ownership information" is unlawful, and punishable by "a civil penalty of not more than $500 for each day

that the violation continues or has not been remedied" and criminal penalties of a fine of "not more than $10,000," or a sentence of imprisonment "for not more than 2 years, or both." *Id.* at §§ (h)(1)-(3).

36. Beneficial ownership information is also presumptively "confidential," and disclosure except as authorized by the Act is likewise subject to civil and criminal penalties. 31 U.S.C. § 5336(h)(2).

37. There is significant evidence that the CTA was intended, at least in part, to compel disclosures of the identities of political donors. The original version of the Act was introduced in 2017, and its co-sponsor Senator Sheldon Whitehouse was explicit about his goals. In a speech Senator Whitehouse gave on the Senate floor in 2017, he explained that a beneficial ownership reporting regime would provide a means of stopping what he saw as the "unprecedented dark money flow into our elections from anonymous dark money organizations, groups that we allow to hide the identities of their big donors," such as "American dark money emperors, like the Koch brothers." Congressional Record, Vol. 163, No. 101 at S3468 (Senate, June 14, 2017). Senator Whitehouse blamed this perceived problem on "the *Citizens United* decision," which "permit[ed] big money to flow through dark money channels." *Id.* Requiring disclosures of "beneficial ownership" information was the antidote to anonymous political donations. *Id.* By tracking "the actual owners of companies" law enforcement could stop entities from "funneling money into our elections through faceless shell companies," and allow the government to determine "the identities behind big political spending." *Id.* at S3469. Since the Act was passed, it has even been hailed by commentators because it "can shine light on dark money in U.S. elections." Devon Himelman, *How the Corporate Transparency Act Can Shine Light on Dark Money in U.S. Elections*, Global Anticorruption Blog (April 15, 2022), *available at*

https://globalanticorruptionblog.com/2022/04/15/how-the-corporate-transparency-act-can-shine-light-on-dark-money-in-u-s-elections/.

B. Implementing Regulations

38. On September 30, 2022, Treasury and FinCEN issued implementing regulations, Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022) (Reporting Rule).

39. According to Treasury: "These regulations implement Section 6403 of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA), and describe who must file a report, what information must be provided, and when a report is due. These requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States." Reporting Rule, 87 Fed. Reg. at 59498.

40. The Reporting Rule mostly tracked the CTA's statutory language, and set out comprehensive requirements at 31 C.F.R. Part 1010.

41. The Reporting Rule also provided that any "reporting company created on or after January 1, 2024 shall file a report within 30 calendar days of the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice . . . that the [] reporting company has been created." 31 C.F.R. §§ 1010.380(a)(1)(i), (ii).

42. "Any domestic reporting company created before January 1, 2024 and any entity that became a foreign reporting company before January 1, 2024 shall file a report not later than January 1, 2025." *Id.* at § (a)(1)(iii).

43. Corrected or updated information must be filed "within 30 calendar days" of changes of reportable information. *Id.* at §§ (a)(2), (3).

44. The Reporting Rule further defined a beneficial owner's "substantial control" in non-exhaustive terms, including where an individual: "(A) Serves as a senior officer of the reporting company; (B) Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); (C) Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding: (1) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company; (2) The reorganization, dissolution, or merger of the reporting company; (3) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company; (4) The selection or termination of business lines or ventures, or geographic focus, of the reporting company; (5) Compensation schemes and incentive programs for senior officers; (6) The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; (7) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or (D) Has any other form of substantial control over the reporting company." 31 C.F.R. § 1010.380(d)(1)(i).

45. The Reporting Rule adopts a similarly expansive definition of "direct or indirect exercise of substantial control," providing that an "individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through: (A) Board representation; (B) Ownership or control of a majority of the voting power or voting rights of the reporting company; (C) Rights associated with any financing arrangement or

interest in a company; (D) Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; (E) Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or (F) any other contract, arrangement, understanding, relationship, or otherwise." *Id.* at § (d)(1)(ii).

46. The Reporting Rule also declined to create additional categories of exemptions; instead, it merely set out the 23 categories found in the statute. *See id.* at § (c)(2).

47. With respect to exemptions for tax-exempt entities, the rule adopts the statutory exemption verbatim. *See id.* at § (c)(2)(xix). FinCEN also pointedly rejected the argument that the exemption extend to "entities that had applied to the IRS for tax-exempt status but were still awaiting a determination" or other "nonprofits . . . that did not qualify for tax-exempt status under section 501(c) of the Internal Revenue Code." Reporting Rule, 87 Fed. Reg. at 59541. Instead, FinCEN relied on "concerns raised about potential exploitation of this exemption as well as the following exemption for entities assisting tax-exempt entities." *Id*. at 59541–42.

II. THE EFFECT ON PLAINTIFFS

48. As FinCEN recognized, the Act and its Reporting Rule "will have a significant economic impact on a substantial number of small entities." *Id.* at 59549.

49. "FinCEN estimates that there will be approximately 32.6 million existing reporting companies and 5 million new reporting companies formed each year." *Id.* at 59584.

50. "Assuming that all reporting companies are small businesses, the burden hours for filing [beneficial ownership information] BOI reports would be 126.3 million in the first year of the reporting requirement (as existing small businesses come into compliance with the rule) and 35

million in the years after. FinCEN estimates that the total cost of filing BOI reports is approximately $22.7 billion in the first year and $5.6 billion in the years after." *Id.* at 59585–86.

51. Plaintiffs are just some of those affected entities.

A. Texas Top Cop Shop, Inc.

52. Plaintiff Texas Top Cop Shop, Inc., is a corporation organized under the laws of Texas and registered with the Texas Secretary of State since 2017.

53. Texas Top Cop Shop is a family-run business that operates a single retail storefront in Conroe, Texas, which sells uniforms and equipment for first responders, such as police officers and emergency services personnel.

54. Texas Top Cop Shop sells its merchandise locally and does not sell any items out of state or through the internet.

55. Texas Top Cop Shop has four employees, including its owners.

56. Texas Top Cop Shop is a licensed dealer of firearms. To obtain such a license, its owners were thoroughly investigated and determined to be law-abiding U.S. citizens.

57. Texas Top Cop Shop has designated a registered agent and office location with the State of Texas, but has not disclosed the identities of each of its officers, shareholders, and beneficial owners.

58. Under Texas law, "[a] corporation is presumed to be a separate entity from its officers and shareholders. As a result, the corporate form normally insulates shareholders, officers, and directors from liability for corporate obligations." *Durham v. Accardi*, 587 S.W.3d 179, 184 (Tex. App.—Houston [14th Dist.] 2019) (citations omitted).

59. While a corporation must register with the Texas Secretary of State, it need not disclose the identities of all of its beneficial owners. *See* Texas Business Organizations Code § 20.001 (filing requirements).

60. As a pre-existing corporation registered with the Texas Secretary of State, Texas Top Cop Shop would be required to comply with the CTA and must file beneficial ownership reports with FinCEN before January 1, 2025.

61. Texas Top Cop Shop would be forced to incur compliance costs should it be forced to file the required reports, including the cost of legal services related to reviewing relevant records and filings.

62. Texas Top Cop Shop has not filed any beneficial ownership reports with FinCEN, and does not intend to disclose the identities of its beneficial owners (as defined by the CTA) absent a judicial declaration that it is required to comply with the CTA and the Reporting Rule, because Texas Top Cop Shop objects to the Act's intrusion into state sovereignty, restriction on First Amendment rights, and invasion of private papers and effects protected by the Fourth Amendment.

63. Texas Top Cop Shop advocates for the repeal of the CTA, but does so as a corporate entity, in part, to protect the associational privacy interests of its beneficial owners.

B. Data Comm for Business, Inc.

64. Plaintiff Data Comm for Business, Inc., is a Delaware corporation with operations in Illinois and Texas. Data Comm is registered to do business as a foreign corporation with the Illinois Secretary of State.

65. Data Comm is a small business that provides technical support, information technology, and communications products and services to other small businesses and individuals, as well as utility companies and federal agencies.

66. Data Comm conducts many of its operations in Illinois, but several of its officers, directors, and owners reside in Texas. Its principal place of business is in Plano, Texas.

67. Data Comm has 10 employees.

68. As a Delaware corporation, Data Comm is a distinct legal entity from its officers, directors, and owners. *See Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973) (discussing corporate veil).

69. Data Comm is not required to disclose the identities of its beneficial owners as a condition of registering to do business in Illinois. *See* 805 ILCS 5/13.05 (filing requirements for foreign corporations).

70. As a pre-existing corporation registered with the Illinois Secretary of State, Data Comm would be required to comply with the CTA, and must file beneficial ownership reports with FinCEN before January 1, 2025.

71. Data Comm would be forced to incur compliance costs should it be forced to file the required reports, including the cost of legal services related to reviewing relevant records and filings.

72. Data Comm has not filed any beneficial ownership reports with FinCEN, and does not intend to disclose the identities of its beneficial owners (as defined by the CTA) absent a judicial declaration that it is required to comply with the CTA and the Reporting Rule, because Data Comm objects to the Act's intrusion into state sovereignty, restriction on First Amendment rights, and invasion of private papers and effects protected by the Fourth Amendment.

73. Data Comm advocates for the repeal of the CTA, but does so as a corporate entity, in part, to protect the associational privacy interests of its beneficial owners.

C. Russell Straayer

74. Plaintiff Russell Straayer is an individual residing in Collin County, Texas.

75. Straayer is a "beneficial owner" of multiple "reporting companies" as those terms are defined by the CTA.

76. For example, Straayer is a beneficial owner and officer of Data Comm, where he serves as Chief Executive Officer.

77. Straayer is not the only beneficial owner of Data Comm, however.

78. Straayer is also a beneficial owner of other reporting companies that are not a party to this litigation.

79. Straayer has been a vocal opponent of the CTA, and has publicly stated his individual opposition to the Act.

80. One of the reporting companies for which Straayer is a beneficial owner, does not take a public stance on the validity or wisdom of the CTA, and does not wish to be associated with Straayer's advocacy.

81. Straayer has not filed any beneficial ownership reports with FinCEN, and does not intend to disclose all of his beneficial ownership interests in various entities (as defined by the CTA) absent a judicial declaration that he is required to comply with the CTA and the Reporting Rule, because he objects to the Act's intrusion into state sovereignty, restriction on First Amendment rights, and invasion of private papers and effects protected by the Fourth Amendment.

D. Mustardseed Livestock LLC

82. Plaintiff Mustardseed Livestock LLC is a limited liability company organized under the laws of Wyoming and registered with the Wyoming Secretary of State since 2020.

83. Mustardseed operates a small dairy farm in Lingle, Wyoming, and does business only in the State of Wyoming.

84. Mustardseed operates primarily as a small family farm and does not engage in interstate commercial activities.

85. Mustardseed consumes most of its production on its own property, but it occasionally sells surplus raw milk directly to customers in Wyoming.

86. In 2023, Mustardseed's gross income from milk sales did not exceed $30,000.

87. Mustardseed's gross income for all sources in 2024 is not expected to exceed $50,000.

88. Mustardseed has designated a registered agent and registered office, but has not disclosed to the State of Wyoming the identities of each of its members.

89. A Wyoming LLC "is an entity distinct from its members," and "may have any lawful purpose regardless of whether for profit." Wyo. Stat. §§ 17-29-104(a),(b).

90. Wyoming law "governs . . . [t]he internal affairs of a limited liability company[.]" Wyo. Stat. § 17-29-106.

91. Wyoming state law permits anonymous ownership in LLCs, and requires only that an LLC disclose a registered agent, who may or may not have an ownership interest in the company, and a registered office within the state where it will accept service of process. *See* Wyo. Stat. §§ 17-28-106 (registration requirements generally), 17-29-113(a) (rules for LLCs).

92. As a pre-existing LLC registered with the Wyoming Secretary of State, Mustardseed would be required to comply with the CTA, and must file beneficial ownership reports with FinCEN before January 1, 2025.

93. Mustardseed would be forced to incur compliance costs should it be forced to file the required reports, including the cost of legal services related to reviewing relevant records and filings.

94. Mustardseed has not filed any beneficial ownership reports with FinCEN, and does not intend to disclose the identities of its beneficial owners (as defined by the CTA) absent a judicial declaration that it is required to comply with the CTA and the Reporting Rule, because Mustardseed objects to the Act's intrusion into state sovereignty, restriction on First Amendment rights, and invasion of private papers and effects protected by the Fourth Amendment.

95. Mustardseed advocates for the repeal of the CTA, but does so as a corporate entity, in part, to protect the associational privacy interests of its beneficial owners.

E. Libertarian Party of Mississippi

96. MSLP is a political organization, whose members seek to advance the platform of the National Libertarian Party within the State of Mississippi, through advocacy and elections for state and local office.

97. MSLP is organized under the laws of the State of Mississippi, and is currently registered with the Mississippi Secretary of State.

98. MSLP is committed to individual liberty and personal responsibility, a free-market economy of abundance and prosperity, and a foreign policy of non-intervention, peace, and free trade. MSLP further seeks a world of liberty; a world in which all individuals control their own lives and are never forced to compromise their values or sacrifice their property.

99. MSLP espouses and promotes a robust separation of the state and federal government, and believes that individual liberty can best be protected by a strictly-limited federal governmentthat does not interfere with or restrict the rights of individuals.

100. MSLP espouses and advocates for the adoption of the National Libertarian Party's platform within Mississippi state and local government.

101. MSLP specifically advocates for the promotion and protection of individual privacy and government transparency. MSLP is committed to ending the government's practice of spying on everyone. MSLP supports the rights recognized by the Fourth Amendment to be secure in our persons, homes, property, and communications. MSLP believes that protection from unreasonable searches and seizures should include records held by third parties, such as email, medical, and library records.

102. MSLP also advocates and supports the right to liberty of speech and action—accordingly it opposes all attempts by government to abridge the freedom of speech and press, as well as government censorship in any form.

103. MSLP has publicly advocated for the repeal of the CTA because its obligations impermissibly intrude on state sovereignty, it subjects law-abiding people to unconstitutional restrictions on free speech and association, and unlawfully intrudes into citizens' private papers and effects.

104. MSLP is not currently regarded as a political organization pursuant to Section 527 of the Internal Revenue Code, and thus is required to comply with the CTA.

105. MSLP has no physical office, instead conducting its activities through its members.

106. MSLP is a political organization that receives donations from individuals and entities, which it uses to promote political candidates for office in Mississippi and policies affecting the residents of the state.

107. MSLP has less than $20,000 in assets, which it derived from donations, and which it uses solely for political expenditures for local candidates for office in the State of Mississippi, or state and local public policy issues affecting the residents of Mississippi.

108. MSLP does not engage in economic activities outside of the State of Mississippi, and does not make political expenditures for candidates or issues outside of the state.

109. MSLP has designated a registered agent and registered address with the State of Mississippi, but has not disclosed the identities of each of its members, officers, delegates, volunteers, major donors, or others who have beneficial ownership interests or substantial control over MSLP.

110. MSLP's bylaws control its corporate operations, and provide for governance by officers, each of whom must be a member of the state party and chosen by party members as officers, as well as appointment of governing committees, and voting delegates.

111. MSLP's bylaws require that a majority of its executive committee, which is comprised of state party officials, must authorize the expenditure of any party money.

112. MSLP's bylaws also provide for amendment of the bylaws at the suggestion of any member of the state party, and will be enacted by a 2/3 majority of voting delegates, which are registered members of the state party.

113. Mississippi law regards MSLP as a distinct legal entity, separate from its members, and does not require disclosure of its members, officers, beneficial owners or control persons. *See* Miss. Code §§ 79-11-105 (requirements for filing of documents); 79-11-181 (liability of members).

114. Mississippi also specifically forbids use and disclosure of "a membership list or any part thereof" of a nonprofit corporation, without the consent of the board. *See* Miss. Code § 79-11-291.

115. As a pre-existing nonprofit corporation registered with the Mississippi Secretary of State, MSLP would be required to comply with the CTA, and must file beneficial ownership reports with FinCEN before January 1, 2025.

116. MSLP would be forced to incur compliance costs should it be forced to file the required reports, including the cost of legal services related to reviewing relevant records and filings.

117. MSLP has not filed any beneficial ownership reports with FinCEN, and does not intend to disclose the identities of its beneficial owners (as defined by the CTA) absent a judicial declaration that it is required to comply with the CTA and the Reporting Rule, because MSLP objects to the Act's intrusion into state sovereignty, restriction on First Amendment rights, and invasion of private papers and effects protected by the Fourth Amendment.

118. MSLP advocates for the repeal of the CTA, but does so as a corporate entity, in part, to protect the associational privacy interests of its beneficial owners.

F. NFIB and Its Members

119. The National Federation of Independent Business, Inc., is a tax-exempt organization under section 501(c) of the Internal Revenue Code and is exempt from the CTA and the Reporting Rule.

120. While NFIB is exempt from the CTA, significant numbers of its approximately 300,000 members would be required to comply with the Act. These members include:

a. Plaintiffs Texas Top Cop Shop and Data Comm; and

b. Grazing Systems Supply, Inc., which is an Indiana corporation, registered to do business with the Indiana Secretary of State, with its principal place of business in Batesville, Indiana. Grazing Systems Supply, Inc. is a family-owned and family-run business. Started in 1989 as a part time business, it has successfully grown to a full-time agricultural supply business specializing in seed and fencing sales. Grazing Systems Supply, Inc. has five total employees. Because Grazing Systems Supply, Inc. has fewer than 20 full-time employees, it must comply with the reporting requirements of the CTA.

121. NFIB's members would be forced to incur compliance costs should they file the required reports, including the cost of legal services related to reviewing relevant records and filings.

122. NFIB and its members oppose the CTA, and NFIB has advocated publicly for its repeal on behalf of its members that must comply with the Act and the Reporting Rule.

123. As an example of NFIB's advocacy, on April 30, 2024, NFIB sent a letter on behalf of its members to the U.S. House Committee on Small Business, urging Congress to repeal the CTA. (Exhibit A).

124. Individual NFIB members, including Plaintiff Data Comm and Grazing Systems Supply, Inc., likewise advocated on their own behalf for the CTA's repeal in an NFIB-led letter to the U.S. House Committee on Small Business. (Exhibit A at 5-6). Data Comm and Grazing Systems Supply, Inc., advocated for the CTA's repeal through their corporate entities in part to protect the associational privacy interests of their beneficial owners.

COUNT I—VIOLATION OF U.S. CONSTITUTION
The CTA Exceeds Congress's Authority Over the States
(U.S. Const. Art. I, amends. IX, X)

125. Plaintiffs repeat and reallege each and every allegation above as if fully set forth herein.

126. The federal government is one of limited, enumerated, powers.

127. The Tenth Amendment confirms that the federal Constitution reserves all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States," "to the States respectively, or to the people."

128. An individual plaintiff may challenge federal action as exceeding Congress's limited, and enumerated, powers. *See Bond v. United States*, 564 U.S. 211, 222 (2011) ("An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete,

particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.").

129. "Throughout the history of American law, the definition and supervision of business entities has been the task of the states. At the Constitutional Convention, during the Progressive Era, and at the height of the New Deal, the federal government debated whether to enter the corporate area itself and every time declined." Boyer, *supra* at 1037–38.

130. For the first time in our nation's history, however, Congress has attempted to "set a clear, Federal standard for incorporation practices" using the CTA. 31 U.S.C. § 5336 note (5)(A).

131. The CTA thus displaces state control over corporate formation and internal affairs, regardless of whether a local entity engages in any interstate or national conduct.

132. "The Corporate Transparency Act is unconstitutional because it cannot be justified as an exercise of Congress' enumerated powers." *Nat'l Small Bus. United v. Yellen*, --- F.Supp.3d ---, No. 5:22-cv-1448-LCB, 2024 WL 899372, at *21 (N.D. Ala. Mar. 1, 2024), *appeal filed* at No. 24-10736 (11th Cir.).

133. This is because the Act, on its face, requires "reporting companies" to create records and file them with the federal government, regardless of whether those companies engage in *any activity* that is within the scope of Congress's enumerated powers, such as interstate or foreign commerce or incurring federal tax liability. Instead, the Act improperly compels action merely because an entity has been formed as a matter of state law. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) (Congress may "anticipate the effects on commerce of an economic activity," but it has never been "permitted . . . to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.").

134. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment and permanent injunction declaring the Act to be unconstitutional on its face and/or as-applied to Plaintiffs, prohibiting Defendants from enforcing the Act, and awarding attorneys' fees, expenses, costs and disbursements, and any other relief that may be appropriate.

COUNT II—VIOLATION OF U.S. CONSTITUTION
The CTA Improperly Compels Speech and Burdens Association
(U.S. Const. amend. I)

135. Plaintiffs repeat and reallege each and every allegation above as if fully set forth herein.

136. The First Amendment prohibits Congress from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

137. The Supreme Court has "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)). "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (quoting *Bellotti*, 435 U.S. at 783).

138. Implicit in the First Amendment's protections is the right of anonymous association. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 605–08 (2021) (*AFP*) (plurality op.). Indeed, "[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." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

139. "Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." *AFP*, 594 U.S. at 608. "Under that standard, there must be a substantial

relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. at 607 (cleaned up). Further, "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Id*. at 611.

140. The CTA compels disclosure of "beneficial ownership" information to FinCEN, and potentially to state and local law enforcement and federal regulators—but those "beneficial owners" include individuals who "indirectly" "exercise[] substantial control over the entity," even when that control might not be formalized. 31 U.S.C. § 5336(a)(3)(A). Even the Act recognizes that beneficial ownership is presumptively "confidential" Information. *Id.* at § 5336(c)(2)(A).

141. This means that key employees, directors, indirect beneficiaries, and significant donors must disclose their identities. *Id*.; *accord* 31 C.F.R. § 1010.380(d)(1)(ii).

142. Furthermore, the Congressional record affirms that the Act was intended to allow the government to determine "the identities behind big political spending." Congressional Record, Vol. 163, No. 101 at S3469.

143. Plaintiffs have engaged in expressive association through their corporate entities, such as advocating for the repeal of the Act.

144. Plaintiffs have a protected interest in maintaining the anonymity of their beneficial owners (as defined by the Act), because they have chosen to engage in expressive advocacy through their corporate forms.

145. The Act's stated goals are to "(A) set a clear, Federal standard for incorporation practices; (B) protect vital Unites (sic) States national security interests; (C) protect interstate and foreign commerce; (D) better enable critical national security, intelligence, and law enforcement efforts to

counter money laundering, the financing of terrorism, and other illicit activity; and (E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."

146. The Act is not narrowly tailored to any of its goals, however, as applying the statute to every state corporation or limited liability company, such as Plaintiffs, no matter an entity's size or purpose, and even when they lack any assets at all, does not advance any of these aims.

147. Likewise, the fact that the statute exempts large corporations and 22 other types of entities, almost all of which are primarily or even exclusively involved in financial transactions, shows that the statute is not narrowly tailored to investigating and preventing financial crimes. *See* 31 U.S.C. § 5336(a)(11)(B). Indeed, FinCEN rejected calls to narrow the statutes reach, because of its dubious insistence that there remains the remote possibility that any charity may still be involved in illicit transactions. *See* Reporting Rule, 87 Fed. Reg. at 59541–42.

148. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment and permanent injunction declaring the Act to be unconstitutional on its face and/or as-applied to Plaintiffs, prohibiting Defendants from enforcing the Act, and awarding attorneys' fees, expenses, costs and disbursements, and any other relief that may be appropriate.

COUNT III—VIOLATION OF U.S. CONSTITUTION
The CTA Unconstitutionally Compels Disclosure of Private Information
(U.S. Const. amend. IV)

149. Plaintiffs repeat and reallege each and every allegation above as if fully set forth herein.

150. The Fourth Amendment protects the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures.

151. "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel*, 201 U.S. 43, 76 (1906). The "compulsory production of private papers," is both a search and seizure. *Id*. The "papers" protected

by the Fourth Amendment include business records. *See id.* 76–77 (subpoena for "all understandings, contracts or correspondence" between corporation and others and "reports made and accounts rendered by such companies from the date of the organization" was unreasonable under the Fourth Amendment).

152. The CTA compels disclosure of "sensitive" and "confidential" information to the government for the express purpose of criminal investigation.

153. Plaintiffs have protected interests in their beneficial ownership information, including interests in the anonymity of their members for expressive purposes, and have protected the information subject to CTA disclosures.

154. Under the Act, however, a reporting company cannot refuse to disclose private information to the government and can face criminal penalties for noncompliance.

155. The Act requires disclosure without any particularized suspicion of wrongdoing and without any precompliance review process where a reporting company can challenge the Act's requirements. The Act also authorizes disclosure of private, personal information to foreign governments, federal regulators, and regulatory agencies for the purposes of law enforcement, without any court authorization or specific requirements regarding those agencies' need for the information.

156. The CTA's mandatory reporting requirements violate the Fourth Amendment's protections against unreasonable searches and seizures. *See City of L.A. v. Patel*, 576 U.S. 409, 419–20 (2015).

157. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment and permanent injunction declaring the Act to be unconstitutional on its face and/or as-applied to Plaintiffs, prohibiting Defendants from enforcing the Act, and awarding attorneys' fees, expenses, costs and disbursements, and any other relief that may be appropriate.

COUNT IV—VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
The Reporting Rule Is Not In Accordance With Law And Is Contrary to Constitutional Right
(5 U.S.C. § 706(2))

158. Plaintiffs repeat and reallege each and every allegation above as if fully set forth herein.

159. The Administrative Procedure Act (APA) directs a court to "hold unlawful and set aside" any agency rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2)(A), (B), (C).

160. The Reporting Rule is "final agency action," which is reviewable under the APA. *See* 5 U.S.C. § 704.

161. The Reporting Rule, issued after notice and comment rulemaking, marks the consummation of Treasury's decision-making process concerning the implementation of the CTA.

162. The Reporting Rule also determines rights and legal obligations, as it purports to establish filing deadlines, including the time to file initial reports and corrected reports, and sets out criteria for determining what information must be reported.

163. The Act's reporting requirements exceed Congress's power, and violate First and Fourth Amendment protections. Thus the Reporting Rule is constitutionally invalid.

164. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment and permanent injunction barring Defendants from enforcing the Reporting Rule, vacatur of the rule, attorneys' fees, expenses, costs and disbursements, and any other relief that may be appropriate.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Plaintiffs demand judgment against Defendants as follows:

(i) The issuance of an injunction prohibiting Defendants from enforcing the Corporate Transparency Act and the Reporting Rule pursuant to 5 U.S.C. § 705 and 28 U.S.C. § 2201;

(ii) A declaratory judgment, pursuant to 5 U.S.C. § 706(2) and 28 U.S.C. § 2202, invalidating the Corporate Transparency Act and holding unlawful and setting aside the Reporting Rule;

(iii) An award of attorneys' fees and costs to Plaintiffs; and

(iv) Any other relief as the Court deems just, equitable and proper.

May 28, 2024

Respectfully submitted,

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*Motion for Admission *Pro Hac Vice* Pending

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

TEXAS TOP COP SHOP, INC., ET AL., Plaintiffs, v. MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., Defendants.	CIVIL ACTION NO.: 4:24-CV-00478 **MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65(a), Plaintiffs move for a preliminary injunction, prohibiting Defendants[1] from enforcing the Corporate Transparency Act, 31 U.S.C. § 5336, and its implementing regulations, 31 CFR § 1010.380, pending further proceedings. The Act and regulations are likely unconstitutional for three reasons. First, the federal government lacks the power to regulate entities organized under state law merely because they have registered with their home state. Congress has no enumerated power to regulate state corporate organization and other purely local activities that have always been regulated exclusively by the states. Second, the Act restricts associational rights protected by the First Amendment because it forces entities to disclose the identities of individuals associated with the entity's expressive activities. Finally, the Act violates the Fourth Amendment because it mandates invasive disclosures on pain of criminal punishment without any particularized suspicion or precompliance review from a neutral party. Despite these constitutional defects, the Act and associated regulations require Plaintiffs to file reports with the U.S. Department of Treasury prior to January 1, 2025. Unless Defendants are enjoined, Plaintiffs must incur substantial compliance costs prior to that filing deadline in service of an unconstitutional statute. This Court should therefore enter an injunction as soon as possible.

[1] Defendants are collectively the federal officers and agencies responsible for enforcing the Act and its regulations.

FACTS AND LEGAL BACKGROUND

On January 1, 2021, Congress enacted the Corporate Transparency Act (CTA), 31 U.S.C. § 5336, which was a federal attempt to regulate in an area of traditional state control. The CTA mandated that any "reporting company," file with the Financial Crimes Enforcement Network (FinCEN) reports of all its "beneficial ownership information." 31 U.S.C. § 5336(b)(1)(A).

A "reporting company" is "a corporation, limited liability company, or other similar entity that is" "created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe;" or "formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe." *Id.* at § 5336(a)(11). The CTA exempts large companies (those employing more than 20 people and generating more than $5,000,000 per year in gross revenue), all publicly-traded companies, and essentially all businesses involved in finance. *See id.* at § (a)(11)(B). A non-profit is exempt only if it has an active exemption under section 501(c) of the Internal Revenue Code or if it is a "political organization (as defined in section 527(e)(1) of such Code) that is exempt from tax under section 527(a) of such Code." *Id.* at § (a)(11)(B)(xix).

Both pre-existing and newly formed entities are required to identify each "beneficial owner" of the entity, by providing the "full legal name," "date of birth," and current address of every natural person who "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity[.]" *Id.* at §§ (a)(3), (b)(1). Each beneficial owner must also provide a non-expired photo identification to FinCEN to prove their identity. *Id.* at § (a)(1). Entities must update this information regularly if it changes. *Id.* at § (b)(1)(D). Failures to file reports or update reports can be criminally enforced. *Id.* at § (h)(3).

FinCEN must disclose this information when requested "from a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity" or "from a State, local, or Tribal law enforcement agency," if authorized by a court. *Id.* at § (c)(2)(B). The CTA also delegates to the Secretary of Treasury the discretion to authorize additional disclosures "to financial institutions and regulatory agencies." *Id.* at § (c)(2)(C).

There is significant evidence that the CTA was intended, at least in part, to compel disclosures of the identities of political donors. The original version of the Act was introduced in 2017, and its co-sponsor Senator Sheldon Whitehouse was explicit about his goals. In a speech Senator Whitehouse gave on the Senate floor in 2017, he explained that a beneficial ownership reporting regime would provide a means of stopping what he saw as the "unprecedented dark money [that] flow into our elections from anonymous dark money organizations, groups that we allow to hide the identities of their big donors," such as "American dark money emperors, like the Koch brothers." Congressional Record, Vol. 163, No. 101 at S3469 (Senate, June 14, 2017). By tracking "the actual owners of companies" law enforcement could stop entities from "funneling money into our elections through faceless shell companies," and allow the government to determine "the identities behind big political spending." *Id.* Since the Act was passed, it has even been hailed by commentators because it "can shine light on dark money in U.S. elections." Devon Himelman, *How the Corporate Transparency Act Can Shine Light on Dark Money U.S. Elections*, Global Anticorruption Blog (April 15, 2022) *available at* https://globalanticorruptionblog.com/2022/04/15/how-the-corporate-transparency-act-can-shine-light-on-dark-money-in-u-s-elections/.

FinCEN has issued regulations implementing the CTA. *See* 31 CFR § 1010.380. Every non-exempt corporate entity in the United States must register its beneficial ownership information

with FinCEN prior to January 1, 2025. *See id.* at § (a)(1). Once filed, reports must be updated within 30 days for any change in reported information. *Id.* at § (a)(2). FinCEN rejected the argument that the exemption for tax-exempt entities should extend to "entities that had applied to the IRS for tax-exempt status but were still awaiting a determination" or other "nonprofits ... that did not qualify for tax-exempt status under section 501(c)." Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59542 (Sept. 30, 2022) (Reporting Rule). Instead, FinCEN pointed to "concerns raised about potential exploitation of this exemption as well as the following exemption for entities assisting tax-exempt entities." *Id*. at 59542-43.

The Effect on Plaintiffs

As FinCEN recognized, the CTA and its Reporting Rule "will have a significant economic impact on a substantial number of small entities." 87 Fed. Reg. at 59550. "FinCEN estimates that there will be approximately 32.6 million existing reporting companies and 5 million new reporting companies formed each year." *Id.* at 59585. "Assuming that all reporting companies are small businesses, the burden hours for filing BOI [beneficial ownership information] reports would be 126.3 million in the first year of the reporting requirement (as existing small businesses come into compliance with the rule) and 35 million in the years after. FinCEN estimates that the total cost of filing BOI reports is approximately $22.7 billion in the first year and $5.6 billion in the years after." *Id.* at 59585-86. Plaintiffs are just some of those affected entities.

Texas Top Cop Shop, Inc., is an existing Texas corporation, which operates as a family-run retail storefront in Conroe, Texas, selling uniforms and equipment for first responders, such as police officers and emergency services personnel. Ex. A at ¶¶ 3-4 (Schneider Decl.). It sells its merchandise locally and does not sell any items out of state or through the internet. *Id.* at ¶ 5. It has four employees, including its owners. *Id.* at ¶ 6. It is also a member of the National Federation

of Independent Business (NFIB). *Id.* at ¶ 3. Texas Top Cop Shop is a reporting company under the CTA, and must file its initial report with FinCEN before 2025. *Id.* at ¶ 9.

Texas Top Cop Shop is also licensed dealer of firearms. *Id.* at ¶ 7. To obtain such a license, its owners were thoroughly investigated and determined to be law-abiding U.S. citizens. *Id.*

Data Comm for Business, Inc., is an existing Delaware Corporation, registered in Illinois, with its principle place of business in Plano, Texas. Ex. B at ¶¶ 3, 5 (Data Comm Decl.). Data Comm is a small business that provides technical support, information technology, and communications products and services to other small businesses and individuals. *Id.* at ¶ 4. Data Comm has 10 employees, and is a member of NFIB. *Id.* at ¶¶ 3, 6. Data Comm is a reporting company under the CTA and must file initial BOI reports before 2025. *Id.* at ¶ 8.

Russell Straayer is an individual who resides in Collin County, Texas, and is a "beneficial owner" of multiple "reporting companies" as those terms are defined by the CTA. Ex. C at ¶¶ 2-3 (Straayer Decl.). Straayer is both a part owner and serves as the Chief Executive Officer of Data Comm, although he is not the only beneficial owner. *Id.* at ¶¶ 4-5. He is also a beneficial owner of other reporting companies that are not a party to this litigation. *Id.* at ¶ 6.

Straayer has been a vocal opponent of the CTA, and has publicly stated his individual opposition to the Act. *Id.* at ¶ 7. One of the reporting companies for which Straayer is a beneficial owner does not take a public stance on the validity or wisdom of the CTA, and does not wish to be associated with Straayer's advocacy. *Id.* at ¶ 8.

Mustardseed Livestock, LLC, is a limited liability company registered in Wyoming, which operates as a small dairy farm in Lingle, Wyoming. Mustardseed is a family farm that sells raw milk directly to consumers in Wyoming (and no other state). Ex. D at ¶¶ 3-6 (Goulart Decl.). It does not have a permanent storefront. *Id.* at ¶ 6. Its typical gross revenue for milk sales is less than

$50,000 annually. *Id.* at ¶¶ 7-8. Mustardseed is a reporting company under the CTA, and must file its initial report with FinCEN before 2025. *Id.* at ¶ 11.

The Libertarian Party of Mississippi is a political organization that is registered as an entity with the State of Mississippi. Ex. E at ¶¶ 3-4 (Lewis Decl.). MSLP is not currently regarded as a political organization pursuant to Section 527 of the Internal Revenue Code, and thus is required to comply with the CTA. *Id.* at ¶¶ 11, 22.

MSLP is a political organization that receives donations from individuals and entities, which it uses to promote political candidates for state office and policies affecting Mississippi residents. *Id.* at ¶ 13. MSLP has no physical office or employees, instead conducting its activities through its volunteer members. *Id.* at ¶ 12. It has less than $20,000 in assets, which it derived from donations, and which it uses solely for political expenditures for local candidates for office in the State of Mississippi, or state and local public policy issues affecting Mississippi residents. *Id.* at ¶ 14. MSLP does not engage in economic activities outside of Mississippi, and does not make political expenditures for candidates or issues outside of the state. *Id.* at ¶ 15.

MSLP is an existing entity that must comply with the CTA before 2025. *Id.* at ¶ 22. Under its bylaws, no individual owns the entity or its assets, but it is controlled by its members, officers, delegates, volunteers, and major donors. *Id.* at ¶¶ 17-19. Its bylaws authorize MSLP to make expenditures only with the authorization of its executive committee, or at the direction of 2/3 of its voting delegates, which are registered members of the state party. *Id.*

The National Federation of Independent Business, Inc. is a membership organization that advocates on behalf of nearly 300,000 member businesses. Ex. F at ¶¶ 4, 6 (Milito Decl.). While NFIB is exempt from the CTA, large numbers of its members must comply, including Texas Top Cop Shop and Data Comm. *Id.* at ¶ 4.

NFIB has advocated publicly for the CTA's repeal on behalf of its members. *Id.* at ¶ 6. For example, on April 30, 2024, NFIB sent a letter on behalf of its members to the U.S. House Committee on Small Business, urging Congress to repeal the CTA. *Id.* at ¶ 7. Several members, including Data Comm, and non-party member Grazing Systems Supply, Inc., also sent letters to the Committee on their own behalf, also advocating for the CTA's repeal. *Id.* at ¶ 8.

All of the plaintiffs oppose the CTA, and wish to protect the relevant information from disclosure. Each objects to the Act's intrusion into state sovereignty, restriction on First Amendment rights, and intrusion into matters protected by the Fourth Amendment. Each corporate plaintiff has also advocated for the repeal of the CTA as an entity, in part, to protect the associational privacy interests of its beneficial owners. None have filed BOI reports with FinCEN.

DISCUSSION

For a preliminary injunction, "a plaintiff must show: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable harm absent the injunction, (3) that the harm she will suffer without the injunction outweighs the cost to comply with the injunction, and (4) that the injunction is in the public interest." *Harrison v. Young*, 48 F.4th 331, 339 (5th Cir. 2022)

A. PLAINTIFFS HAVE STANDING TO CHALLENGE THE CTA

"At the preliminary injunction stage, the movant must clearly show only that each element of standing is likely to obtain in the case at hand." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329-30 (5th Cir. 2020). An association has standing when: "(1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Ctr. for Bio. Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019) (citation omitted). A member must have "(1) suffered an injury in

fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 585 U.S. 48, 65 (2018).

"An increased regulatory burden typically satisfies the injury in fact requirement." *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (citation omitted). If a "new Rule requires at least some degree of preparatory analysis, staff training, and reviews of existing compliance protocols," this is sufficient to permit a pre-enforcement challenge. *Career Colls. & Sch. of Tex. v. United States Dep't of Educ.*, 98 F.4th 220, 234 (5th Cir. 2024) (citation omitted). Moreover, when challenging a law or regulation imposing such burdens, an injunction blocking the law or regulation typically satisfies the traceability and redressability tests. *See id.*

Separately, a plaintiff has standing to raise a pre-enforcement challenge to a law or regulation if he (1) has an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) his intended future conduct is "arguably ... proscribed by a statute," and (3) "the threat of future enforcement of the [challenged] statute is substantial." *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-64 (2014) (citations omitted).

But the rules for standing are relaxed in the First Amendment context. A "First Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself. It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech." *Speech First, Inc.*, 979 F.3d at 331 (citation omitted). Moreover, "when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id*. at 335 (citation omitted).

Plaintiffs have standing, first, because the CTA and the Reporting Rule result in increased compliance obligations. Each individual plaintiff is required to comply with the CTA and the Reporting Rule, and thus they are all within the 32.6 million existing entities that FinCEN estimated will face "significant economic impact[s]" from the Act. Reporting Rule, 87 Fed. Reg. at 59550, 59585. In fact, FinCEN says "that the total cost of filing BOI reports is approximately $22.7 billion in the first year and $5.6 billion in the years after." *Id*. at 59585-86. Each has confirmed that they will incur such costs unless the Act is enjoined. *See* Ex. A at ¶ 10, Ex. B. at ¶ 9, Ex. C at ¶ 10, Ex. D at ¶ 12, Ex. E at ¶ 23, Ex. F at ¶ 5.

Even without considering the increased compliance issues, Plaintiffs have standing to raise constitutional rights that are threatened by future enforcement. As discussed below, the Act encroaches on constitutional interests, including infringing First Amendment interests in refusing to make these disclosures. The CTA's "mere existence risks chilling First Amendment rights" and thus enables a pre-enforcement challenge. *See N.C. Right to Life, Inc.*, 168 F.3d at 710.

NFIB also has associational standing to sue on behalf of its members. It has identified several of its members who must comply with the CTA and the Reporting Rule, including Plaintiffs Texas Top Cop Shop and Data Comm, and NFIB member Grazing Systems Supply, Inc. Ex. F. at ¶ 4. This challenge to the CTA is also plainly germane to NFIB's purposes, as it regularly advocates for small businesses. *Id.* at ¶ 6. The claim and the requested relief don't require participation of individual members, even though several are participating in this suit.

B. THE CTA IS LIKELY UNLAWFUL IN SEVERAL WAYS

1. THE CTA EXCEEDS CONGRESS' ENUMERATED POWERS

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533

(2012). The Tenth Amendment confirms that the federal Constitution reserves all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States," "to the States respectively, or to the people." An individual plaintiff may challenge federal action as exceeding Congress's limited, enumerated, powers. *See Bond v. United States*, 564 U.S. 211, 222 (2011). But, as one district court has already ruled, "the CTA exceeds the Constitution's limits on the legislative branch and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress' policy goals." *Nat'l Small Bus. United v. Yellen*, No. 5:22-cv-1448-LCB, 2024 U.S. Dist. LEXIS 36205, at *4 (N.D. Ala. Mar. 1, 2024), *appeal filed* at No. 24-10736 (11th Cir.).

In that other case, the Government unsuccessfully offered three sources of constitutional authority: (1) the foreign affairs power, (2) the commerce clause, and (3) the necessary and proper clause combined with the taxing power. *Id.* at *18-19. None passed muster. *Id.* at *59.

a. The States Have Always Had Exclusive Control Over Corporate Formation and Registration

"Throughout the history of American law, the definition and supervision of business entities has been the task of the states. At the Constitutional Convention, during the Progressive Era, and at the height of the New Deal, the federal government debated whether to enter the corporate area itself and every time declined." Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1037-1038 (1986).

Even as the Court recognized an increasing role for Congress to regulate interstate commerce, the Supreme Court emphasized that "state law governs in the corporate area. Federal law forms an overlay, significant but secondary, upon state law. It does not provide for business organization, nor does it define or create trusts, partnerships, or corporations. It deals only with the transfer of interests in those business entities." *Id.* at 1056. As the Supreme Court said, "No

principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987).

b. The CTA Is Not an Exercise in Foreign Affairs

The "foreign affairs powers" are not enumerated in the Constitution, but are inferred as a necessary aspect of a unified federal government. *See Hines v. Davidowitz*, 312 U.S. 52, 62 (1941). More precisely, this authority is comprised of "the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations[.]" *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). On the latter point, it is typically presumed that the "dynamic nature of relations with other countries requires the Executive Branch to ensure that [relevant] policies are consistent with this Nation's foreign policy with respect to these and other realities." *Id.* at 397.

Not everything implicates foreign affairs or threatens war with foreign nations merely because it has an international element. Thus, when confronted with a statutory reading of an international treaty that threatened to "dramatically intrude[] upon traditional state criminal jurisdiction," the Supreme Court unanimously adopted a narrow interpretation to avoid such constitutional doubt. *Bond v. United States*, 572 U.S. 844, 859-60 (2014). As Justice Scalia wrote in a concurring opinion, "to interpret the Treaty Power as extending to every conceivable domestic subject matter—even matters without any nexus to foreign relations—would destroy the basic constitutional distinction between domestic and foreign powers." *Id*. at 883.

The CTA is not an exercise of some ill-defined, yet plenary, foreign affairs power, as it applies *exclusively* to entities that register "with a secretary of state or a similar office under the law of a State or Indian Tribe." *See* 31 U.S.C. § 5336(a)(11). It is a purely domestic statute, affecting only entities that are registered to do business domestically, and only requires that these

entities file reports with the federal government. *See id*. It has no extraterritorial reach and does not purport to be premised on a treaty or implement an international agreement to which the United States is a party. *See id.* Its only incidental connection to international affairs is that certain entities "formed under the law of a foreign country" must comply if and only if they are "registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe." *Id.*[2] This case raises the Court's precise concern in *Bond* that the purported exercise of foreign affairs would improperly intrude into state police power. *See* 572 U.S. at 859-60; *accord Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010) (issues "within the realm of traditional state responsibilities" not barred by deference on issues of foreign affairs). The CTA cannot be justified as an exercise of the federal power to conduct foreign affairs.

c. The CTA Is Not a Valid Exercise of the Commerce Power

"Because the CTA does not regulate commerce on its face, contain a jurisdictional hook, or serve as an essential part of a comprehensive regulatory scheme, it falls outside Congress' power to regulate non-commercial, intrastate activity." *NSBU*, 2024 U.S. Dist. LEXIS 36205, at *55.

Article 1, Section 8, Clause 3 of the U.S. Constitution gives Congress the power "to regulate commerce ... among states." The Court has articulated "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e.,

[2] More obliquely, the Act provides the "sense of Congress," which pointed to a desire to "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards," but this is simply a goal of conforming to policies adopted by other countries, not an invocation of any specific relations with a foreign state, much less an obligation imposed by a formal treaty. *See* 31 U.S.C. § 5336 note § 5(E).

those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (cleaned up).

The Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536. After all, "The founding generation understood the term 'commerce' to mean only 'trade or exchange of goods.'" William J. Seidleck, *Originalism and the General Concurrence*, 3 U. PA. J. L. & PUB. AFFS. 263, 269 (2018).

With respect to the first two categories, the text of the CTA does not regulate the channels and instrumentalities of interstate commerce. The CTA applies to "reporting companies," defined (with a list of exceptions) as entities "created by the filing of a document" "with a secretary of state or a similar office under the law of a State or Indian Tribe." 31 U.S.C. § 5336(a)(11). The CTA then mandates that those entities report information about their beneficial owners and applicants to FinCEN. *Id*. § 5336(b)(1)-(2)(A). The word "commerce," or references to any channel or instrumentality thereof, are nowhere to be found in the CTA. *See* 31 U.S.C. § 5336.

Merely "filing [] a document" with a state registrar is not a sufficient use of the means or instrumentalities of *interstate* commerce to justify the Act. Indeed, the Government conceded as much in prior litigation. *See NSBU*, 2024 U.S. Dist. LEXIS 36205, at *39 ("The Government wisely ... concedes that '[i]t is the activities of these entities, not the mere fact that they submitted documents to a Secretary of State, that implicates the Commerce Clause and permits Congress to exercise its authority.'"). Similarly, it is insufficient that the CTA mandates filing with FinCEN, as Congress can't engineer the relevant interstate nexus by demanding conduct that would not otherwise occur. *See NFIB*, 567 U.S. at 549.

The CTA also cannot be justified by purported aggregate effects on interstate commerce. When a statute relies on this third category the question is whether the statute regulates "an

economic class of activities" or "non-economic activity." *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, 658 F.3d 500, 505 (5th Cir. 2011). When "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute" does not deprive Congress of the ability to regulate that activity. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). This is true only if the regulated activities "are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.*

If, however, the class of activities is *non*-economic, then aggregation is impermissible, and intrastate conduct is beyond the reach of Congress. *See Taylor v. United States*, 579 U.S. 301, 306 (2016) ("While this final category is broad, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). In *United States v. Morrison*, 529 U.S. 598, 613 (2000), the Court rejected aggregation because the statute at issue, which punished "[g]ender-motivated crimes of violence," did "not, in any sense of the phrase, [target] economic activity." The *Raich* decision upheld this "pattern of analysis," noting that the statute in *Morrison* was "unconstitutional because . . . it did not regulate economic activity." 545 U.S. at 25; *accord Lopez*, 514 U.S. at 567 (The "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

A class of *future* economic activity is also not subject to aggregation. "The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions." *NFIB*, 567 U.S. at 557. The Court has always required "preexisting economic activity." *Id.*; *see also BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (federal vaccine mandate "likely exceeds the federal government's

authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power"), *aff'd* 142 S.Ct. 661 (2022).

The CTA does not regulate an "economic class of activity." It regulates the act of registration under state law, irrespective of the presence or absence of any commercial activity. *See* 31 U.S.C. § 5336(a)(11). No goods are sold, no services are provided. The Act applies to non-profit entities, even if they have no assets whatsoever, and even if they don't engage in *any activity*, commercial or otherwise. As FinCEN noted, "nonprofits ... that did not qualify for tax-exempt status under section 501(c)" must still file reports, regardless of their activities. *See* 87 Fed. Reg. at 59542. The government has even admitted in other litigation that the mere act of registering with a state is not economic. *See NSBU*, 2024 U.S. Dist. LEXIS 36205, at *39.

Nor is the CTA a comprehensive regulatory scheme over commerce. "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. The regulatory scheme should, however, "directly regulate economic, commercial activity." *See id*. at 26.

The CTA is not part of a larger regulatory scheme, and Congress did not identify any such regulatory scheme in passing it. A vague goal of "protecting commerce" or "deterring money laundering" is not such a scheme. The CTA's organization also disproves Congress' pretense. Congress chose to require all entities to file reports once they registered with a state, regardless of their activities or non-economic purposes, and then created exemptions that broadly, and irrationally, excluded businesses that were the most likely culprits of international money laundering, such as money transmitters, public companies and large private businesses. *See* 31 U.S.C. § 5336(a)(11)(B). Many non-profits or entities with no assets or activities must still file

reports. This structure makes one thing perfectly clear—the CTA's vague goals would not be undermined if the Act couldn't reach entities engaged in *no* commercial activity and with *no* assets.

Reading *Raich* as a justification for the CTA would bless federal control of every person and entity in the country. Everyone registers with a state or local government at some time in their life—when they attend school, pay taxes, obtain identification, etc. If Congress can use that as a means to prop up a vast federal regulatory scheme, then what could possibly be beyond reach? *Morrison* spoke of "the but-for causal chain from" isolated activities "to every attenuated effect upon interstate commerce" as being impermissible. 529 U.S. at 615. The Court in *Lopez* also warned that courts may not "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. at 567. The Court in *NFIB* likewise said, "No matter how inherently integrated" the activity actually regulated (or mandated) by the law is with commerce in the abstract, "they are not the same thing: They involve different transactions, entered into at different times, with different" parties. 567 U.S. at 558. A court should look to the face of the law at issue, and should require, at least, some level of "proximity and degree of connection" between the statute and commerce at large. *Id.* There is no such direct link between filing a document in a state and the CTA's broad concern with international money laundering and illicit finance, and there is indeed, no direct link with registration and any commercial activity that can be extrapolated on a grand scale. The "connection between incorporation and criminal activity is far too attenuated to justify the CTA." *NSBU*, 2024 U.S. Dist. LEXIS 36205, at *41.

d. The CTA Is Not a Legitimate Exercise of the Taxing Power

The taxing power also does not justify the CTA. The federal government has the enumerated power to "lay and collect Taxes." U.S. Const., Art. I, § 8, cl. 1. But that power only

allows the government to impose "exaction[s]" that "produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564. The CTA imposes no such taxes, though, so it cannot be justified as a direct exercise of that power. *NSBU*, 2024 U.S. Dist. LEXIS 36205, at *56-57.

This means that the CTA could only be upheld if it was "necessary and proper for carrying into Execution" the taxing power. *See* U.S. Const., Art. I, § 8, cl. 18. But the Necessary and Proper Clause will not justify an act of Congress unless it "involve[s] exercises of authority derivative of, and in service to, a granted power." *NFIB*, 567 U.S. at 560. Rather than provide an independent source of power, the clause merely allows execution of existing powers, and, at most, forgives borderline questions concerning "individual *applications* of a concededly valid statutory scheme." *See id.* (citing *Raich*, 545 U.S. at 72). "When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain." *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring); *but see* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 186 (2003) (the Founders believed the Clause "did not go 'a single step beyond the delegated powers.'").

The connection between the taxing power and the CTA is far too attenuated to pass scrutiny. "It would be a 'substantial expansion of federal authority' to permit Congress to bring its taxing power to bear just by collecting 'useful' data and allowing tax-enforcement officials access to that data." *NSBU*, 2024 U.S. Dist. LEXIS 36205, at *58 (quoting *NFIB*, 567 U.S. at 560). That kind of unfettered legislative power "is in no way an authority that is 'narrow in scope,' or 'incidental' to the exercise of the [taxing] power." *See NFIB*, 567 U.S. at 560 (citations omitted). Indeed, "even if" the CTA's provisions were "necessary," "such an expansion of federal power is not a 'proper' means for making those [policy goals] effective." *NSBU*, 2024 U.S. Dist. LEXIS 36205, at *58.

e. The CTA Is Invalid As-Applied to Certain Plaintiffs

Even if the CTA could be upheld for certain entities with significant interstate commercial activities, as applied to other entities with no meaningful interstate commercial ties, particularly MSLP and Mustardseed, the CTA likely falls outside of the scope of any enumerated power. MSLP is a political party that can only operate within the State of Mississippi, and it can only do so to support local candidates for political office and local issues. Ex. E at ¶¶ 13-15. Moreover, it has very few assets, which it only uses to make local political expenditures. *Id.* Certainly, the federal government has no foreign affairs interests in regulating a state political party. Nor does it have any conceivable basis to use its commerce powers over the MSLP, as deeming its activities to be sufficiently commercial for federal control would require this Court to imaginatively aggregate some non-economic factor to such a degree that it is impossible to conceive of any entity that would be out of federal reach. Nor does the taxing power justify the CTA, as MSLP's tax obligations are well-established and the federal government already has significant, yet tailored, authorities to investigate the party and its finances.

Similarly, Mustardseed is a family dairy farm in the very center of our nation, thousands of miles from any foreign state, engaged in minimal economic activity, all of it completely local. Ex. D at ¶¶ 4-8. It is absurd to think that the federal government has a compelling international interest that would allow it to mandate the CTA's filing regime, much less a national economic interest in regulating the corporate entity itself, divorced from the farm's meager economic activity, or some overriding, yet totally obscured, interest in exacting federal taxes. Instead, MSLP and Mustardseed both demonstrate the extremity of the CTA's intrusion into state affairs.

2. THE ACT IMPERMISSIBLY BURDENS ANONYMOUS ASSOCIATION

"[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (collecting cases). This includes a right to do so anonymously. *Americans for Prosperity v. Bonta*, 141 S.Ct. 2373, 2382-83 (2021) (plurality op.). "It 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." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

"To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). The "First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private." *Id.*

Expressive association can come in myriad forms. When any "level" of an "organization ha[s] taken public positions on a number of diverse issues ... [like] civic, charitable, lobbying, fundraising, and other activities," these are all "worthy of constitutional protection under the First Amendment." *Jaycees*, 468 U.S. at 626-27 (citations omitted). Members involved in such endeavors are generally protected in expressing the "views that brought them together." *Id.* at 623. In this vein, the Supreme Court has recognized the expressive association rights of members of organizations that advocate for political, social, and cultural issues, see, e.g., *NAACP*, 357 U.S. at 462, political parties and organizations, see, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), and non-profit organizations of all types, see, e.g., *AFP*, 141 S. Ct. at 2383, *Boy Scouts*, 530 U.S. at

656, and *Jaycees*, 468 U.S. at 612. But groups need not engage in political advocacy in order to be protected. *See Boy Scouts*, 530 U.S. at 648. The organization need only have some "conception of the good life," such as advocating that a particular "reform is a good or bad idea." *McDonald v. Longley*, 4 F.4th 229, 245 n.20 (5th Cir. 2021). Furthermore, "[t]he membership is part of the message" when an organization takes such a stance, which means that individual members are free to refuse to associate with the message or conceal their association with it. *See id.* at 245-46.

Moreover, a *for-profit* corporate entity still has the same right to expressive association as any other speaker. "[T]he Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). And this applies equally to "nonprofit or for-profit corporations." *Id.* Thus, in *303 Creative LLC v. Elenis*, 143 S.Ct. 2298, 2316 (2023), the Court held that a single-member company, engaged in expressive "commercial" activity, had precisely the same expressive rights as any other entity, and thus could refuse to associate its commercial products with ideas it did not share.

"Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association." *Boy Scouts*, 530 U.S. at 648. "Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." *AFP*, 141 S.Ct. at 2383.[3] "Under that standard, there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. Further, "a reasonable assessment

[3] This part of Justice Roberts' opinion was only joined by Justices Kavanaugh and Barrett. *Id.* However, a majority of the Court called for *at least* this level of scrutiny. Justice Thomas concurred that the statute was unlawful and argued that the correct standard was strict scrutiny. *Id.* at 2389-90 (Thomas, J., concurring). Justice Alito, joined by Justice Gorsuch, agreed that the statute violated the First Amendment under either standard, but believed it unnecessary to articulate which applied. *Id.* at 2392 (Alito, J., concurring).

of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Id*. at 2385.

In applying this standard, the Court recently concluded that a law mandating that charitable organizations disclose the names and addresses of donors who had contributed more than $5,000 in a tax year violated the First Amendment. *Id*. Even though the disclosures were non-public, the Court held that the "disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important." *Id*. at 2389. Because the statute chilled protected conduct, even though it was undoubtedly lawful in certain contexts, the Court held that it was facially invalid. *Id*.

Plaintiffs are engaged in expressive activities, and thus have First Amendment interests in maintaining anonymity of their members. MSLP, of course, is a political party that advocates positions on a wide range of public issues, including the protection of constitutional rights threatened by the CTA, see Ex. E at ¶¶ 3, 5-10, which is the paradigmatic example of an expressive association. *See Kusper*, 414 U.S at 57. As a corporation that makes expenditures that are purely political, it obviously also has an interest in maintaining the privacy of its officers, directors, beneficiaries of its ownership (whoever that might be), and significant donors who exert control over the local party and its platform. It also, unquestionably, has the right to refuse to disclose the identities of its members. *See NAACP*, 357 U.S. at 462.

The other plaintiffs have also been engaged in advocacy targeted at the CTA itself, using the corporate form. While it is itself exempt from the CTA's registration requirements, NFIB has lobbied Congress to repeal the CTA on behalf of its hundreds of thousands of affected members. Ex. F at ¶¶ 6-8. It presents a united voice on political issues affecting small businesses everywhere.

When an organization like NFIB takes such a stance, individual members are free to refuse to associate with the organization or conceal their association. *See McDonald*, 4 F.4th at 245-46.

Texas Top Cop Shop and Data Comm are examples of NFIB's members that have adopted NFIB's advocacy concerning the CTA as their own, see Ex. A at ¶¶ 3, 9, 12, Ex. B at ¶¶ 3, 11-12, meaning that their "membership is part of the message." *See id*. at 245. Further, each business has also publicly advocated for the repeal of the CTA, and Data Comm even sent a letter of its own to a Congressional Committee. Ex. A at ¶¶ 9, 12, Ex. B at ¶¶ 11-12. All are expressive acts, and all could be threatened if the members of each business were required to reveal their identities. *See McDonald*, 4 F.4th at 245-46 (opinion on whether "a reform is a good or bad idea").

While ostensibly neutral, the CTA still demands information that implicates the right to anonymous speech and association and must pass exacting scrutiny. Every reporting company, including charitable or advocacy organizations like MSLP, must disclose to FinCEN, and potentially to state and local law enforcement and federal regulators, its beneficial owners. And those "beneficial owners" include individuals who "indirectly" "exercise[] substantial control over the entity," even when that control might not be formalized. 31 U.S.C. § 5336 (a)(3)(A). Thus, each of the plaintiffs, regardless of their mission, would be required to not only disclose the names of any 25% owners, but also their directors, officers, influential members, or even donors. The Reporting Rule makes this clear, mandating disclosures for senior officers, any person with "substantial influence over important decisions," major expenditures or investments, "[a]mendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures," or even the scope of operations. 31 C.F.R. § 1010.380(d)(1)(i). This would mean that the plaintiffs would all be required to disclose significant information about their activities, and,

since all have been involved in direct political advocacy, most especially MSLP, they would need to disclose the identities of those people who made the decision to advocate at all. Indeed, because MSLP's bylaws can be amended at the urging of any single state party member, and adopted by a 2/3 majority of voting members, MSLP would need to disclose the identity of each of its registered members, Ex. E at ¶¶ 17-19, even though the Court struck down a law demanding disclosure of "the names and addresses" of NAACP "members" and "agents" more than 60 years ago. *See NAACP*, 357 U.S. at 453. Much less invasive laws have triggered exacting scrutiny. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366 (11th Cir. 1999) (applying exacting scrutiny to "a provision that requires corporate applicants for adult business licenses to disclose the names of 'principal stockholders'"); *Buckeye Inst. v. IRS*, No. 2:22-cv-4297, 2023 U.S. Dist. LEXIS 201628, at *12 (S.D. Ohio Nov. 9, 2023) (holding that exacting scrutiny applied to federal law requiring disclosure of "substantial donors" for 501(c)(3) tax exemption).

The CTA fails exacting scrutiny. Like the statute in *AFP*, the CTA purports to thwart financial malfeasance, and specifically money laundering using shell companies. *See* 31 U.S.C. § 5336 note. In FinCEN's words, "These requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States." Reporting Rule, 87 Fed. Reg. at 59498. But applying the statute to every entity registered with a state, no matter their size or purpose, and even when they lack any assets at all, is obviously a poor fit for that aim. Likewise, the fact that the statute exempts large corporations and more than a dozen other entities, almost all of which are primarily or even exclusively involved in financial transactions, shows that the statute is not narrowly tailored to investigating and preventing financial crimes. *See* 31 U.S.C. § 5336(a)(11)(B). Indeed, FinCEN rejected calls to narrow the statute's reach, because of its dubious

insistence that there remains the remote possibility that any charity may still be involved in illicit transactions. *See* 87 Fed. Reg. at 59542-43. If that's true, however, it's not clear why federally exempt organizations need not comply with the CTA, while others, like MSLP who could potentially qualify for federal exemption but still lack that status, must file reports. The Congressional record provides an answer—the Act was intended in part to allow the government to determine "the identities behind big political spending." *See* Congressional Record, Vol. 163, No. 101 at S3469. While that might be the real reason behind the Act, it is also an unconstitutional objective. *See AFP*, 141 S.Ct. at 2389. The CTA's exemption of the most obvious candidates for financial misconduct at the expense of local entities proves its lack of narrow tailoring.

MSLP once again drives this point home. It is virtually indistinguishable from the advocacy groups in *AFP*, but the federal government's interest is even weaker. Neither Congress nor FinCEN asserted a legitimate interest in policing political donations, claiming instead a broad need to investigate *everyone* including advocacy organizations, against "money laundering, terrorist financing, corruption, tax fraud, and other illicit activity." *See* 87 Fed. Reg. at 59498. But there is no rational reason why a party in charge of around $20,000 in local donations should be made to give up its expressive interests on the purely theoretical notion that it could possibly be involved in financial crimes. *See* Ex. E at ¶¶ 13-15. Applied in this context, the justification for the CTA bears a striking resemblance to the illegitimate excuses used by the State of Alabama in the 1950s: "The exclusive purpose was to determine whether [the NAACP] was conducting intrastate business in violation of the Alabama foreign corporation registration statute, and the membership lists were expected to help resolve this question." *NAACP*, 357 U.S. at 464. The other small businesses, particularly Texas Top Cop Shop, which has already been thoroughly vetted as it acquired a federal firearms license, Ex. A at ¶ 7, and Mustardseed, with its minimal income and

purely local reach, Ex. D at ¶¶ 4-8, are also highly unlikely culprits for international money laundering and terrorist financing. Indeed, the large number of NFIB members that must comply with the CTA, all small businesses, comprise a whole class of entities that are the *least likely* culprits for international money laundering. Given the intrusion into protected association, the CTA's vague goals, and the poor fit between the two, the CTA is facially unconstitutional.

3. THE ACT IS FACIALLY INVALID UNDER THE FOURTH AMENDMENT

"[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *see also Patel v. City of Los Angeles*, 738 F.3d 1058, 1061 (9th Cir. 2013) (*en banc*) ("The 'papers' protected by the Fourth Amendment include business records like those at issue here.") *aff'd* 576 U.S. 409 (2015). The "compulsory production of private papers," is both a search and seizure. *Hale*, 201 U.S. at 76. The "papers" protected by the Fourth Amendment include business records. *See id.* 76-77 (subpoena for "all understandings, contracts or correspondence" between corporation and others and "reports made, and accounts rendered by such companies from the date of the organization" was unreasonable under the Fourth Amendment). Thus, when a law mandates that a business compile private information and disclose it upon demand by law enforcement, this constitutes a "search." *See City of L.A. v. Patel*, 576 U.S. 409, 421 (2015).

The Fourth Amendment also has a strong preference for warrants. Thus, "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions." *Id*. at 419 (cleaned up). "This rule applies to commercial premises as well as to homes." *Id*. at 419-20 (citation omitted).

In some circumstances, a warrantless "administrative search" may be permissible "where the primary purpose of the searches is distinguishable from the general interest in crime control." *Id*. at 419 (cleaned up). Even still, "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id*. And when administrative searches create criminal consequences for noncompliance, "[a]bsent an opportunity for precompliance review," there is an "intolerable risk" that such searches will be abused. *Id*.

In addition to the need for pre-compliance review, the government is obligated to demonstrate some level of individualized suspicion before it can demand a business entity's private papers. *See Patel*, 738 F.3d at 1064 ("The government may ordinarily compel the inspection of business records only through an inspection demand 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'") (quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1945)). Thus, while subpoenas for corporate records are usually permitted on a showing of need less than probable cause, judicial process is still required to determine that "the charge [against the target] is proper and the material requested is relevant," and that the subpoena not be "too indefinite," has not "been issued for an illegitimate purpose, [and is not] unduly burdensome." *McLane Co. v. EEOC*, 581 U.S. 72, 77 (2017); *see also See v. City of Seattle*, 387 U.S. 541, 544 (1967) ("It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.").[4]

[4] Similarly, courts have "recognized the existence of a constitutionally protected interest in the confidentiality of personal financial information," which can only "be overcome by a sufficiently weighty government purpose." *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 322-23 (2d Cir. 1999); *see also NASA v. Nelson*, 562

The blanket requirement that all reporting companies provide beneficial ownership information with no precompliance process and no individualized suspicion violates the Fourth Amendment. On one side of the equation, the CTA's broad disclosure requirements certainly implicate privacy concerns. Indeed, the Act itself recognizes that beneficial ownership information "shall be confidential and may not be disclosed" by FinCEN except in carefully limited ways. *See* 31 U.S.C. § 5336(c)(2)(A). And courts have recognized a "constitutionally protected interest in the confidentiality of personal financial information." *See Statharos*, 198 F.3d at 322-23 (collecting cases). Moreover, as discussed above, the reporting requirements implicate information protected by the First Amendment against disclosure. MSLP has an obvious First Amendment interest in this information, but so too do NFIB's members, including the named plaintiffs, because all have engaged in protected advocacy relying on their corporate forms. In a variety of ways, the CTA's disclosure requirements are therefore significantly more intrusive than a hotel's guest lists, which were protected by the Court in *Patel*, 576 U.S. at 419.

On the other hand, the CTA provides *no* limitations. The Act applies to at least 32.6 million existing entities, including those entities with no assets and no operations, and regardless of whether the entity is likely to have committed a crime. Its express purpose is crime control, and the mandated reports are to be used by law enforcement simply to look for potential criminality. There is also no opportunity for precompliance review by *anyone*, yet refusing to file mandated reports comes with criminal liability. The CTA is thus facially invalid.

U.S. 134, 138 (2011) ("We assume, without deciding, that the Constitution protects a privacy right[.]"); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing constitutional protections related to "individual interest in avoiding disclosure of personal matters," and "independence in making certain kinds of important decisions"); *Nat'l Treasury Emps. Union v. United States Dep't of the Treasury*, 25 F.3d 237, 242 (5th Cir. 1994) (recognizing the "individual interest in avoiding disclosure of personal matters ... which is properly called the right to confidentiality"). While the contours of this latter right are somewhat unclear, the Second Circuit has noted that mandatory financial disclosure laws for "heavily regulated" businesses must still pass "intermediate scrutiny" to be valid. *Statharos*, 198 F.3d at 323.

4. The Reporting Rule Must Be Vacated As Well

As discussed, the CTA imposes multiple unconstitutional requirements on Plaintiffs. The Reporting Rule implements these same unconstitutional provisions while also setting out compliance deadlines. *See* 31 C.F.R. § 1010.380(a)(1)(iii). The Administrative Procedure Act instructs courts to "hold unlawful and set aside agency action ... found to be ... contrary to constitutional right[s]." 5 U.S.C. § 706(2)(B). Thus, a "Final Rule is invalid to the extent it implements [] unconstitutional statutory provisions." *Brackeen v. Haaland*, 994 F.3d 249, 425 (5th Cir. 2021) (*en banc*) *overruled in part on other grounds by Haaland v. Brackeen*, 599 U.S. 255 (2023*); see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (explaining "unlawful" agency action "includes unconstitutional action"). Because the Reporting Rule implements the CTA's unconstitutional provisions, this Court should also enjoin the rule.

B. PLAINTIFFS FACE IRREPARABLE HARM ABSENT AN INJUNCTION

"An irreparable harm is one for which there is no adequate remedy at law." *Book People, Inc. v. Wong*, 91 F.4th 318, 340 (5th Cir. 2024) (citation omitted). "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Id.* (quoting *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012)). Indeed, the Supreme Court has said that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, when a law or regulation "threatens" First Amendment rights, a plaintiff suffers an irreparable injury. *See Book People Inc.*, 91 F.4th at 341.

Separately, "the nonrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm." *Rest. Law Ctr. v. United States DOL*, 66 F.4th 593, 597 (5th Cir. 2023). "Even purely economic costs may count as irreparable harm where they cannot be

recovered in the ordinary course of litigation," such as in regulatory challenges under the APA. *Id*. (citation omitted). Further, such costs need not be significant or reach "a specific dollar amount," and an agency's own estimation of compliance costs can satisfy this showing. *See id.* at 597-98.

Plaintiffs will suffer irreparable harm from the CTA unless this Court enjoins it and its implementing regulations prior to January 1, 2025. First, because the named plaintiffs (as well as large numbers of NFIB's other members) will be required to comply with the filing requirements, and must expend resources to do so, these "nonrecoverable compliance" costs constitute irreparable harm. *See Rest. Law Ctr.*, 66 F.4th at 597. Not only have plaintiffs each averred that they would need to spend time and effort to make the required filings, but they would also need to incur legal expenses to review their obligations and assist with the filings. *See* Ex. A at ¶ 10, Ex. B. at ¶ 9, Ex. C at ¶ 10, Ex. D at ¶ 12, Ex. E at ¶ 23, Ex. F at ¶ 5. This is something FinCEN itself recognized would affect the estimated 32.6 million small entities like the plaintiffs, resulting in an estimated burden of 126.3 million hours in the first year of the reporting requirement, for a total cost of approximately $22.7 billion in the first year. Reporting Rule 87 Fed. Reg. at 59585-86.

Second, because the CTA and the Reporting Rule infringe Plaintiffs' constitutional rights, including their First Amendment associational rights, the mere "threat[]" of such infringement causes them irreparable harm. *See Book People Inc.*, 91 F.4th at 341. As discussed above, each Plaintiff faces the unconstitutional threat of revealing protected information on pain of criminal punishment. This independently constitutes irreparable harm.

C. THE EQUITIES FAVOR AN INJUNCTION

The third and fourth factors, "harm to the opposing party and weighing the public interest ... merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 420 (2009) (discussing identical factors for a stay). And whatever legitimate interest the government might

have in a challenged law or regulation, "neither [the government] nor the public has any interest in enforcing a regulation that violates federal law. Indeed, injunctions protecting First Amendment freedoms are always in the public interest." *Book People, Inc.*, 91 F.4th at 341 (cleaned up). If a plaintiff is likely to succeed in showing that a law or regulation is invalid, then the public interest accords with an injunction. *See id.*

Whatever legitimate interests the Government might have in deterring money laundering or other financial crimes, those cannot outweigh the constitutional invalidity of the CTA. Because the CTA and its implementing regulations are unlawful, the equities favor an injunction.

CONCLUSION

This Court should preliminarily enjoin Defendants from enforcing the CTA and its implementing regulations.

DATED: June 3, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg
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CERTIFICATE OF CONFERENCE

I hereby certify that counsel has complied with the meet and confer requirement in Local Rule CV-7(h); and that the motion is opposed. Counsel for Plaintiffs conferred with Counsel for Defendants, Faith E. Lowry and Stuart J. Robinson, regarding the relief requested and the grounds raised by Plaintiffs on June 3, 2024. Despite good faith efforts by counsel, the motion is opposed.

Respectfully,

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG*

*Admitted *Pro Hac Vice*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

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

Plaintiffs,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Defendants.

Civil Action No. 4:24-cv-00478 (ALM)

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

For decades, Congress has legislated to curb money laundering and terrorist financing. As illicit actors find new ways to circumvent those laws, Congress has responded to ensure that the government possesses the information to counteract such evolving threats. Most recently, these threats come from the exploitation of legal entities such as corporations to facilitate illicit activity that imperils the national security and foreign policy of the United States. Criminals can easily create these entities under state laws and may generally do so without disclosing their involvement. As a result, the United States has become a popular jurisdiction for criminals to create legal entities that facilitate and further fraud, human smuggling, corruption, drug trafficking, and terrorist financing.

To address these harms, Congress passed the Anti-Money Laundering Act of 2020, which includes the Corporate Transparency Act ("CTA"). This legislation requires certain domestic and foreign companies to report information concerning their beneficial owners and those individuals filing certain entity-creation forms to the Financial Crimes Enforcement Network ("FinCEN"), a bureau of the U.S. Department of the Treasury. Congress assessed that this information—including a beneficial owner's name, address, date of birth, and a unique identifier such as a driver's license number—will prove highly useful to law enforcement and the intelligence community's efforts to counter the threat posed by criminals, terrorists, and others undermining U.S. interests.

Plaintiffs challenge the constitutionality of the limited reporting requirements established by the CTA. But they have not shown a likelihood of success on the merits of these claims because the CTA (1) falls well within Congress's power, amplified by the Necessary and Proper Clause, to regulate commerce, ensure national security, and lay and collect taxes; (2) accords with the First Amendment; and (3) does not unreasonably invade any Fourth Amendment privacy interests. Nor does consideration of the remaining preliminary injunction factors favor Plaintiffs. The Court should deny Plaintiffs' motion for preliminary injunction.

BACKGROUND

I. Statutory Background

Federal law has long prohibited money laundering, *see* 18 U.S.C. §§ 1956, 1957, financing terrorism, *see id.* § 2339C, evading taxes, *see* 26 U.S.C. § 7201, and a number of other harmful economic activities, *see*, *e.g.*, 18 U.S.C. §§ 1001, 1341, 1343. According to one estimate, "domestic financial crime, excluding tax evasion, generates approximately $300 billion of proceeds" each year. *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59,498, 59,579 (Sept. 30, 2022).[1] Because financial crime is complex, easily concealed, and facilitated by an interconnected financial system, Congress has adopted various measures to aid enforcement. *See*, *e.g.*, *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 26 (1974) (discussing Bank Secrecy Act of 1970, 31 U.S.C. § 5311 *et seq.*).

Despite these efforts, there remained a significant gap in the government's ability to detect and prosecute financial crime. Under state law, "corporations, limited liability companies, [and] other similar entities" are generally not required to report "information about the[ir] beneficial owners." Anti-Money Laundering Act of 2020 ("AMLA"), Pub. L. No. 116-283, div. F, § 6402(2), 134 Stat. 4547, 4604 (2021).[2] "A person forming a corporation or limited liability company within the United States" thus "typically provides less information at the time of incorporation than is needed to obtain a bank account or driver's license." H.R. Rep. No. 116-227, at 2 (2019). That enables "malign actors" to "conceal their ownership of corporations" and then use those anonymous corporations to engage in "money laundering," "the financing of terrorism," and "serious tax fraud." NDAA § 6402(3).

Congress and the Executive Branch identified "[t]his lack of transparency" as "a primary obstacle to tackling financial crime in the modern era." H.R. Rep. No. 116-227, at 10. When investigators trace illicit funds to a corporation, they often cannot identify the corporation's owners

[1] Internal quotations marks and citations are omitted throughout this brief, unless noted.
[2] The AMLA and CTA were enacted as part of the National Defense Authorization Act ("NDAA").

from available sources because ownership records "do not exist." 87 Fed. Reg. at 59,504. Instead, investigators must pursue "human source information, grand jury subpoenas, surveillance operations, witness interviews, search warrants, and foreign legal assistance requests to get behind the outward facing structure of the[] shell companies[.]" *Id.* The "strategic use" of such companies by criminals thus "makes investigations exponentially more difficult and laborious." *Id.* at 59,505. And because criminals may "layer" multiple shell companies, even the most thorough investigation may not yield results. NDAA § 6402(4).

Criminals routinely exploit this enforcement gap. Federal prosecutors report that "large-scale schemes that generate substantial proceeds for perpetrators and smaller white-collar cases alike routinely involve shell companies." 87 Fed. Reg. at 59,503. Likewise, drug traffickers "commonly use shell and front companies to commingle illicit drug proceeds with legitimate revenue of front companies, thereby enabling the [drug traffickers] to launder their drug proceeds." *Id.*

In addition to facilitating domestic crime, the absence of company-ownership information threatens U.S. national-security and foreign-policy interests. For instance, "Russian elites, state-owned enterprises, and organized crime, as well as the Government of the Russian Federation have attempted to use U.S. and non-U.S. shell companies to evade sanctions[.]" *Id.* at 59,498; *see id.* at 59,502 (discussing use of shell companies by the Government of Iran). And more broadly, the absence of company-ownership information in the United States undermines the federal government's longstanding diplomatic efforts to combat cross-border financial crime by "mak[ing] the United States a jurisdiction of choice for those wishing to create shell companies that hide their ultimate beneficiaries" and "a weak link in the integrity of the global financial system." *Id.* at 59,506. Because it did not collect ownership information, the United States fell out of "compliance with international anti-money laundering and countering the financing of terrorism standards." NDAA § 6402(5)(E).

For similar reasons, criminals can use the government's lack of information about the

ownership of corporations to obscure their income and assets and thus perpetrate "serious tax fraud." NDAA § 6402(3). A "[Department of the] Treasury study based on a statistically significant sample of adjudicated [IRS] cases from 2016-2019 found legal entities were used in a substantial proportion of the reviewed cases to perpetrate tax evasion and fraud." 87 Fed. Reg. at 59,503.

To address this enforcement gap, Congress enacted beneficial ownership reporting requirements. The AMLA adopts various provisions designed to "modernize" federal laws concerning money laundering and terrorism financing. NDAA § 6002(2). Among those is the CTA, which aims to ensure that the United States uniformly collects beneficial ownership information notwithstanding the disparate corporate formation requirements imposed by states. *Id.* § 6002(5).

In enacted findings accompanying the CTA, Congress determined that "the collection of beneficial ownership information" is "needed" to "protect interstate and foreign commerce" and "better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity[.]" *Id.* § 6402(5). Congress further determined that the reporting requirements would "facilitate important national security, intelligence, and law enforcement activities[,]" *id.* § 6402(6)(A), assist in improving "tax administration[,]" 31 U.S.C. § 5336(c)(5)(B), and "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards[,]" NDAA § 6402(5)(E). And Congress described the reported information as "highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators." *Id.* § 6402(8)(C).

The CTA accordingly requires that certain businesses report information about their beneficial owners and applicants to FinCEN. A "beneficial owner" is "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise[] (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)(A). *But see id.* § 5336(a)(3)(B) (establishing certain exceptions). And

an "applicant" is an individual who files documents to form or register the corporate entity. *See id.* § 5336(a)(2). For each applicant and beneficial owner, a covered business must report the individual's legal name, date of birth, residential or business address, and driver's license number or other "unique identifying number[.]" *Id.* § 5336(a)(1), (b)(2)(A).

In addition to providing that covered businesses file reports when they first become subject to the CTA, the statute also requires that those businesses submit updated reports when ownership information changes. In particular, when "there is a change with respect to any" ownership information, a covered business must "submit to FinCEN a report that updates the information relating to the change." *Id.* § 5336(b)(1)(D). A person who willfully violates either the initial or ongoing reporting requirements is subject to civil and criminal penalties. *See id.* § 5336(h). *But see id.* § 5336(h)(3)(C) (providing certain safe harbors).

These requirements apply to "reporting compan[ies]." *Id.* § 5336(a)(11). That term generally includes any "corporation, limited liability company, or other similar entity that is" either "created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe[,]" or "formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe[.]" *Id.* § 5336(a)(11)(A).

Congress exempted from the reporting requirements 23 categories of legal entities, such as banks, public accounting firms, and other businesses already subject to reporting or recordkeeping requirements. *Id.* § 5336(a)(11)(B). It excludes certain domestically owned entities no longer engaged in business. *Id.* § 5336(a)(11)(B)(xxiii). It also excludes certain trusts, political organizations, and non-profits. *Id.* § 5336(a)(11)(B)(xix).

Consistent with Congress's purposes, the CTA generally contemplates that reported information be used to facilitate the investigation and prosecution of financial crimes, among other

things. For example, FinCEN may share ownership information with federal agencies "engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity[.]" *Id.* § 5336(c)(2)(B)(i)(I). FinCEN may share the same information with state and local law enforcement agencies when a court "authorize[s] the law enforcement agency to seek the information in a criminal or civil investigation[.]" *Id.* § 5336(c)(2)(B)(i)(II).

II. FinCEN's Rulemaking

The CTA directs FinCEN to implement certain aspects of the statute by regulation. *See id.* § 5336(b)(5). FinCEN issued its final rule on beneficial ownership information reporting in September 2022. 87 Fed. Reg. at 59,509. As relevant here, the rule, as amended, establishes the deadlines by which covered entities must comply with the statute. For businesses created or registered before 2024, compliance is required by January 1, 2025. *See* 31 C.F.R. § 1010.380(a)(1)(iii).

III. This Litigation

Plaintiffs filed this action on May 28, 2024. Compl., ECF No. 1. Plaintiffs consist of two corporations whose principal place of business is in Texas (Texas Top Cop Shop, Inc. and Data Comm for Business, Inc.), an individual residing in Texas (Russell Straayer), a Wyoming limited liability company (Mustardseed Livestock, LLC), a Mississippi non-profit corporation (Libertarian Party of Mississippi ("MSLP")), and a Tennessee non-profit organization (National Federation of Independent Business ("NFIB")). Compl. ¶¶ 1-6. They allege that Texas Top Cop Shop, Data Comm for Business, Mustardseed, and MSLP are subject to the CTA's reporting requirements by January 1, 2025, *id.* ¶¶ 60, 70, 92, 115; Mr. Straayer is a beneficial owner of Data Comm for Business and "has been a vocal opponent of the CTA," *id.* ¶¶ 76, 79; and NFIB is exempt from the CTA but brings this claim on behalf of its members, *id.* ¶ 120. Plaintiffs first claim that the CTA exceeds Congress's powers under the Constitution. *Id.* ¶¶ 126-34. Second, Plaintiffs assert that the reporting requirements of the CTA compel disclosure of information in violation of the First Amendment. *Id.* ¶¶ 136-48. Third, in

Plaintiffs' view, the CTA constitutes an unreasonable search and seizure in violation of the Fourth Amendment. *Id.* ¶¶ 150-57. And fourth, Plaintiffs allege that FinCEN's final rule on reporting requirements contravenes the Administrative Procedure Act, 5 U.S.C. § 702(2). *Id.* ¶¶ 159-64.

Despite the fact that no Plaintiff must comply with the CTA until January 2025, Plaintiffs moved for a preliminary injunction on June 3, 2024. ECF No. 6 ("Pls.' Mot."). They seek a nationwide injunction prohibiting enforcement of the CTA and its implementing regulations. ECF No. 6-1.

LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (cleaned up). A plaintiff may obtain this "extraordinary remedy" only "upon a clear showing" that it is "entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff must show (1) "a substantial threat of irreparable injury[,]" (2) "a substantial likelihood of success on the merits," (3) "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted," and (4) "that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016). The plaintiff must "clearly carr[y] the burden of persuasion on all four requirements." *Id.*

ARGUMENT

I. Plaintiffs Fail to Demonstrate Irreparable Harm

As discussed below, Plaintiffs have not shown a likelihood of success on the merits of any of their claims. Their request that this court preliminarily enjoin an Act of Congress fails at the threshold, however, because Plaintiffs do not demonstrate any irreparable harm.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 582-83 (E.D. La. 2016), *aff'd*, 678 F. App'x 250 (5th Cir. 2017). "To constitute irreparable harm, an

injury must be certain, great, actual and not theoretical," *Duarte v. City of Lewisville*, 136 F. Supp. 3d 752, 791 (E.D. Tex. 2015) (Mazzant, J.), *aff'd*, 858 F.3d 348, (5th Cir. 2017), and must also be "future or continuing," *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014). Plaintiffs must substantiate any claim of irreparable injury with "independent proof, or no injunction may issue," *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989).

As an initial matter, Plaintiffs' delay in seeking preliminary relief following passage of the CTA weighs heavily against any argument that they might suffer imminent, irreparable injury absent emergency relief. "Delay in seeking a remedy is an important factor bearing on the need for a preliminary injunction." *Anyadike v. Vernon Coll.*, No. 7:15-cv-00157, 2015 WL 12964684, at *3 (N.D. Tex. Nov. 20, 2015). "[A]nywhere from a three-month delay to a six-month delay [is] enough to militate against issuing injunctive relief." *Leaf Trading Cards, LLC v. Upper Deck Co.*, No. 3:17-CV-3200, 2019 WL 7882552, at *2 (N.D. Tex. Sept. 18, 2019) (collecting cases). Here, the bipartisan CTA was enacted in 2021, more than three years before Plaintiffs filed the instant suit. And FinCEN has been accepting beneficial ownership reports for more than six months, since January 1, 2024. *See* FinCEN FAQ B.3, https://perma.cc/LE24-SVRB. Plaintiffs' actions "suggest[] a lack of urgency that militates against a finding of irreparable injury." *Shenzhen Tange Li'An E-Commerce, Co. v. Drone Whirl LLC*, No. 1:20-CV-738-RP, 2020 WL 5237267, at *4 (W.D. Tex. Sep. 2, 2020); *see BuzzBallz, LLC. v. JEM Beverage Co., LLC*, No. 3:15-cv-588, 2015 WL 3948757, at *6 (N.D. Tex. June 26, 2015).

And regardless of their delay, Plaintiffs have not demonstrated that a preliminary injunction is necessary because "the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); *see Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). No Plaintiff is required to comply with the CTA until January 1, 2025. The parties therefore have more than six months to resolve this case through dispositive motions before any injury could be deemed imminent.

Plaintiffs nonetheless attempt to establish irreparable harm by refencing alleged compliance costs associated with the CTA's reporting requirements. But the evidence Plaintiffs cite in support is wholly conclusory, consisting of a single statement in the non-associational Plaintiffs' declarations. *See*, *e.g.*, Decl. of Russell Straayer ¶ 9, ECF No. 6-3. Plaintiffs have already, by their own admissions, determined that they are subject to the reporting requirements. *E.g.*, *id.* The form itself is simple and free. Press Release, U.S. Beneficial Ownership Information Registry Now Accepting Reports (Jan. 1, 2024), available at https://perma.cc/6NRG-CTZB. The information requested is, as Plaintiffs' exhibits describe it, "readily available." ECF No. 6-3 at p.6; *see also* 87 Fed. Reg. at 59,573. Because Plaintiffs have already determined that they are subject to the reporting requirements and given the evidence reflecting the simplicity of the form itself, Plaintiffs have not shown that their own alleged compliance costs are more than *de minimis*. *See Second Amend. Found., Inc. v. ATF*, No. 3:21-cv-0116, 2023 U.S. Dist. LEXIS 202589, at *48-49 (N.D. Tex. Nov. 13, 2023) (plaintiff failed to show irreparable harm where the record did not reflect compliance costs that were more than *de minimis*).

Plaintiffs next attempt to establish irreparable harm by arguing that "the CTA and the Reporting Rule infringe Plaintiffs' constitutional rights, including their First Amendment associational rights," citing *Book People Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024). Pls.' Mot. at 29. But the "invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury." *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016). Courts have thus declined to find irreparable harm based solely on a plaintiff's allegation that his constitutional rights have been violated. *E.g.*, *Castro v. City of Grand Prairie*, No. 3:21-CV-885, 2021 WL 1530303, at *2 (N.D. Tex. Apr. 19, 2021); *Sheffield v. Bush*, 604 F. Supp. 3d 586, 609 (S.D. Tex. 2022). And, as explained below, Plaintiffs have not shown a likelihood of success on the merits of their claims.

Plaintiffs therefore fail to establish imminent, irreparable harm, and their motion for preliminary injunctive relief should be denied for this reason alone.

II. Plaintiffs Fail to Demonstrate a Likelihood of Success on the Merits of Their Claims

The CTA falls within Congress's authority for two independent reasons. First, the statute regulates commercial entities and is thus directly authorized by the commerce power. Second, corporate ownership reporting requirements effectuate a number of powers vested in the federal government, including the commerce, tax, and national-security powers, and are therefore authorized by the Necessary and Proper Clause. Either of these bases suffices to defeat Plaintiffs' challenge, and Plaintiffs have failed to "establish that no set of circumstances exists under which the Act would be valid." *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012) (op. of Roberts, C.J.) ("*NFIB*"). Because Plaintiffs have not "clearly demonstrated" that Congress lacked the constitutional authority to pass the CTA, *see NFIB*, 567 U.S. at 538, Plaintiffs fall well short of establishing a likelihood of success.

A. Congress Has Broad Authority to Enact Economic Regulations

Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "[T]he power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement' . . . ; to adopt measures 'to promote its growth and insure its safety' . . . ; 'to foster, protect, control and restrain.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937); *see NFIB*, 567 U.S. at 549 (op. of Roberts, C.J.). In addition to regulating the "channels of interstate commerce," "the instrumentalities of interstate commerce, and persons or things in interstate commerce[,]" Congress may "regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17, 34 (2005). When Congress acts in this third category, it has the power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17. And "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* A court "need not determine whether [the regulated] activities, taken in the aggregate,

substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22 (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

The Necessary and Proper Clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its other enumerated powers and the powers vested in the Executive Branch, U.S. Const. art. I, § 8, cl. 18, also "grants Congress broad authority to enact federal legislation[,]" *United States v. Comstock*, 560 U.S. 126, 133 (2010). It is therefore sufficient if "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 134; *see United States v. Darby*, 312 U.S. 100, 121 (1941).

In assessing the breadth of Congress's authority to regulate activities that substantially affect interstate commerce, the Supreme Court has distinguished between laws with an "apparent commercial character," *United States v. Morrison*, 529 U.S. 598, 611 & n.4 (2000), and laws that have "nothing to do with 'commerce' or any sort of economic enterprise," *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 613. The Court has also distinguished regulations of commercial activity from regulations that would address inactivity by requiring individuals to engage in commercial transactions in which they would prefer not to engage. *NFIB*, 567 U.S. at 553 (op. of Roberts, C.J.). Supreme Court precedent thus "provides two recognized and historically rooted means of congressional regulation under the commerce power: (1) whether the activity is any sort of economic enterprise, however broadly one might define those terms; or (2) whether the activity exists as an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000).

B. The CTA Permissibly Effectuates Prohibitions on Harmful Economic Activities

1. The CTA's reporting requirements form a critical part of the federal government's comprehensive anti-money laundering regime. "[M]oney laundering is a quintessential economic activity." *United States v. Goodwin*, 141 F.3d 394, 399 (2d Cir. 1997). The same is true of fraud, drug

trafficking, and other financial crimes targeted by the CTA. *See United States v. McClaren*, 13 F.4th 386, 402 (5th Cir. 2021) (drug trafficking is economic activity); *see also Groome Res. Ltd.*, 234 F.3d at 208 (discussing breadth of "economic activity"). "Indeed, it is difficult to imagine a more obviously commercial activity than engaging in financial transactions involving the profits of unlawful activity." *Goodwin*, 141 F.3d at 399. Plaintiffs cannot dispute that Congress may, pursuant to the Commerce Clause, prohibit these harmful forms of economic activity. 18 U.S.C. §§ 1956, 1957 (prohibiting money laundering); *id.* § 2339C (terrorism financing); 26 U.S.C. § 7201 (tax evasion).

Various economic crimes are made easier to commit, and harder to discovery, through the formation of corporate entities that may conduct economic transactions in their own names without disclosing beneficial ownership information. NDAA § 6402(2). By definition, a corporate entity has legal authority to conduct economic transactions in its own name, including by "[m]ak[ing] contracts," "borrow[ing] money[,]" "incur[ring] liabilities," and transferring "real or personal property." *E.g.*, Del. Code Ann. tit. 8, § 122. But state law generally does not require "corporations, limited liability companies, [and] other similar entities" to report "information about the[ir] beneficial owners." NDAA § 6402(2); *see* Compl. ¶¶ 59, 69, 91. As Congress determined, "malign actors" can thus "conceal their ownership of corporations" and use them to conduct illicit transactions without detection. NDAA § 6402(3). "This lack of transparency" has been "a primary obstacle to tackling financial crime in the modern era." H.R. Rep. 116-227, at 10; *see* 87 Fed. Reg. at 59,504-05. Many criminals, both foreign and domestic, exploit this knowledge gap. *E.g.*, 87 Fed. Reg. at 59,503.

Congress passed the AMLA in response to these concerns. The AMLA, of which the CTA is a part, aims "to modernize" existing federal legislation seeking to combat "money laundering and counter[] the financing of terrorism," among other financial crimes. NDAA §§ 6001, 6002(2), 6401. The CTA fills an important gap in Congress's comprehensive regime to prevent money laundering by facilitating the uniform collection of beneficial ownership information. *Id.* § 6002(5). In particular,

the statute requires legal entities—that is, those entities that have the ability to engage in commercial transactions in their own name—to disclose the identities of the individuals who created the entities and have authority to direct their operations. The statute contemplates that the reported information will be used for law enforcement and related activities. 31 U.S.C. § 5336(c)(2). For instance, FinCEN may share information with federal agencies when it would be "in furtherance" of "national security, intelligence, or law enforcement activity," *id.* § 5336(c)(2)(B), and with state or local agencies when a court "has authorized the law enforcement agency to seek the information in a criminal or civil investigation," *id.* The reporting requirements enable investigators to trace "the flow of illicit funds" into and through corporations and thus detect and prosecute financial crimes. NDAA § 6002(5)(A).

Congress thus determined that this information "is needed" to "protect interstate and foreign commerce" and "counter money laundering, the financing of terrorism, and other illicit activity[.]" NDAA § 6402(5). Congress further determined such information would "discourage the use of shell corporations as a tool to disguise and move illicit funds" and "assist national security, intelligence, and law enforcement agencies with the pursuit of crimes." *Id.* § 6002(5). These findings rest on an extensive record demonstrating that "efforts to investigate corporations and limited liability companies suspected of committing crimes have been impeded by the lack of available beneficial ownership information." H.R. Rep. 116-227, at 2; *see also Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981). By contrast, failure to include the CTA in the AMLA would have left a "gaping hole" in Congress's efforts to curb illicit financial activity. *Raich*, 545 U.S. at 22.

As these provisions illustrate, the CTA effectuates legitimate prohibitions on harmful forms of economic activity. The reporting requirements enable investigators to trace "the flow of illicit funds" into and through corporations and thus to detect and prosecute financial crimes. NDAA § 6002(5)(A). The CTA is therefore "rationally related to the implementation" of valid prohibitions, *Comstock*, 560 U.S. at 134, and it accordingly falls within the established scope of Congress's authority

under both the Commerce and Necessary and Proper Clauses.

Defendants recognize that one district court has concluded that the CTA is not an essential part of Congress's comprehensive, anti-money laundering regulatory regime. *See Nat'l Small Bus. United v. Yellen* ("*NSBU*"), 2024 WL 899372, at *17 (N.D. Ala. Mar. 1, 2024), *appeal filed*, No. 24-10736 (11th Cir. Mar. 11, 2024).[3] Defendants respectfully submit that the district court's order and opinion, from which the government has appealed, erred in concluding that the CTA was an isolated, "single-subject statute" such that the "'comprehensive regulatory scheme' framework" did not apply, *id.* at *17, particularly given the CTA's role as an important part of the AMLA. Further, the *NSBU* court erred in holding that the "CTA is far from essential" on the basis that some financial institutions are required to retain certain beneficial owner information about their customers pursuant to a 2016 rule. *See id.* (citing 31 C.F.R. § 1010.230(a)). Rather, two aspects of that rule led Congress to reasonably determine, on an extensive record, that the CTA's disclosure requirements were "needed" to combat economic crimes, notwithstanding the 2016 rule. NDAA § 6402(5); *see also* 87 Fed. Reg. at 59,548 (explaining how Congress addressed relationship between the CTA and the 2016 rule). First, the 2016 rule applies only to entities that choose to become customers of a comparatively narrow set of financial institutions. *See* 31 C.F.R. § 1010.605(e). Second, the rule required those institutions to retain, but not transmit to the government for law enforcement purposes, certain customer information. The elected Branches determined that the CTA is critical to the government's larger efforts to combat financial crime, and there is no basis for second-guessing that judgment. *See Hodel*, 452 U.S. at 283.

Nor can Plaintiffs advance their argument by asserting, without any supporting authority, that "[t]he CTA is not part of a larger regulatory scheme, and Congress did not identify any such regulatory scheme in passing it." Pls.' Mot. at 15. Congress in fact did so by making the CTA part of the AMLA.

[3] In another case challenging the constitutionality of the CTA, a district court has denied a motion for preliminary relief. Order, *Small Bus. Ass'n of Mich. v. Yellen*, No. 1:24-cv-00314 (Apr. 26, 2024).

Plaintiffs contend that "[a] vague goal of 'protecting commerce' or 'deterring money laundering' is not such a scheme." Pls.' Mot. at 15. But the Fifth Circuit has never required the incantation of certain words before finding that a statute survives a Commerce Clause challenge. *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638-41 (5th Cir. 2003) (upholding Endangered Species Act provision regulating Cave Species). Moreover, Congress plainly identified the regulatory scheme as one aimed at curbing illicit financial activity and incorporated it into the government's signature anti-money laundering statute. NDAA §§ 6001, 6002(2), 6401.[4]

2. The CTA is separately authorized by the Commerce Clause because it regulates economic activity with a substantial effect on interstate commerce. After all, the CTA applies to corporations and other entities legally authorized to conduct commercial transactions, and it excludes from its reach many non-profits and domestically owned entities that are no longer "engaged in active business" or "otherwise hold[ing] any kind or type of assets." 31 U.S.C. § 5336(a)(11)(xix), (xxiii).

Plaintiffs allege that the CTA impermissibly applies to corporate entities "irrespective of the presence or absence of any commercial activity." Pls.' Mot. at 15. This assertion misconstrues the CTA as having nothing to do with commercial activity, as if the act of incorporation bears no rational connection to such activity. But it is hardly speculative that entities that incur the trouble and expense of filing papers to obtain authority to conduct commercial transactions in their own name go on to engage in commercial activity. This point is illustrated by the reporting companies at issue here. Texas Top Cop Shop is a retail commercial enterprise, selling equipment, uniforms, and firearms. Decl. of Linda Schneider ¶¶ 4, 7, ECF No. 6-2 Data Comm for Business "provides technical support, information technology, and communications products and services to other small businesses and individuals." Decl. of Russell Straayer ¶ 4, ECF No. 6-3. Mustardseed operates a dairy farm and sells

[4] Congressional focus on this class of commercially organized entities to report information under the CTA is far afield of Plaintiffs' suggestions that validating the CTA here would mean any person who ever registered with the government for any reason could be regulated by Congress. Pls.' Mot. at 16.

"directly to customers[.]" Decl. of Tony Goulart ¶ 6. And even MSLP—which leaves unclear why it does not qualify for an exemption from the definition of "reporting company" as a tax-exempt political organization, *see* 31 U.S.C. § 5336(a)(11)(B)(xix)(II)—holds assets in its own name and transfers money derived from donations. Decl. of Glen Lewis ¶¶ 14-15, ECF No. 6-6.[5]

In light of the documented misuse of anonymous corporations to facilitate money laundering and similar activities, the CTA reasonably applies to a class of entities that can be used to conduct and conceal illicit transactions. *See* 31 U.S.C. § 5336(a)(11). The universe of entities subject to the CTA's reporting requirements—which excludes many trusts, political organizations, and non-profits, as well as many entities that are no longer "engaged in active business" or "otherwise hold[ing] any kind or type of assets," *id.* § 5336(a)(11)(B)(xix), (xxiii)—confirms that the statute is a constitutional, commercial regulation. The reporting requirements thus govern entities with both the power and the purpose of conducting the types of commercial transactions that concerned Congress.

Plaintiffs improperly focus on edge cases and possible exceptions. Pls.' Mot. at 15. The Supreme Court has "never required Congress to legislate with scientific exactitude." *Raich*, 545 U.S. at 17. Rather, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* That is especially so where, as here, the "'total incidence' of a practice"—the formation of entities that may engage in commercial activity while hiding the identities of their beneficial owners—"poses a threat to a national market[.]" *Raich*, 545 U.S. at 17; *see id.* at 23 ("[W]e have often reiterated that 'where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'"); *see also* 87 Fed. Reg. 59,501.

[5] For these and other reasons, Plaintiffs' "as-applied" challenge fails. Pls.' Mot. at 18 (incorrectly suggesting that Commerce Clause reaches only "entities with *significant* . . . commercial activities" or more than "very few assets[,]" and acknowledging Plaintiffs' economic activity) (emphasis added). Further, Plaintiffs appear to concede that the statute may be constitutional as applied to other entities, *see id.*, thus dooming their facial challenge.

Finally, Plaintiffs argue that the CTA improperly "regulates the act of registration under state law[.]" Pls.' Mot. at 15. But the CTA does not purport to override or preempt any state-law incorporation provisions. The reporting requirements apply to "corporation[s]" and "similar entit[ies]" authorized to do business in the United States, without regard to where, when, or how those businesses are incorporated. 31 U.S.C. § 5336(a)(11)(A). For example, reporting companies that were formed or registered before the effective date are subject to the reporting requirements. *See id.* § 5336(b)(1)(B). Requiring a decades-old business to report its ownership at the time the CTA takes effect bears no resemblance to regulating the act of incorporation.

The same understanding is confirmed by other provisions of the CTA. Businesses subject to the CTA must report changes in ownership on an ongoing basis, without regard to whether they take any new action relating to incorporation. *See id.* § 5336(b)(1)(D). And some businesses covered by the CTA never incorporate in the United States at all: a business incorporated in a foreign country is subject to the CTA if it is "registered to do business in the United States." *Id.* § 5336(a)(11)(A)(ii). Conversely, the reporting requirements do not extend to various categories of businesses—such as banks, insurers, and certain utilities—that are incorporated but are subject to other federal reporting requirements or are otherwise less likely to be used for financial crimes. *See id.* § 5336(a)(11)(B).[6]

In short, Congress prevented certain anonymous transactions by requiring entities with the capacity to engage in commerce to identify the natural persons behind the corporate form. Had Congress defined the relevant class of entities in terms of their capacity to engage in commercial transactions in their own name, presumably Plaintiffs would not argue this burdened state corporate organization. Congress's decision to identify those entities in a precise and administrable way, in terms of the incorporation or registration that is a prerequisite to engaging in such transactions, does not

[6] This fact refutes Plaintiffs' claim that the CTA "irrationally[] excluded business . . . such as money transmitters, public companies and large private businesses." Pls.' Mot. at 15.

transform the CTA into a regulation of incorporation or registration.

3. The CTA is thus a fundamental part of Congress's regulation of commerce and bears no resemblance to the enactments that the Supreme Court has held to exceed Congress's authority. *See* Pls.' Mot. at 14, 16. Unlike in *Lopez* or *Morrison*, "inference upon inference" are not needed to connect the CTA with commerce. *Lopez*, 514 U.S. at 561, 567; *Morrison*, 529 U.S. at 613. And unlike this case, neither *Lopez* nor *Morrison* "involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation[.]" *Raich*, 545 U.S. 1 at 39 (Scalia, J., concurring in the judgment). The reporting requirements also differ from the statutory provision at issue in *NFIB*, which "requir[ed] that individuals purchase health insurance." *NFIB*, 567 U.S. at 548 (op. of Roberts, C.J.). That requirement "primarily affects healthy, often young adults[,] who are less likely to need significant health care," and thus targets "a class whose commercial inactivity rather than activity is its defining feature." *Id.* at 556. Here, however, the CTA regulates a class of entities—primarily active, for-profit businesses—whose defining feature is their ability to conduct commercial transactions without disclosing their real parties in interest. For the same reason, Plaintiffs' reliance on *BST Holdings, L.L.C. v. OSHA*, is misplaced. *See* 17 F.4th 604, 617 (2021) (discussing vaccine mandate).

Unlike where Congress asserts unprecedented and "extraordinary" powers, *NFIB*, 567 U.S. at 560 (op. of Roberts, C.J.), "[r]egulation requiring the submission of information" is a "familiar category" of federal legislation, *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 437 (1938); *see*, *e.g.*, 26 U.S.C. § 6012 (tax returns); 31 U.S.C. § 5311 (bank reports about transactions); 52 U.S.C. § 30104 (political campaign contributions). And more generally, the CTA continues Congress's long and extensive history of regulating businesses. *E.g.*, 15 U.S.C. § 1 et seq. (Sherman Act); 29 U.S.C. § 201 et seq. (FLSA); 15 U.S.C. § 45 (FTCA); *see N. Am. Co. v. SEC*, 327 U.S. 686, 706 (1946). The CTA's reporting requirements are thus a conventional legislative response to enforcement challenges.

4. The CTA is further authorized by the Commerce Clause because it regulates the channels of, and entities in, interstate commerce. "Congress, of course, has undoubted power under the [C]ommerce [C]lause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 99 (1946); *see also N. Am. Co.*, 327 U.S. at 705-06. "Thus to the extent that corporate business is transacted through such channels, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare[,]" and "[i]t may prescribe appropriate regulations and determine the conditions under which that business may be pursued." *Am. Power & Light Co.*, 329 U.S. at 99-100. Entities constituting CTA reporting companies utilize the channels of interstate commerce, including telecommunications and electronic bank routing systems. NDAA §§ 6002, 6402; 166 Cong. Rec. at S7310 (statement of Sen. Brown); 166 Cong. Rec. at H6932 (statement of Rep. McHenry). As the foregoing cases explain, Congress's power to regulate interstate commerce extends beyond directly regulating such networks, and includes the power to regulate those entities who seek to misuse those channels to commit economic crimes. The CTA's reporting requirements are thus an authorized use of Congress's power.

5. The CTA is also necessary and proper for carrying into execution other powers. First, the CTA effectuates Congress's power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. "The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established." *Shultz*, 416 U.S. at 59. The "Founders intended the scope of the foreign commerce power to be . . . greater" than the interstate commerce power. *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 448 (1979). Congress expressly found that the CTA "is needed to . . . protect . . . foreign commerce." NDAA § 6402(5)(C). The legislative record also confirms that foreign actors are engaging in illicit activity by exploiting lax

beneficial ownership reporting requirements within the United States. *E.g.*, 166 Cong. Rec. at S7310 (statement of Sen. Brown); 166 Cong. Rec. at H6932 (statement of Rep. McHenry); *Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency: Hearing before the Senate Judiciary Comm.*, 115th Cong. (2018) (statement of Sen. Grassley).

The CTA additionally aids the enforcement of prohibitions designed to protect U.S. foreign policy and national security interests. "Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *see also Hernandez v. Mesa*, 589 U.S. 93, 103-04 (2020). The same is true of matters pertaining to national security, which "is the prerogative of the Congress and President." *Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017); *see also Ullmann v. United States*, 350 U.S. 422, 436 (1956). The already "strong presumption of constitutionality due to an Act of Congress," *United States v. Di Re*, 332 U.S. 581, 585 (1948), is heightened where a statute "implicates sensitive and weighty interests of national security and foreign affairs[,]" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010).

Congress found that "malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, . . . harming the national security interests of the United States and allies of the United States[.]" NDAA § 6402(3). And Congress concluded that collecting beneficial ownership information "is needed to . . . protect vital Unite[d] States national security interests"; "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 Executive Branch agrees with that assessment. *See*, *e.g.*, 87 Fed. Reg. at 59,498. The elected Branches' foreign affairs and national security powers, as amplified by the Necessary and Proper Clause, thus authorize the CTA.

Plaintiffs' argument to the contrary largely depends on the incorrect premise that the CTA

intrudes on states' authority to regulate corporate formation. Pls.' Mot. at 11-12. Moreover, the Necessary and Proper Clause empowers Congress to carry into execution not only the powers delineated in Article I, but also "all other Powers vested by this Constitution in the Government of the United States," including "Powers vested . . . in any Department or Officer." U.S. Const. art. I, § 8, cl. 18. That includes Congress's powers over foreign affairs and national security, *see United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936), as well as the President's powers to conduct "law enforcement[,]" gather "intelligence," prevent "terrorism," and safeguard "national security," NDAA § 6402(5)(D). Nor can Plaintiffs support their theory by citing *Bond v. United States*, 572 U.S. 844 (2014), Pls.' Mot. at 11-12, which is far afield. First, *Bond* involved statutory interpretation, and did not involve the constitutional question of Congress's broad foreign affairs and national security powers. *See id.* 572 U.S. at 856. Second, *Bond* involved a "purely local crime" (theft), described by the Supreme Court as an "unremarkable local offense." *See id.* at 848. Here, as Congress explained in enacting the AMLA, the CTA is necessary to prevent interstate and international money laundering, terrorism financing, and tax evasion.

Plaintiffs fare no better in complaining about the scope of the CTA. Insofar as it regulates a corporate entity "formed under the law of a foreign country," 31 U.S.C. § 5336(a)(11)(A)(ii), it is not "a purely domestic statute," Pls.' Mot. at 11, and in any event, Congress can regulate U.S. persons in furtherance of national security and foreign policy interests, *Worthy v. United States*, 328 F.2d 386, 393 (5th Cir. 1964) (recognizing congressional authority "to require passports and to impose reasonable restrictions upon foreign travel"). Nor can Plaintiffs rely on *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), cited in Pls.' Mot. at 12; that case not only involved a preemption claim (not present here), but also affirmed the importance of allowing the political branches to effectuate U.S. foreign policy. *Dunbar*, 615 F.3d at 579. Finally, Plaintiffs' "as-applied" challenge incorrectly assumes that Congress's exercise of its foreign affairs powers must be grounded in a "compelling international

interest[,]"*see* Pls.' Mot. at 18; rather, Congress may enact laws rationally related to this power and need not show that every entity subject to the law poses a threat to national security.

The reporting requirements are also a necessary and proper exercise of the government's authority to lay and collect taxes. U.S. Const. art. I, § 8, cl. 1. Pursuant to that authority, Congress may pass laws "in aid of a revenue purpose[,]" *see Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937), and to facilitate tax collection, *see Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). Indeed, Congress has given the IRS "broad power to require the submission of tax-related information that it believes helpful in assessing and collecting taxes." *CIC Servs., LLC v. IRS*, 593 U.S. 209, 212 (2021); *see Shultz*, 416 U.S. at 26. The reporting need not be "coupled with a concurrent tax" but can be "designed to aid the collection of tax [in the] future." *United States v. Matthews*, 438 F.2d 715, 717 (5th Cir. 1971). Here, Congress determined that the lack of beneficial ownership information allows criminals to obscure their income and assets and thus "facilitate[s] . . . serious tax fraud." NDAA § 6402(3). Congress found that the new reporting requirements would be "highly useful" in detecting tax fraud, 31 U.S.C. § 5336(a)(11)(xxiv)(ii), and improving "tax administration" generally, *id.* § 5336(c)(5)(B). The requirements are thus authorized by Congress's authority to take all steps necessary and proper to preserve the government's ability to lay and collect taxes. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003) (statute need not be "absolutely necessary" to regulatory regime); *Comstock*, 560 U.S. at 133-34 (sufficient if law is "convenient, or useful").

The extent of Plaintiffs' misunderstanding of controlling cases is exemplified by their claim that the Necessary and Proper Clause does not "provide an independent source of power" and instead "merely allows [the] execution of existing powers, and, at most, forgives borderline questions concerning 'individual applications of a concededly valid statutory scheme.'" Pls.' Mot. 17 (quoting *Raich*, 545 U.S. at 72). To the contrary, the Supreme Court has long recognized that the Clause vests Congress with broad authority to adopt measures to effectuate its powers. *See M'Culloch v. Maryland*,

17 U.S. (4 Wheat.) 316, 421 (1819). The Court has accordingly upheld many significant exercises of federal authority under the Necessary and Proper Clause, including the creation of a national bank, the establishment of the federal prison system, and the enactment of large portions of the federal penal code. With those benchmarks in mind, the limited reporting requirements at issue here represent a particularly appropriate exercise of Congressional authority under the Clause.

Nor can Plaintiffs contend that the CTA is an invalid exercise of the tax power because it permits the same information to also be used for other non-tax purposes. "[A] law does not stop being a valid tax measure just because it also serves some other goal." *United States v. Bolatete*, 977 F.3d 1022, 1032 (11th Cir. 2020); *see Sonzinsky*, 300 U.S. at 513-14. Here, ownership reporting requirements play a significant role in preventing tax evasion. That they further other important government objectives supports, rather than undermines, Congress's power to enact them. Plaintiffs' "as-applied" challenge likewise fails, Pls.' Mot. at 18, as individualized suspicion is not needed to require tax reporting, and Congress reasonably determined that existing tax laws were not adequate.[7]

C. The CTA's Disclosure Requirements Do Not Violate the First Amendment

Plaintiffs next assert that the CTA, on its face, unduly burdens "expressive associational right[s]." Pls.' Mot. at 19. Here, Plaintiffs appear to present an "overbreadth" First Amendment challenge, pursuant to which Plaintiffs must show that "a substantial number of [the CTA's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021).

But the limited ownership reporting requirements at issue here raise no First Amendment concern. As an initial matter, the CTA does not restrict the expression of any entity. Instead, it merely requires that certain businesses report their applicants and beneficial owners to FinCEN. The

[7] Count I of Plaintiffs' Complaint appears to assert a claim under the Tenth Amendment. Compl. ¶¶ 127-28. As Plaintiffs do not brief this claim in their motion, Defendants do not respond to it here. *Cf. Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003).

government routinely requires entities to report similar information. For example, taxpayers must disclose detailed information on their tax returns, *see* 26 U.S.C. § 6012; political campaigns must report contributions and expenditures, *see* 52 U.S.C. § 30104; and corporations involved in federal litigation must generally disclose their owners, *see*, *e.g.*, Fed. Reg. Civ. P. 7.1(a). These and other disclosure requirements have long been understood as constitutional, and Plaintiffs identify no basis for treating the CTA differently. That is fatal to their First Amendment claim.

Fifth Circuit case law also confirms that the CTA readily passes muster under the First Amendment. As the court recently reaffirmed, requirements that regulated entities disclose "factual and uncontroversial" information at most implicate a "deferential standard of review, under which the [disclosures] must be 'reasonably related to the State's interest' and not 'unjustified or unduly burdensome.'" *RJ Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 882 (5th Cir. 2024); *see also Chamber of Commerce of United States v. SEC*, 85 F.4th 760, 767 (5th Cir. 2023) (SEC's stock buy-back rationale disclosure requirement did not impermissibly compel speech). There can be no dispute that the disclosures at issue here, which involve basic information regarding an entity's beneficial owners, are "factual and uncontroversial." *RJ Reynolds*, 96 F.4th at 882. And Plaintiffs make no attempt to argue that the "deferential standard" applicable to factual and uncontroversial information would not be satisfied here. That is unsurprising given Congress's finding that the CTA is needed to advance law enforcement and national security interests of the highest order, *see* NDAA § 6402(5), and the CTA's tailored focus on those entities that can be used to perpetrate financial crimes.

The cases Plaintiffs cite only serve to underscore that their First Amendment claim is meritless. In *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 463 (1958), the Court invalidated a state statute that compelled an advocacy group to disclose its members "because NAACP members faced a risk of reprisals if their affiliation with the organization became known" and because the government "had demonstrated no offsetting interest 'sufficient to justify'" the disclosure. *Bonta*, 594 U.S. at 606-607

(summarizing *NAACP*). Here, the CTA does not require the disclosure of individuals who are merely associated with regulated entities through run-of-the-mill membership; rather, it only requires the disclosure of those "beneficial owners" who own or control regulated entities. 31 U.S.C. § 5336(a)(3)(A). Nor do Plaintiffs assert—let alone show—that they face any "risk of reprisal" as a result of the CTA's reporting requirements. *Bonta*, 594 U.S. at 606-07.

Plaintiffs offer no evidence that someone would hesitate to become an owner of a company because the fact of their ownership would become known to the federal government, and the government may later use that information for a limited set of legitimate purposes. Their speculative, conclusory assertions that their companies' advocacy "could be threatened if the members of each business were required to reveal their identities," Pls.' Mot. at 22, are insufficient, *see Citizens United v. FEC*, 558 U.S. 310, 370 (2010); *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *Ala. State Fed'n of Tchrs., AFL-CIO v. James*, 656 F.2d 193, 197 (5th Cir. 1981). Indeed, the record is to the contrary: Data Comm for Business has both disclosed the identity of its leadership and publicly advocated for the repeal of the CTA. Straayer Decl. ¶¶ 2, 11. So have Mustardseed and MSLP. Goulart Decl. ¶¶ 2, 14; Lewis Decl. ¶¶ 3, 10. Plaintiffs have not "made [any] showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462. There is no reason to credit Plaintiffs' conclusory assertion that confidentially reporting information in accordance with the CTA would chill expressive conduct.

Nor can Plaintiffs advance their argument by highlighting MSLP, "a political party[.]" Pls.' Mot. at 21. Again, MSLP's Executive Committee is publicly available online, https://perma.cc/UZY8-KV3X, undercutting the notion that disclosure to FinCEN would chill any of MSLP's advocacy work. And although MSLP states that (but does not explain why) it is "not currently regarded as a political organization pursuant to Section 527 of the Internal Revenue Code,"

Lewis Decl. ¶ 11; Pls.' Mot. at 22 (MSLP "could potentially qualify for federal exemption"), the CTA provides an exemption for such entities, 31 U.S.C. § 5336(a)(11)(B)(xix)(II), further detracting from Plaintiffs' ability to show that the CTA would likely chill protected speech or association.[8]

D. The CTA Does Not Violate the Fourth Amendment

Plaintiffs' Fourth Amendment claim is equally meritless. The Supreme Court has long-recognized that reporting requirements of the kind at issue here raise no Fourth Amendment concern. In *Shultz*, the Court upheld a statute requiring banks to report transactions over a specified dollar amount to the government. 416 U.S. at 67; *see* 31 U.S.C. § 5313. For each covered transaction, a bank must disclose the "name," "address," and "social security or taxpayer identification number" of "the individual presenting [the] transaction." *See e.g.*, 31 C.F.R. § 1010.312. Congress explained that this information would be "highly useful" in "criminal, tax, or regulatory investigations." 31 U.S.C. § 5311(1). Because the relevant "information is sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type," the Court concluded that the reporting requirements were reasonable and therefore sustained them under the Fourth Amendment. *Shultz*, 416 U.S. at 67. That conclusion reflects the well-established principle that where the government does not seek to make "non-consensual entries into areas not open to the public," and instead merely requires regulated entities to divulge certain records, the Fourth Amendment is more readily satisfied. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984).

Consistent with these precedents, Congress has routinely enacted reporting requirements. For example, federal law requires taxpayers to file tax returns and various entities to file tax information returns, 26 U.S.C. §§ 6012, 6031-60; employers to collect and make available information about new

[8] Indeed, given all of the activities it says it engages in (soliciting and accepting donations, and providing donations to political candidates, Lewis Decl., ¶¶ 13, 14), it is unclear why the MSLP is not registered as a political organization with the IRS. Its decision not to do so, when the choice is available to it, should not be held against FinCEN.

employees' eligibility to work, *see* 8 U.S.C. § 1324a; and political campaigns to report contributions and expenditures, *see* 52 U.S.C. § 30104. As the Supreme Court has explained, "reporting requirements are by no means *per se* violations of the Fourth Amendment," and "a contrary holding might well fly in the face of the settled . . . history of self-assessment of individual and corporate income taxes in the United States."[9] *Shultz*, 416 U.S. at 59-60.

The CTA falls comfortably within the category of reasonable reporting requirements that have long been understood to be constitutional. As with the statute at issue in *Shultz*, the CTA directs the disclosure of information that Congress identified as "highly useful" to combatting serious crimes. *See* NDAA § 6402(8)(C); 31 U.S.C. § 5311(1). And with respect to the CTA in particular, Congress found that corporate ownership reporting requirements were "needed" to combat "the financing of terrorism" and to "protect vital United States national security interests." NDAA § 6402(5)(B), (D). The CTA therefore serves government interests of the highest order.

Any asserted privacy interest would in any event be minimized by detailed statutory safeguards that Plaintiffs do not address. When FinCEN receives beneficial ownership information, it can only disclose that information to law enforcement and other entities in specified circumstances that sometimes require court authorization. *See* 31 U.S.C. § 5336(c)(2). And entities that receive ownership information from FinCEN must restrict access, implement security measures, and comply with many similar protocols. *See id.* § 5336(c)(3). Any individual who violates those protocols is subject to criminal and civil penalties. *See id.* § 5336(c)(4). Moreover, Congress exempted 23 types of entities from the beneficial ownership reporting requirements. *See supra* at 5. Thus, Plaintiffs are simply

[9] Tellingly, Declarant Russell Straayer is publicly identified on Illinois's Business Entity Search system in connection with Data Comm for Business. And Data Comm for Business concedes that the information sought by the beneficial owner reporting requirement "is duplicative of information available in personal and corporate tax returns, FinCEN from Form 104 reporting, [and] publicly available incorporation information." ECF No. 6-3 at p.8. Plaintiffs thus cannot demonstrate either a subjective or objective expectation of privacy in this information.

incorrect to say that the "CTA provides no limitations." Pls.' Mot. at 27.

Plaintiffs make no attempt to reconcile their Fourth Amendment argument with *Shultz* or with the many reporting requirements that have long been understood as constitutional. Instead, Plaintiffs insist that there exists an ironclad requirement for a warrant or "opportunity to obtain pre-compliance review before a neutral decisionmaker" prior to disclosure. *See* Pls' Mot. at 26. This type of requirement is out of step with the Supreme Court's admonition that "'[t]he touchstone of the Fourth Amendment is reasonableness." *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004) (en banc). Under this theory, vast swathes of state and federal law would be subject to Fourth Amendment challenges, and *Shultz* itself would be wrongly decided. That is fatal to Plaintiffs' argument. But rather than grapple with cases addressing reporting requirements, Plaintiffs chiefly rely (Pls.' Mot. 25-27) on *City of Los Angeles v. Patel*, which addressed an ordinance that permitted police officers to enter hotels and inspect their guest registers at any time of the day or night, as often as they liked, 576 U.S. 409, 421 (2015). This case casts no doubt on the constitutionality of a statute that requires certain businesses to self-report their beneficial owners.

Alternatively, even as to cases that establish a warrant requirement in some contexts, the CTA falls within the "special needs" exception to such a requirement. *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 619 (1989). The CTA addresses a need "beyond the normal need for law enforcement," *id.*—that is, the advancement of U.S. national security and foreign policy interests, *see Klayman v. Obama*, 805 F.3d 1148, 1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). The compelling need to address threats to "U.S. national security and foreign policy interests," 87 Fed. Reg. at 59,500, outweighs any privacy interest in the limited disclosures required by the CTA. *Cf. United States v. Gordon*, 2016 WL 11668976, at *3 (D. Mass. Aug. 30, 2016).[10]

[10] Insofar as Plaintiffs' APA claim simply recasts their constitutional challenges, Pls.' Mot. at 28, it fails for the reasons discussed above. Defendants reserve the right to argue that the APA challenge fails

III. The Balance of Equities and the Public Interest Disfavor a Preliminary Injunction

The remaining two preliminary injunction factors—the balance of the equities and the public interest—"merge when the Government is the opposing party" and weigh sharply in Defendants' favor. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). As an initial matter, because Plaintiffs cannot establish the first two factors necessary to obtain an injunction, "it is clear they cannot make the corresponding strong showings [on the second two factors] required to tip the balance in their favor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009); *see Mayo Found. for Med. Educ. & Rsch. v. BP Am. Prod. Co.*, 447 F. Supp. 3d 522, 535 (N.D. Tex. 2020).

But even if Plaintiffs could satisfy one or both of the first two factors, the remaining factors tip decisively in Defendants' favor. The speculative risk of harm to Plaintiffs' asserted interests must be weighed against the obstruction of legitimate government functions that could result if the Court entered Plaintiffs' proposed injunction. *See Winter*, 555 U.S. at 24; *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 459 (5th Cir. 2016). Indeed, "[a]ny time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). An injunction would interfere with Congress's judgment about how best to combat "money laundering," "the financing of terrorism," and "serious tax fraud," and its ability to do so. NDAA § 6402(3). These compelling interests weigh heavily against granting an injunction.

IV. Plaintiffs' Proposed Injunction Is Improper

Even if the Court disagrees with Defendants' arguments, any preliminary relief granted must be no broader than necessary to remedy any demonstrated irreparable harms of the Plaintiffs in this case. *See Gill v. Whitford*, 585 U.S. 48, 73 (2018); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765

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on other grounds, including that the rule constitutes agency action committed to agency discretion by law, 5 U.S.C. § 701(a), or involves a foreign affairs function of the United States, *id.* § 553(a)(1).

(1994) (citation omitted). The Court should, therefore, decline Plaintiffs' invitation to enjoin the CTA's reporting requirements across the board.[11] "Both the Fifth Circuit and the Supreme Court have suggested that nationwide injunctions are, at best, reserved for extraordinary circumstances." *Second Amend. Found. v. ATF*, No. 3:21-cv-0116, 2023 WL 4304760, at *3 (N.D. Tex. June 30, 2023)). "Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018). This concern is particularly acute where, as here, the Eleventh Circuit is simultaneously considering the legality of the same challenged provisions. *See Nat'l Small Bus. United, et al. v. U.S. Dept. of the Treasury, et al.*, No. 24-10736 (11th Cir.). This Court should therefore follow the Fifth Circuit's mandate "to avoid rulings which may trench upon the authority of sister courts," *W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 729 (5th Cir. 1985), and decline to issue the broad relief that Plaintiffs request.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

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[11] Plaintiffs first state that the "Reporting Rule Must Be Vacated As Well," but conclude by saying that "this Court should also enjoin the rule." Pls.' Mot. at 28. Regardless of how Plaintiffs seek to set aside the rule, any relief afforded by the Court should be limited in accordance with the APA and equitable principles, including that the "relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir.) (en banc) (plurality opinion) (concluding without contradiction from any other member of the Court that the district court could consider on remand "a more limited remedy" than universal vacatur, and instructing the district court to "determine what remedy . . . is appropriate to effectuate" the judgment), *cert. granted*, 144 S. Ct. 374 (2023); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (declining to enter vacatur in favor of remand). Although Defendants recognize that the Fifth Circuit has previously accepted the argument that 5 U.S.C. § 706(2) authorizes vacatur of an agency action, *see Data Mktg. P'ship LP v. U.S. Dep't of Labor*, 45 F.4th 846, 851 (5th Cir. 2022), Defendants respectfully contend that it does not. Section 706(2) is merely a rule of decision directing the reviewing court to disregard unlawful agency action in resolving the case before it; it does not dictate any particular remedy. *See* Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev 417, 451-52 (2017); *see id.* at 438, n. 121. The Court should thus not issue any preliminary relief that extends beyond Plaintiffs.

Dated: June 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 26, 2024, I electronically submitted this document to the clerk of court of the U.S. District Court for the Eastern District of Texas using the court's electronic case filing system. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/Stuart J. Robinson
STUART J. ROBINSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

TEXAS TOP COP SHOP, INC., ET AL	DOCKET 4:24-CV-478
VS.	OCTOBER 9, 2024
ATTORNEY GENERAL MERRICK GARLAND, ET AL	9:00 A.M. SHERMAN, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 67

REPORTER'S TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE AMOS L. MAZZANT, III,
UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFFS:	CALEB KRUCKENBERG CHRISTIAN CLASE THE CENTER FOR INDIVIDUAL RIGHTS 1100 CONNECTICUT AVENUE NW, SUITE 625 WASHINGTON, DC 20036
FOR THE DEFENDANTS:	FAITH LOWRY DEPARTMENT OF JUSTICE - CIVIL 1100 L STREET WASHINGTON, DC 20005
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PROCEEDINGS RECORDED USING MECHANICAL STENOGRAPHY;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

(Open court, all parties present.)

THE COURT: Good morning. Please be seated.

We're here in case 4:24-cv-478, *Texas Top Cop Shop, et al versus Garland, et al.*

And for the Plaintiffs?

MR. KRUCKENBERG: Good morning, your Honor. Caleb Kruckenberg for the Plaintiffs. I'm joined by my colleague, Christian Clase. And I'll just note that I'm joined by Russell Straayer, who's one of the named Plaintiffs, and he's at the table beside me.

THE COURT: Okay. Very good.

And for the Defense?

MS. LOWRY: Good morning, your Honor. Faith Lowry for the Defendants.

THE COURT: And where did you -- where did y'all come from?

MS. LOWRY: I am now down in San Antonio, so it was a short flight up to Love.

THE COURT: Not too bad.

MR. KRUCKENBERG: And, your Honor, I'm coming from Washington, DC.

MR. CLASE: I'm coming from Nashville, Tennessee.

THE COURT: Okay. Well, welcome to Sherman. I assume it's your first time here.

MS. LOWRY: It is. It's a beautiful courthouse.

Happy to be here.

THE COURT: Yeah. It's the oldest courthouse being used in the Fifth Circuit, so -- opened in 1907.

Well, here's my thoughts, is I have a number of questions, and so we'll start with the Plaintiffs, if you want to take the podium. And I thought I'd ask my questions that I have, and then you can say whatever else you want to say, so -- and I'll do that for both sides.

MR. KRUCKENBERG: Yes, your Honor.

THE COURT: So are you doing slides or something, or no?

MR. KRUCKENBERG: No, your Honor. I just have my notes on my laptop.

THE COURT: No, that's fine.

So let me start off and ask. You don't explicitly say you're asking for a nationwide injunction and -- but the Government, I think, characterizes that's what you're asking. And so are you asking for a nationwide injunction in terms of what the relief is, or is it just for the parties before the Court?

MR. KRUCKENBERG: Your Honor, we are asking -- I think there are sort of two ways to look at it, but we're really only asking for preliminary relief for the parties. And when we say that, we mean the named Plaintiffs and also the associational members of NFIB.

There is -- you know, obviously, if we're looking at eventual relief or ultimate relief, there are issues about the Administrative Procedure Act and *vacatur* and things like that.

But I think for simplicity's sake, we can just say for the preliminary injunction the only request we're making is with respect to the Plaintiffs.

THE COURT: Okay. I just wanted to clear it up. I wasn't sure, so --

MR. KRUCKENBERG: Yes.

THE COURT: Okay. And then, of course, we've had two District Judges, you know, address this in the country so far. Why do you think that the *Firestone-Yellen* case is wrong, and does that change anything in your argument, what -- what's happened there?

MR. KRUCKENBERG: Yes, your Honor. So there's -- in my mind, there's a few issues with the District of Oregon case, the *Firestone* case. And I think probably the most obvious issue is that, you know, A, there are different claims at issue. And I think one of the distinguishing factors there is that the District Court said that there was no showing of injury.

And while that may have been acceptable under Ninth Circuit precedent, I don't think that kind of holding could possibly be valid here under binding Fifth Circuit

precedent.

One of the things the District Court in *Firestone* said was -- and this is on page 26 of the opinion -- quote, Plaintiffs offer no evidence, only speculation of injury.

And there the Court was talking about compliance costs and potential constitutional injuries, and I don't think there's any kind of dispute here that the Plaintiffs must comply with the Corporate Transparency Act, the Plaintiffs here.

There are compliance costs associated. Those have been calculated by FinCEN. And Fifth Circuit is very clear that compliance costs on administrative regulation, that can constitute irreparable injury if the underlying regulation is unlawful. So I don't think that issue is in play here in the same way.

On the merits, I think one of the critical errors -- just talking about enumerated powers and the First Amendment, the Court -- with respect to the First Amendment, the Court didn't cite to the *Americans for Prosperity* case at all.

And one of the issues there was that the District Court in *Firestone* concluded that, again, there was no evidence of chill or that anyone had refrained from expressive conduct because of the fear of the CTA, but that was dealt with in the *AFP* decision. The Court said we

don't have to have evidence like that in exactly this concept -- context.

So I think that was an error that the District Court made in *Firestone*.

And on the commerce issue, I think the Court there essentially made the mistake that the United States has encouraged this Court to make, and that is to equate registry of a business entity with the act of commerce. And those are not the same thing, and I think the proof is pretty obvious. A corporate entity can be forced to register even if they have no economic activity, even if they have no assets, even if they have no activities whatsoever.

And to say that that is commerce *per se* I think is in error. Those are just not the same things. They're -- instead, they're -- I think it is up to the United States to demonstrate a clear connection, which is absent.

THE COURT: And I have a bunch of these general questions, and then we'll go into each of the topics.

But why exactly is the statute unconstitutional as applied to MSLP, which is a political organization that is not exempt under the CTA because it's not considered a political organization under the Tax Code?

MR. KRUCKENBERG: Well, I think that is a clear example of the inartful drafting of the Corporate

Transparency Act, and that's why there's a First-Amendment problem.

Yes, some corporations will not have these kinds of interests. But clearly, a political party, like MSLP, can and does, and they still have to register. And it's not because of some realistic concern that MSLP is uniquely involved in money-laundering activity but just, by virtue of sort of the quirk in the IRS regulations, they have to register. They don't have an active exemption under 501(c). They're not actively recognized as a political organization.

But that doesn't mean they're a commercial entity. That just means that they don't have this distinct tax status and they have to register here. And if they have to register, I don't think there is any doubt under *AFP versus Becerra* that they have to disclose information that has First-Amendment protections.

So the question is: Is the justification given by the Government under the Corporate Transparency Act sufficient to force a political party like MSLP to disclose their donors, their control persons, and put it on a federal registry?

And, I mean, these are the same interests at issue in *AFP*. And if there the integrity of political donations was not enough, I -- I fail to see how this very abstract

sense of money laundering in general is sufficient to say we can invade this interest of a political organization.

But I also think even if we're talking about the other Plaintiffs, the ones that are not directly involved in political advocacy, they also have First-Amendment interests that I don't think we can discount or ignore, because -- I mean, one of the things that we saw is that several of the Plaintiffs engaged in direct corporate advocacy.

And we actually have an issue where not everyone associated with those corporate entities wants to associate with that advocacy, as is their right, and -- and one of DataComm's beneficial owners says, "I don't want to be associated with that. I don't want to be disclosed for fear of being associated with your political message." And that is exactly the kind of First-Amendment interest we're normally talking about in this context.

THE COURT: Now, your brief suggests that the CTA is unconstitutional as applied because the five Plaintiff companies don't have substantial assets and don't engage in interstate commerce.

But the Government responded that nothing in the CTA narrows the application to the companies that have substantial ties to interstate commerce. What would be your response to that?

MR. KRUCKENBERG: That's essentially saying some companies do engage in commerce; therefore, we can regulate anything as long as some participants eventually engage in business.

And essentially what they're saying is, well, lots of businesses are in business. It's good enough. But that -- I think the Supreme Court has been very clear with us. You have to have some principle.

And the concern here is there is no limiting principle on what is the difference between a business entity that has no interstate activities, no economic activities, and interstate commerce in general.

And I think when we're considering the analysis, it's very helpful to look at the case out of Alabama, and I think the District Court made a very cogent observation there. If we just look at the statute, the triggering event for federal jurisdiction is the filing of a document with a state registrar. That's it. That is the triggering event.

And the Government's entire theory is lots of people who file documents with state registrars eventually end up in interstate commerce. But that's the same kind of reasoning that everybody has to buy health insurance as a matter of interstate commerce because they eventually will be participants in the market. And the Court in *NFIB* said

that that is not sufficient.

THE COURT: Why isn't MSLP and Mustardseed basically like the farmer in the *Wickard* case or the marijuana growers in *Raich* -- I'm not sure I'm pronouncing that right -- but *Gonzales versus Raich*.

MR. KRUCKENBERG: Right.

And the distinction there is the Court in *Raich* said we have to distinguish between economic classes of activity and noneconomic classes of activity. And if we have a comprehensive regulatory regime over economic classes of activity, then we can reach these edge cases, these individual Plaintiffs or entities that don't have interstate activity.

In the illicit marijuana market, that makes a lot of sense. There is a federal prohibition on marijuana. Growing marijuana for personal use affects that commercial market. That makes sense.

Here, there is no comprehensive federal regulatory regime for corporate registry. Quite the opposite. There has never been one in the nation's history.

There is no federal regulatory regime that is in existence that depends on capturing in these kinds of edge cases. Instead, we are creating a brand-new one that's not yet taken effect. And so the whole idea in *Raich* was if we can't capture this type of activity, the existing laws

won't work.

This is a new regime that it claims to solve a problem that goes unaddressed and says to be able to work, we have to bring in everything, even if it's economic or not. And that's just not consistent, I think, with what the Court was saying in *Gonzales and Raich*.

THE COURT: Now, you agree that the fact the Supreme Court has acknowledged that corporate formation is generally an issue left to the states doesn't foreclose the possibility of Congress regulating what companies do. You agree with that, don't you?

MR. KRUCKENBERG: Absolutely.

THE COURT: And so why is this not just an extension of that?

MR. KRUCKENBERG: Well, I think the Court has been very clear in the corporate sphere throughout its history with what the dividing line is and some of the court's earlier cases, particularly in the 1930s and '40s where they're dealing with the first efforts to nationalize corporate regulation with the Securities Exchange Act. And the Court said, look, what makes this different, what makes this a federal issue is the interstate aspect of corporate transactions.

And it's not an accident that the Securities and Exchange Act -- each offense under the Securities and

Exchange Act has an element of interstate commerce that must be proven by the Securities and Exchange Commission. Federal jurisdiction is -- I mean, we're used to this. It's common. Wire fraud, money-laundering statutes, all of the substantive offenses have an interstate element. And suddenly the federal government has said we don't need that anymore for the Corporate Transparency Act.

And as the court recognized in Alabama, that's the problem. It's such a simple fix for the Government. They could say as long as these entities are engaged in interstate commerce.

That's what they should have done and we could solve that problem very easily, but they didn't. And as we've seen with the Plaintiffs, because they didn't, they claim that it attaches to everybody, no matter what, and there is no limit on the federal jurisdiction.

THE COURT: So you believe that would be the most tenable ground for Congress to have done that, is what you just indicated?

MR. KRUCKENBERG: I think that would have been a very simple legal solution. I think the Court has been very clear that that -- that's essentially all Congress has to do. But it's very important that they didn't and it's, I think, very telling that they didn't. And so we can maybe envision a constitutional statute, but it doesn't

save the CTA.

THE COURT: Now, why is there insufficient nexus for Congress to legislate pursuant to the Necessary and Proper Clause? Because doesn't the law -- the law imposes a very low bar for Congress to use the Necessary and Proper Clause. Why isn't that met here?

MR. KRUCKENBERG: So, I think this is where we're seeing the slippage of language. And what I mean by that is in the United States' briefing they use phrases like "this information is useful," "this information would benefit the federal government."

Sure. That's not necessary and proper, and that is a distinct kind of an idea.

And the Supreme Court in *NFIB*, when they were talking about both the Commerce Clause and the Necessary and Proper Clause -- and they rejected both justifications for the Affordable Care Act -- the Court was very clear in saying that there is a limit. And it goes to the class of activity, economic/noneconomic.

And it was insufficient in that case for the Government to say everybody will eventually participate in the insurance market. That is close enough to commercial activity that under the Necessary and Proper Clause, we can get there.

And I think a similar kind of argument is being

made here. Yes, these entities are not engaged in business. Yes, not every entity that has to register is commercial. But some of them are, and so that gets us close enough.

And that is not the appropriate constitutional analysis. You have to look at what the law actually does and whether or not that is a direct connection.

THE COURT: So let me turn -- I have some questions regarding -- more specific on the Commerce Clause.

In listening to the *Yellen* -- the oral argument before the Eleventh Circuit, the term that kept coming up multiple times is the comment "There's nothing more economic than companies."

So -- that seems true, so why doesn't the Commerce Clause not authorize passage of the CTA based on some of the arguments made there at the Eleventh Circuit?

MR. KRUCKENBERG: I dispute the premise. I don't think there's anything economic about a company, and I think that is a -- that's an erroneous kind of a shorthand reasoning. That's where we're --

THE COURT: So, is that because it doesn't deal -- in your mind, it doesn't deal with companies or the act of registration is --

MR. KRUCKENBERG: Either one. But certainly not

the act of registration, because, again, there doesn't even have to be a company that does anything. It just has to register before the CTA is implicated.

But as we've seen with MSLP, that is a company, that is a business entity or a corporate entity. It's not a business, though. It doesn't engage in commerce, and it's not a for-profit venture. It is a political organization that spins on political matters. That's it.

And there are lots of instances. There are -- every nonprofit is a company. There are so many LLPs, LLCs, corporations, all these entities. They exist for lots of different reasons.

Business is a common one, but it's not the only one. And it is not true to say that every business or every entity -- every corporate entity is engaged in business or will one day engage in business. It's demonstrably false.

THE COURT: So I guess I'm trying to understand the idea of CTA. Does it regulate, you know, entity formation at all under state law, and does it subtract or add anything to the registration process in terms of the CTA?

I understand this is typically a state function, but in terms of Congress trying to pass laws that involve interstate commerce, why is that not the case? Because --

I guess could it be more accurate to say the CTA is regulating companies because they're the ones who engage in interstate commerce, financial crimes, which has been what the goal of the CTA was to deal with?

MR. KRUCKENBERG: Well, existing rules capture the problem that the Government is claiming they need to get to because -- I mean, think about money laundering. It's clearly federally illegal already, and there's an interstate element to that.

So the idea that we need the CTA to get at something, well, what is it that you need to get at? I think that's a suggestion. They say we need to get to something that's less interstate.

But if I'm looking at just as a function of law what this does, probably the easiest example is MSLP. There are Mississippi statutes -- and we've cited in the Complaint and in the briefing -- that say things like you cannot force a political entity like this to disclose their members. There's -- there are state protections built in as a part of the registration process for a business entity like MSLP.

This preempts those, or claims to. And this says notwithstanding those protections, notwithstanding that anonymity that you're normally guaranteed under state law, we're making you tell us anyway and register with FinCEN.

This is a new activity that is preempting contrary state law in a number of jurisdictions.

And so that, I think, is really where the concern comes up, because it's changing the entire game. It's changing the way that corporations have identified -- or have registered, have disclosed information to the public, and this is completely new.

THE COURT: Well, isn't the potential -- or isn't that the potential to engage in kind of preexisting illegal market sufficient under the *Gonzales/Raich* case?

MR. KRUCKENBERG: Sure. And that's why -- that's why money laundering can be prosecuted.

But, again, we're sort of -- if I can think of an analogy, it's almost like the Government is saying lots of cars use roads; so, therefore, anybody who uses a road is a car.

And that is not -- that's not a logically consistent kind of an argument, but that's what they're saying. They're saying, well, lots of businesses engage in commerce and some businesses engage in money laundering; therefore, we must regulate every entity. And that's clearly just not the case.

And I think also what proves the lie in the reasoning is the list of exemptions. So if this is really about money laundering -- I mean, we can debate why or why

not they think the existing remedies are inadequate, but they also exempted most of the likely culprits from the CTA.

And, yes, some are registered with the SEC or other regulators, but some are not. I mean, an entity that has $5 million in revenue and 20 employees is exempt just because. And I don't think that is logically consistent with their idea of it's really about money laundering.

THE COURT: Now, what's your response -- you know, the Government takes position of using channels of interstate commerce and that the reporting companies use the phones, Internet, other things that are in commerce. What's your response to that in terms of why it's not authorized by the CTA because they use these channels of commerce?

MR. KRUCKENBERG: Well, your Honor, if that was the case, then we have officially crossed the line that the limits on federal jurisdiction are truly meaningless. I doubt there's a human being alive who has not --

THE COURT: So, in your view, under that theory every -- there would be nothing that couldn't be regulated, then?

MR. KRUCKENBERG: Every person in the United States has used the instrumentalities or channels of interstate commerce at some point in their life. I used a

number of them this morning.

If that is sufficient, just because a business entity will some day predictably use the channels of interstate commerce -- because, again, it's not an element of the registration statute -- then there is absolutely no limit.

I'll also point out that the United States has conceded in other litigation, the Alabama case particularly, that the filing of a document, the triggering event for federal jurisdiction -- they've said, well, okay, we concede that that is not the use of the channels of interstate commerce sufficient to justify the act, which I think is a wise concession because that comes from the *NFIB* case, again, which is you can't tell people they have to do something that then triggers a federal obligation.

THE COURT: Now, this case is different than the *Morrison* case, is it not? That -- and regulating necessary commercial potential conduct is not a noneconomic activity like gender-motivated crimes that was in the *Morrison* case. Do you agree with that?

MR. KRUCKENBERG: Yes, your Honor. And I think if we're -- and *Morrison* and *Lopez*, I think, very clearly present the other side of this, that there is a line where we look at the actual statute and the essential purpose of the statute.

And, yes, gender-motivated crime, that is not commercial activity, the same as incorporating a nonprofit political party is not commercial activity.

THE COURT: And do you acknowledge that a jurisdictional hook is not necessary for Congress to legislate pursuant to the Commerce Clause?

MR. KRUCKENBERG: I do. It's not always necessary.

But, again, I think that's where we're in the very limited *Raich versus Gonzales* universe where we have a legitimate federal regulatory framework that does have a jurisdictional hook.

And what the Court says is in those cases we can still encompass certain local activity within the framework. But that is, I think, very different than saying we never have to have a jurisdictional hook and we can regulate wholly local activity anyway. Those are -- I think those are very sort of subtly different ideas. And that, frankly, is what the Government is trying to raise here, they're trying to defend the CTA based on.

THE COURT: So what is the basis for your conclusion that CTA is not part of an integrated statutory scheme?

MR. KRUCKENBERG: So the question is what statutory scheme and what comprehensive regulatory

framework?

So if we're saying, well, the CTA, which does not yet exist, that's -- I mean, we're assuming our conclusion, right?

And the way I read *Raich* is what the Court is really talking about is we have to have a legitimate regulatory framework and the local coverage has to be, quote, essential to that larger framework.

THE COURT: But wouldn't financial crimes -- they would be economic activities, wouldn't they?

MR. KRUCKENBERG: So you -- yes, you can always -- you can always take it out to this level of abstraction where we're saying, well, it's financial crimes in general. But that's not --

THE COURT: But Congress already has preexisting regulatory schemes in place to target that, right?

MR. KRUCKENBERG: Sure. And those are constitutional because they're different. Because, like I said, if we look at money laundering, there is a jurisdictional element. If there are tax-reporting obligations, those typically arise from financial institutions, not -- under a completely different regulatory regime.

And this -- I mean, the framers of --

THE COURT: Isn't that one of the goals of the

CTA, is -- a scheme that's already there, they're still trying to ferret out any kind of nefarious motive by other companies, and isn't that one of the goals?

MR. KRUCKENBERG: Yes, and that's the problem.

So we have an existing money-laundering reporting framework, the Bank Secrecy Act, that entire framework, which applies almost exclusively to outward-facing monetary transactions or interstate activities. There is a lot of reporting obligations there. That's the existing framework.

What Congress said is we don't think that's good enough because we don't like the existing framework, so we're going to come up with a new framework, a new registry obligation to do something different. It's not essential to the existing scheme; it's a new scheme.

And if we're reading *Raich* to say we can do anything federally as long as it serves a useful function, then, again, we've taken whatever limits exist and we've destroyed them. I mean, there's no limiting principle to say, like, well, yeah, of course, the Government thinks this is useful. That's why they passed it. Doesn't mean it's constitutional.

THE COURT: And Congress doesn't actually have to identify the regulatory scheme in the CTA, does it?

MR. KRUCKENBERG: I don't think they do. But,

again, we have to look at what is it.

And if we look in context and we look particularly at what the CTA says and it claims to be amending part of the Bank Secrecy Act, then I think it best -- if it's part of the regulatory scheme, we have to place it within the Bank Secrecy Act.

And then we have to say does this -- is this an essential component of the success of the existing Bank Secrecy Act, or is this something different? And I think everything indicates this is something very different. Nothing like this has ever been passed before.

THE COURT: And to make sure I understand, what is the -- what is -- in your view, what does the CTA regulate?

MR. KRUCKENBERG: The CTA regulates any person once they file a state incorporation document. And I say "incorporation," but partnership agreement, whatever.

As soon as they register with a state entity, the CTA comes in and it says you must create and produce records and file them with us on our dates and if you do not, there is a presumption of criminal liability.

So every Plaintiff here has been directed to comply before the end of the year. If they don't file anything, it is a federal felony. They have been informed of their obligation, and they decided not to.

And the only triggering event, the only thing that

they have done to incur that obligation is registering -- is preexisting registration with their state entities. All the entities filed their registration statements before the CTA even took effect. It's not like they have even done anything since the act was passed. Instead, they have just been registered under state law.

THE COURT: So to make sure -- I'm still trying to make sure I understand. So, in your mind, the CTA just regulates -- it's -- you don't view it as regulating registration?

MR. KRUCKENBERG: No. And I think if we look at the specific requirements -- so registration under state law -- and let me just use an example from one of the clients.

If I think of Texas Top Cop Shop, they registered in Texas as a corporation. They had to identify a registered representative. That's it. They don't have to identify the officers, the directors, the shareholders, anything like that.

Now, because of the CTA, they have to identify the beneficial owners. That, yes, includes the actual owner, the 25 percent or more. That includes people with substantial control, formally or informally. That includes a lot of other entities that do not have to be disclosed, and they have to create those records.

They have to chase down the ownership interests, the control -- the informal control interests, and then they have to identify those and create those records, file those records, have photocopies of identification of each individual identified, have their current address, their date of birth. And they have to file it all with FinCEN before the end of the year, and every Plaintiff has to do that.

And according to FinCEN, at least 32 million other small businesses nationwide, existing ones, have to do all of those activities before the end of the year and then probably 5 million new ones each additional year thereafter.

So this is not just registry; this is an ongoing reporting requirement. You have an ongoing obligation to update information that changes.

And this is very invasive information. I mean, this is your photocopy of your driver's license, your birthday.

THE COURT: Now switching gears. Aside from *Yellen*, what is your best case for the proposition that Congress cannot invoke the Necessary and Proper Clause to assist in collecting taxes?

MR. KRUCKENBERG: Your Honor, that, again, is *NFIB versus Sebelius*. And I think the Court there -- when we

talked about the taxing and spending power, laying and assessing taxes, we have to create revenue. The Court was clear. So we have to have some kind of revenue generation.

THE COURT: But isn't that case very different? I mean, that dealt with a case of requiring someone to purchase health care, which is very different than requiring disclosure, who's in charge of a company or owns a company.

MR. KRUCKENBERG: Right.

So the tax premise that the Court rejected in *NFIB* was we can buy -- we can make people buy health care or impose a tax penalty upon them if they choose not to. That's the mechanism, right?

And so the Government said there, well, we would be raising revenue by taxing them for not participating. That's a taxing power.

The Court rejected it, and they said that is too attenuated a revenue-generating measure under the taxing power and the Necessary and Proper Clause. It's just too attenuated from revenue generation.

Here, where's the revenue coming from? It's not from the CTA; it's through this theoretical enforcement. They are saying once we have all this information about all these companies, we might be able to catch cheating and that's maybe gonna raise revenue.

That's -- I mean, in the Affordable Care Act situation, we at least knew who was gonna have to pay taxes and we knew what they were going to have to pay. And here, it's just this theoretical possibility, well, we're certainly going to catch something in our massive database of information just to, sort of, hunt around for the hope of crime. I mean, that's very different, and I think that's a very concerning kind of a position to take from the Government. I mean, that's why we have the Fourth-Amendment argument.

THE COURT: Switching gears again. The CTA and the Government reference that the U.S. is out of step with international standards for corporate disclosures. Are you aware of what that standard is?

MR. KRUCKENBERG: Your Honor, there -- this has been a debate for a long time. And as a matter of state law and as a matter of state policy, every state has taken the view that anonymity in corporate affairs or anonymity in corporate ownership is a worthwhile interest. And there are lots of legitimate business reasons for anonymity and also protected interests, like First-Amendment associations. The states have all recognized that.

Some federal policy makers disagree and other countries disagree, but that really has nothing to say about what our Constitution says is appropriate.

And, frankly, if the federal government wants to change the standards, they could have done so in a way that at least didn't have the kind of commerce problems. But then, of course, we still have First- and Fourth-Amendment concerns.

And so I guess with due respect to my European colleagues, they don't have the same constitutional protections. And that's why we're out of step, because we actually protect different kinds of liberties.

THE COURT: Now, I know you rely upon *Bond* and -- how is that applicable to this case? Because it seems like the facts of *Bond* are just so distinguishable from what we have here.

MR. KRUCKENBERG: I think *Bond* is useful in a -- constitutional avoidance in a statutory interpretation analysis.

And, essentially, the argument here is if we take the United States at its word -- and this really is justified under the foreign affairs power -- then there's nothing really concerning going on.

And I think what Justice Scalia's concurrence in *Bond* really got at is that would upset -- if we're reading these kinds of powers to say anything is international because we say it is, then that upsets normal understanding of jurisdiction, normal understanding of federalism, and

we're not willing to risk it as a Court. I mean, that's what the Court said. We're just not gonna go there if there's any plausible interpretive off-ramp.

I don't think we have to get there because there is no international element here. The only international element --

THE COURT: But don't you -- I mean, you agree that it's not purely a domestic statute. Foreign companies also have to comply, correct?

MR. KRUCKENBERG: Sure. But that doesn't mean any law that has some international application is justified under the foreign affairs doctrine. I mean, the foreign affairs doctrine is about truly national decisions interacting with international actors.

And the rationale for the foreign affairs doctrine -- I mean, it's implied from the Constitution. And the idea is that, well, we have to have some national consensus; otherwise, individual actors might risk political relationships with foreign countries.

That, obviously, is very different from here where, yes, some of the 32 million businesses might have international contact, maybe, but maybe not. We don't know. That's merely an assumption.

THE COURT: But isn't that a national security concern, that you have foreign companies that you're

figuring out whether they're -- are they doing terrorism financing, things like that?

MR. KRUCKENBERG: Sure. And that's why money laundering and international financing of terrorism and material support for terrorism are all prohibited, and they're all legitimately prohibited under foreign affairs powers when they have an international element.

But it's not enough to just say that those are important concerns; therefore, anything that could possibly serve them must also be valid.

THE COURT: And then other than *Bond*, what's your best case for the proposition that Congress cannot legislate in this arena with its foreign affairs and necessary and proper power? Do you have another case other than *Bond*?

MR. KRUCKENBERG: Well, your Honor, if we go to any of -- and so, first of all, I would just rely on the briefing. I don't have it in front of me. But if we look at any of the foreign affairs doctrine cases -- so *Bond* talks -- and, obviously, *Bond* was not resolved on constitutional grounds, but *Bond*, as I said, was about constitutional avoidance.

But if we look at the origins of the doctrine, every time it's invoked it's about not binding the United States or not allowing a state to change our relationship

with our foreign adversaries or some sort of international activity. And that is a very, very different kind of a relationship.

And if we're implying this power, it has to be actually and directly related in some way to international affairs.

THE COURT: So those are the questions I had for you.

Now, I -- if you have other things you want to talk about, you certainly can or we can switch over to the Government and -- and to be candid, I mean, we can talk about constitutional claims, but if I get to -- if you don't win on the things I've already asked about, then I don't think the constitutional claims are strong. So I think your better arguments are the other claims, so that's the reason why I really don't feel -- that's why I'm not asking any questions about -- generally about going specifically to your constitutional claims.

But you're welcome to say anything you want to say about those. I'm just -- I'm trying to be as open as possible about -- I think your -- if you win this case, at least at this preliminary stage, it's going to be on these other matters, probably not the constitutional claims, based on my looking at everything.

But that doesn't mean that -- you know, if you

lose on the first part, doesn't mean -- I'll be forced at the second so --

MR. KRUCKENBERG: Well, and, your Honor, I -- obviously, I appreciate -- I appreciate your frankness with this. But I do want to talk about the First-Amendment claim because I think it is easy to overlook in the context of everything that's happening.

And as I said at the outset, the *Firestone* opinion from Oregon I think really does a disservice to the First-Amendment issue, and part of that was because those Plaintiffs had different claims and they had different interests.

But here, we have unequivocal, expressive conduct that is within the scope of the statute. There's -- there -- the disclosure requirements for all of the Plaintiffs, not just MSLP, implicate expressive conduct. But, obviously, MSLP is the most extreme example. I mean, these are the inner workings of a state political party, about who funds them, about who's making decisions about how to spend money, political money for political purposes. That is core expressive activity. And the CTA is forcing them to disclose that information to the Secretary of Treasury for his review for crime -- criminal investigative purposes.

That is more invasive than the regime in *AFP*

versus Becerra. I mean, that was a situation where donors -- or nonprofits had to say who gave them donations in a registry to the state secretary, Becerra, and those were nonpublic. Those could not be -- it was the same thing. It was to check with compliance. And the Court said that failed exacting scrutiny.

And I don't see any principled way to distinguish what's happening in *AFP versus Becerra* versus what's happening here with the CTA to the Libertarian Party of Mississippi. I don't think there's even a good argument that those are distinguishable. And that raises a constitutional problem, and particularly in a preliminary injunction context.

And, again, *Becerra* said this. We don't have to say -- we don't to have actual evidence that people are chilled from their exercise of free speech or association. It's enough that their behavior is arguably proscribed by the statute. That creates a presumption of a First-Amendment chill, and that is enough for preliminary injunction.

And so I would just urge this Court to consider that issue because I think that is -- it's one that the United States has not argued very much but is one that I think the Supreme Court has been very clear on.

THE COURT: Thank you.

MR. KRUCKENBERG: And, your Honor, just to finish up, I do want to touch very briefly on the Fourth-Amendment issue.

And I know we've talked about this a little bit, but even if we're looking at this under *Patel* and under the sort of lesser reasonable -- or the lesser test we might apply for a subpoena, even then this fails.

And one thing that I would point out that we've argued in the briefing is that our clients actually have reasonable expectations of privacy in the information at issue. I mean, the CTA says this information is private, which is kind of a tell. But it's also -- again, it implicates First-Amendment interests in some cases, I mean, with the MSLP.

If there's a reasonable expectation of privacy, the Court has said, in *Carpenter,* that this Schultz (phonetic) analysis that the Government relies on, that doesn't even apply. You have to have a warrant if there's a reasonable expectation of privacy. Not even the third-party doctrine applies there.

But even if we don't have a reasonable expectation of privacy, even if we reject that, under the *Oklahoma Press* standard that we usually use for subpoenas, as the Court made clear in the *Patel* case, you have to at least have an option of precompliance challenge.

So think about IRS subpoenas. This is where it comes up all the time. This is similar kinds of information. If the IRS subpoenas you because they suspect you of tax fraud, you have to produce information. The IRS still has to subpoena you, and you can go to Federal Court and challenge the subpoena and that is your precompliance effort to challenge the inquiry.

Here, there's nothing. There is a presumption of disclosure of all information, no matter what, for every person, for all 32 million-plus existing entities, must be filed for the explicit purpose of criminal investigation, and there is no opportunity for review from a neutral party. That is too far.

And, your Honor, I'm more than happy to answer any other questions but, otherwise, we would urge this Court to preliminarily enjoin the statute.

THE COURT: Okay. Thank you. I appreciate it.

MR. KRUCKENBERG: Thank you.

MS. LOWRY: Good morning, your Honor.

THE COURT: Good morning.

Let me start off and ask you, your response argues that the Plaintiffs' delay in seeking relief weighs against the idea that they suffer any kind of irreparable injury. But the FinCEN has not been accepting beneficial ownership reports long before the Plaintiffs actually filed the suit.

So what about that?

MS. LOWRY: I think there are three relevant dates that we can use to measure Plaintiffs' delay against.

First, there is the passage of the CTA in 2021.

Second is the finalizing of the final rule for the Beneficial Ownership Interest reporting requirement at the end of 2022.

And then you see the opening of the -- of FinCEN saying we'll now take those Beneficial Ownership Interest filings starting at the beginning of this year.

Regardless of which date you use, the Plaintiffs in this case either waited several months or several years to initiate this lawsuit. And if delay in seeking a preliminary injunction is going to mean anything, those six months, over a year, back to two years of delay are going to weigh against the finding of irreparable harm.

THE COURT: Now, at the same time, you know, you say that there's plenty of time to render a meaningful decision on the merits. So on the one hand, you say they waited too long, but on the other hand, you say they didn't wait long enough for a preliminary injunction to be warranted. Which is it?

MS. LOWRY: I think that is just the nature of the inquiry for irreparable harm, that you need this -- the urgent need and that you did not delay in seeking it. That

goes to whether the Plaintiffs have created the urgency of the situation. Had they filed at any of these earlier times, that urgency wouldn't exist.

I would concede, though, your Honor, we're now into October. That argument was made several months ago when the briefing was filed. I would take that off the table at this point. We're, obviously, now in a shorter time frame.

THE COURT: Okay. Thank you.

Now, do you disagree that the costs Plaintiffs will incur by complying constitutes irreparable harm?

MS. LOWRY: I do, your Honor, at least as supported by the evidence attached to the briefing.

While compliance costs can be competent evidence of irreparable harm, here the Plaintiffs haven't specified what those compliance costs are. And FinCEN's compliance cost estimates were, at least the large numbers that Plaintiffs cite, in the aggregate.

As to the individual Plaintiffs and parties, I believe the estimate was as low as something like $85. That would be a *de minimis* compliance cost. Because the Plaintiffs haven't actually supported what those costs are going to be, I think that shows that they haven't demonstrated that those costs would be more than *de minimis*.

THE COURT: Well, how are compliance costs *de minimis*?

MS. LOWRY: I believe this was the bump stocks case in front of Judge O'Connor, a finding that $200 or less in compliance costs are *de minimis*, so that there is some -- it's not a single dollar of compliance cost is sufficient to demonstrate irreparable harm. There actually has to be a more than *de minimis* amount.

I think the Courts come down somewhere in the 100 to $200 range. We just don't have evidence that the compliance costs here are going to exceed that.

THE COURT: And then the *Yellen* case, isn't that totally different because you didn't have -- you had unverified complaint and there were no declarations like we have here?

MS. LOWRY: Yes. That is a distinguishing feature of *Yellen*. That is why the evidence was not competent in that case and not sufficient in that case.

Ours is -- rather than having, you know, unverified and no evidence whatsoever -- is just conclusory.

THE COURT: And then what is your response to the Plaintiffs' argument that the Fifth Circuit case, *Rest. Law Center versus DOL*, forecloses the argument that Plaintiffs have not shown irreparable harm through their declarations

that demonstrate their compliance costs?

MS. LOWRY: I don't know the specific -- how I would specifically distinguish that case, only to say that the allegations of compliance costs here are entirely conclusory. There are no specifics as to what those compliance costs are going to be.

When we look, for example, at Mustardseed, we have what appears to be a relatively small operation, selling milk. I don't understand the complication with their filing that would justify more than *de minimis* compliance costs.

THE COURT: And then don't the penalty provisions of the CTA suggest Congress isn't regulating companies as much as regulating individuals?

MS. LOWRY: The criminal penalties -- whether that shows regulation at the individual level or the corporate level? Is that the question?

THE COURT: Yes.

MS. LOWRY: Yeah, I think that the criminal penalties most relevant here are as applicable to -- under the Anti-Money Laundering Act. That is the regulatory scheme that we should be looking at.

And individuals can be prosecuted for their participation through companies and activities that they engage in through companies in addition to, you know, the

corporate forums.

THE COURT: Okay. Now, switching to the Commerce Clause, you seem to argue that CTA regulates either companies as instrumentalities of commerce or future possible conduct. What exactly is the activity the CTA regulates, and where in the statute can you draw that from?

MS. LOWRY: I believe that the conduct that the CTA regulates is the anonymous existence and operation of corporations.

And here we need to separate the "who" from the "what." When you look at -- your Honor addressed, like, the *Gonzales* cases, guns in school zones or violence against women. Those laws applied to everyone, right? That was the "who." When the Court did the Commerce Clause analysis, it looked at the "what," guns in school zones, violence against women.

Here, the "who" isn't everyone. It's not every person in the United States. It's defined through the filing with the Secretary of State and the ability to do business in your own name. That helps inform our "what," right, but the "what" is really the anonymity at issue, which was the harm and the problem that Congress was seeking to address.

THE COURT: And how do you look at that as purely a state function? I mean, states have determined that

being anonymous is a goal and a desire. And so this idea that they're doing channels of commerce to try to overstep the states in that regard seems like that would give you carte-blanche authority to do anything under the Commerce Clause.

MS. LOWRY: Well, I think there is the channels-and-instrumentalities inquiry, but our primary arguments looked at either direct regulation of interstate activity or, in the sort of *Raich* realm, intrastate activities that have substantial effects on interstate commerce or the comprehensive regulatory scheme, which we see through the Anti-Money Laundering Act.

THE COURT: So what do you think is your best argument under the Commerce Clause, then?

MS. LOWRY: I believe the best argument under the Commerce Clause is the substantial effects on interstate commerce, even to the extent that the activities are purely intrastate.

And here, we have the findings from the agency which were articulated through Congress that money laundering and tax evasion create 300 billion, with a B, dollars of profit annually and that the Government does not have the tools that they need to address that problem.

The Plaintiffs here have conceded the Anti-Money Laundering Act has the interstate nexus. Then we look

if -- if the -- the question should be does the corporate anonymity problem have a substantial impact on interstate commerce. Yes. That is why Congress passed this law.

And Congress didn't say -- I believe the Plaintiffs, in the Plaintiffs' argument, said it would be useful or it would benefit the Government to have this information.

Congress said this information is needed. That is the Section 6402(5) of the Act. This information is necessary to address this problem, and that is sufficient under the Commerce Clause and, in particular, because the Court's inquiry is not really to judge anew the policy interests of Congress in this area but to ask whether Congress had a basis for concluding that that connection exists. That is apparent on the face of the statute, and that's enough to survive the Commerce Clause challenge.

THE COURT: Now, is your argument -- are we assuming that these companies are violating some criminal statute just because -- you're requiring everyone to do this registration, and so that's why I'm struggling with this idea that -- does that mean that you're assuming everyone is somehow in violation of the law?

MS. LOWRY: No, your Honor. It's recognition of the difficulty of the problem. You already have these anonymous corporations and businesses for which you cannot

identify any real human person. I don't think it would be effective to then ask this anonymous person that you can't find, even through subpoena and warrant powers, when you go through these very in-depth investigations, "Can you please disclose yourself? We would like you to register with FinCEN."

What has been determined is that there is this comprehensive regulatory framework and what is needed is this information so that the bad apples can be identified.

THE COURT: But, you know, I -- I have money-laundering and wire-fraud cases -- criminal cases all the time, so there's mechanisms for that already. It seems like you're adding on and basically requiring everyone to register that -- casting this wide net. And I guess I'm just trying to understand where does that stop, then?

MS. LOWRY: I would have two responses.

One here, your Honor, is to acknowledge that Plaintiffs are bringing a facial challenge under the Commerce Clause, and they have argued that we are applying the inappropriate standard under *Salerno* to say that they need to show that there would be no constitutional applications to satisfy that facial challenge. Your Honor said you listened to the Eleventh Circuit argument. This was heavily featured there in the questions by the judges on the panel.

The Supreme Court clarified that that is the appropriate test just this term in *Rahimi*, which was a Second-Amendment challenge. So, again, a constitutional claim, a facial challenge outside of the First-Amendment context affirming that *Salerno* is the proper standard.

So Plaintiffs, I believe, cite an Eleventh -- at least out-of-circuit authority, the *Club Madonna* Eleventh Circuit case from 2022. That can't overcome *Rahimi* now, 2024, saying that this is the "most difficult challenge to mount successfully" because it requires the Plaintiff to "establish no set of circumstances exists under which the Act would be valid."

So we don't need to look for the most fringe cases, you know, businesses that truly have no nexus to interstate commerce in any fashion, to deny the facial challenge and say there are clear cases of businesses operating in interstate commerce on their own.

I think here the *NFIB* Plaintiff is the most problematic for Plaintiff. There are 300,000 business members of NFIB. They are not members of a trade organization because they have no business, hold no assets, and are not engaged in any commerce. They can't show there are no constitutional applications even as to the named Plaintiffs among them, and they -- for that reason alone, they can't satisfy their burden.

THE COURT: And then I know you touched on this, but how is the CTA part of a broader regulatory scheme?

MS. LOWRY: The broader regulatory scheme is the Anti-Money Laundering Act, which itself was originally passed sort of through the Bank Secrecy Act. We're now looking at more like, you know, 30 and 50 years of history. But the Corporate Transparency Act itself was Section 6400 going down but as part of the 6000 division, which is the Anti-Money Laundering Act. It was the Anti-Money Laundering Act that directs Treasury to collect this information. Then when you get down to 6400, you see what types of information it's being directed to collect.

THE COURT: So what is your authority for -- just because Congress has legislated against these financial crimes -- that the CTA is part of a broader regulatory scheme?

MS. LOWRY: That, I believe, is the sort of *Raich* and related tests, that you can regulate interstate activity that is -- if a comprehensive regulatory scheme would be undermined by failing in the absence of these means, I think the $300 billion of money-laundering and tax-evasion profits, while the anti-money laundering statute has been on the books for years and years, demonstrates that -- or at least supports Congress' finding of that need.

THE COURT: And are you still asserting the channels of commerce argument that you make in the briefs?

MS. LOWRY: Yes. Yes, your Honor. And that is because I don't hear Plaintiffs to be disputing that their Plaintiffs use the channels of interstate commerce.

And this is the --

THE COURT: I don't think they deny that either, but the issue really is under that kind of argument, where does it stop? I mean, why is that not just a general police power to do whatever Congress wants to do? That seems a bridge too far.

MS. LOWRY: I think that it is in the rational relations test of Congress' power. And you need to also have, you know -- I really think the answer is, your Honor, here for the facial challenge we, again, aren't looking at the very edges of the case and the concern of how broad the limiting principle at issue. We need to look for the clear cases in the middle. That's what *Rahimi* specifically addresses. We don't need to look at hypotheticals at the fringe; we need to look at the center of the power.

THE COURT: And switching to the taxing power -- and did you want to talk about anything else about -- I asked my questions regarding Commerce Clause, but did you have anything else you wanted to add on that or --

MS. LOWRY: I do just very briefly, your Honor. I

was taking a couple notes.

In addition to the *Firestone* opinion, we did also have one additional case with a denial of a P.I. -- request for a preliminary injunction related to the Corporate Transparency Act. That was the *SBA* case, 1:24-cv-315, Western District of Michigan.

THE COURT: Would you give that cite again?

MS. LOWRY: Yes. It's 1:24-cv-315, Western District of Michigan.

That P.I. was denied from the bench. Summary judgment is now fully briefed. But just kind of looking at the full balance there, we do have the two denials, the one grant up on appeal.

THE COURT: There is not a written opinion on that?

MS. LOWRY: No written opinion, correct.

THE COURT: Okay.

MS. LOWRY: Looking at my notes.

Plaintiffs, again, have focused a lot in their commerce power argument on the idea that there are businesses that do no commerce. I just want to highlight that that does not apply to even the named Plaintiffs in this lawsuit.

Texas Top Cop Shop, obviously, is engaged in commerce. They have employees. They are a -- hold a

federal firearms license which requires them to report their responsible persons, at least as it pertains to their gun sale business.

DataComm, according to their declarations, does business with public utilities and federal -- not their declarations, excuse me. It's paragraph 65 of the Compliant. They do business with federal agencies and public utilities.

The parties in this case are not even the fringe cases that Plaintiffs are using to support their argument that we're outside the commerce power.

I am ready to move past that if you are, your Honor.

THE COURT: Okay. That's fine. I just have a couple of other questions.

But the CTA is in no way a tax, right? I mean, I don't see how that's a tax.

MS. LOWRY: No. The CTA is not itself a tax, your Honor; it is a tool for ensuring that proper taxes are collected given -- and justified by the volume of the problem of tax evasion as found by Congress.

THE COURT: And so how does the CTA somehow help the administration of taxes aside from identifying tax fraud?

MS. LOWRY: It doesn't even itself, your Honor,

identify tax fraud. It ensures that -- the information of who the beneficial owners are, who the flesh-and-blood people making decisions at these corporate entities is, so that if you have, you know, cause and suspicion of tax fraud, there are records in existence that you can use when investigating those crimes.

It is not -- so it's a tool in the toolbox to ensure that those records even exist in the first place based on Congress' finding and the agency experience in investigating these types of crimes, that you often go through these exhaustive investigations and you still turn nothing up.

THE COURT: So it's not a tax. I'm just trying to understand how we have authority under this clause to actually support the CTA.

MS. LOWRY: Well, I think it's the Necessary and Proper Clause as applied to the taxing power.

And then we're looking at the necessary and proper cases and case law that really do give Congress the breadth and means to effectuate the powers that it has, which here includes the taxing power.

THE COURT: Right. But it has to be related to the taxing power, and it's not a tax. And isn't that a stretch to use the Necessary and Proper Clause which, again, goes back to the core power, which is taxing, and

there's no taxing here?

MS. LOWRY: I think it is just a straightforward application of the Necessary and Proper to achieve the taxing power itself. That would be our argument.

THE COURT: So what is the limit, then, to using the Necessary and Proper Clause of -- on the issue of taxing? There has to be a limit somewhere.

MS. LOWRY: Sure?

THE COURT: Where do we draw the line?

MS. LOWRY: I think the line to be drawn is from the cases themself in *Comstock* and whether Congress had a rational basis for drawing this connection between the means and the ends.

THE COURT: And then for foreign affairs power, where do you perceive the national security interest that's involved in the CTA?

MS. LOWRY: I think this is the findings by Congress that there are foreign corporations who are using the anonymity that they can maintain in the United States to commit crimes here.

And we -- your Honor, we can look at the language of the corporate transparency itself, 6402(4), where Congress provides: "Money launderers intentionally conduct transactions through corporate structures in order to evade detection and may layer such structures, much like Russian

nesting 'Matryoshka' dolls, across various secretive jurisdictions such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process."

But even beyond the sort of rabbit hole of continuous corporate formation -- the language of the final rule -- when investigators trace illicit funds to a corporation or similar entity, they often find that corporate ownership records are not attainable, quote, because they do not exist. This, quote, lack of transparency has been a primary obstacle to tackling financial crime in the modern area. That's the House report and the final rule.

So then we have, to that end -- this is language from the Anti-Money Laundering Act, and that's where I'm saying that is the comprehensive scheme of which the Corporate Transparency Act is just one part.

Requiring the Treasury Department to establish uniform beneficial ownership information reporting requirements to, (A), improve transparency for national security, intelligence, and law enforcement agencies and financial institutions; (B), discourage the use of cell corporations as a tool to disguise and move illicit funds.

We have in-depth and specific findings for why

this requirement is necessary, not merely convenient, to battle what Plaintiffs concede is interstate activity, here criminal activity in the form of money laundering.

THE COURT: And then is there any kind of treaty in play in this case?

MS. LOWRY: I am not aware of one as I stand here today, your Honor. I -- if we cited one in our brief, I'm just -- it's not coming to my mind.

THE COURT: That's fine.

And then -- and I'll check the briefs on that.

What is the international standard the U.S. has fallen out of step with?

MS. LOWRY: I do not know the answer to that, your Honor. I would be happy to address it in further briefing. Only that that is the findings of Congress, that we have fallen out of step with international money-laundering standards.

THE COURT: And then what is your view -- what are the guardrails on the foreign affairs power that Congress -- there has to be some kind of guardrails. So what is -- in your view, what is the guardrails for how we look at that?

MS. LOWRY: I believe, again, the guardrails are the findings of Congress and the availability of the Court to review, even on a deferential standard, whether Congress

had a basis for concluding that the means justify the ends. The necessary and proper test is still going to be the bounds on that power.

THE COURT: And then -- and I was going to ask you in the beginning and I didn't ask that, but -- because it was really I think your briefing that indicated or implied that they were seeking a nationwide injunction, which they said they are not.

My question, though, for the Government is let's say the Court grants some kind of injunction for these parties. How does that impact anybody else going forward? I mean --

MS. LOWRY: I would have two responses, your Honor.

I think there are two totally dissimilar categories of Plaintiffs here. You have the sort of individual businesses, and we can even include MSLP there. Then you have NFIB, which everyone agrees is exempt from the CTA already. They do not have to file.

Plaintiffs are seeking injunctive relief on behalf of their 300,000 members, which really is nationwide injunctive relief. Those parties are not before the Court. I think they totally defeat the facial challenge here because they demonstrate real business is taking place. There are 300,000 of them who decided to be members in this

trade association.

So for all practical purposes, the limit that they have offered here before the Court is a concession, and one we welcome, but their brief sought to enjoin the CTA, period, full stop. And if they were granted relief as to NFIB's members who have not even been named or disclosed, that would be effective nationwide relief.

I think the -- to your Honor's latter point, that would be a significant harm to the public interest in this case because that would be 300,000 businesses excluded from the reporting requirements -- which, you know, to be effective, there has to be participation. We're talking about excluding unnamed companies in a way that would totally frustrate the goals and aims of the CTA and its compliance standards.

THE COURT: Well, but, you know, if the Court would ever -- it gets to the point of saying Congress exceeded their authority, shouldn't there be some kind of relief like that anyways?

And there's a mechanism if a Court grants an injunction. The Government can appeal and, you know -- I get it -- i have a lot of appeals go to the Fifth Circuit, and so I'm not -- and then they can determine whether or not I was right or wrong if I grant any kind of relief.

But, I mean, it seems to me that the idea that it

would thwart the goal of the CTA -- I understand that, but they only get there if -- if the Court is convinced that they have a likelihood of success on the merits is a good one, well, there should be relief, you know.

So that's why I asked the question to them, because of what you said in your brief. And I'm going to have them come back and answer this question about although they only asked for the parties, the 300,000 members is a legitimate issue. Is it, in effect, giving nationwide relief in a way? But I'll ask him that question.

MS. LOWRY: Yes, your Honor. I mean, I, obviously, acknowledge there are always potential appeal rights. There is a process to go through. We have argued there's no likelihood of success. If you find there is a likelihood of success, we turn to the other elements.

We would still argue that the equities favor the Government here versus -- for individual businesses filing their BOI information versus, you know, enjoining duly enacted law of Congress.

But I take your Honor's point. If you find that it exceeded the power, you're obviously going to find that the interest the Government has in the policy is decreased.

THE COURT: And then if you want to address -- I know he discussed a couple of the constitutional claims. Again, I didn't ask a lot of questions -- although I have

questions in those areas, I didn't ask them just because I just -- I try to be as candid and open as possible to attorneys. I don't think that's their best argument in terms of it -- in terms of their attempt to get relief, so that's the reason I didn't do that.

But you're welcome to respond to that or anything else you want to say. I have asked all these questions, but I still want to give you the opportunity if you have some other points on issues that I've already addressed or even any amendments. That's up to you.

MS. LOWRY: Thank you, your Honor. It feels like an area where I'm likely to do more harm than good for myself, given those caveats. I would just, though, highlight the *NetChoice* --

THE COURT: You know, it's funny you say that because, you know, one of the hardest things I do is sentencings all the time and I just had a sentencing yesterday where I was prepared to give a person a downward variance, and then he started on the allocution saying, "I didn't intentionally do this."

And I stopped him right away and said, "You're going down a path that may do more harm."

Ultimately, I gave him -- I did -- he talked to his counsel and, you know, got it together, and I gave him a break. But anyhow -- sorry, that's a total aside.

MS. LOWRY: Yes.

THE COURT: I understand.

MS. LOWRY: Only --

THE COURT: Again, I'm giving you the opportunity to say anything you want to say.

MS. LOWRY: Only, then, to highlight the *NetChoice* case this term from the Supreme Court, because I don't believe it was addressed in our briefing, addressed the standard for these overbreadth facial challenges and said the choice to litigate these cases as facial challenges, quote, comes at a cost. This Court has made facial challenges hard to win. So in the singular context, even a law with a plainly legitimate sweep may be struck down in its entirety only if the law's unconstitutional applications substantially outweigh its constitutional ones.

So because it was not addressed in the briefing, relatively new this case -- this term case, I would put *NetChoice* before the Court. And besides that, I would rest on our briefs.

THE COURT: Thank you.

And I will tell you that, you know, if for some reason -- and I just don't know yet because I don't -- I'll take this matter under advisement. I don't have an answer. It's very challenging questions, and I know more about the

Commerce Clause than I thought I ever would know. And I've been on the bench for a while, but I haven't had to deal with Commerce Clause issues.

And so that's been the majority of my focus in preparation for today, so -- but I will tell you -- and I will give the parties an opportunity and we'll do it by telephone. If for some reason I need to turn to the constitutional claims, I do have -- I probably will have some questions about that.

But if we did that, I'd follow up with another supplemental hearing just via telephone. So I just wanted to -- because I know I don't want to -- I'm not trying to -- I don't mean give short shrift to those claims. My review, it just seems like the better claims were what I concentrated my time on, but I don't -- if I need to reach those claims, because if I find relief on the part -- first part, I don't have to -- I won't address the constitutional claims.

But if I find that the Commerce Clause and those claims -- those aren't going to work, I'm going to have to address the constitutional claims. And if that happens, I will give you -- everyone an opportunity to argue that and we'll do it via telephone.

Okay. I just wanted to say that so --

MS. LOWRY: Thank you, your Honor, for -- we,

obviously, welcome that invitation.

For the reasons I've said here today and for the reasons in our brief, we would ask that Plaintiffs' motion for a preliminary injunction be denied in its entirety.

THE COURT: Okay. Thank you.

MS. LOWRY: Thank you, your Honor.

THE COURT: Just a couple of things we want to address, and, of course, then you can also decide to respond to anything that's been said.

I would like to address the issue of the irreparable harm. The Government's response is, you know, declarations are conclusory and that's not enough. They cite Judge O'Connor's case. So I'll give you a chance to respond to that.

MR. KRUCKENBERG: Your Honor, I think the Fifth Circuit's analysis in the --

THE COURT: Is your mic -- it's dropped down or --

MR. KRUCKENBERG: My apologies.

All right. Hopefully, that's better.

Your Honor, the Fifth Circuit's analysis in the *Restaurant Center* case -- I forget the actual name of the -- it's the one we cited in our brief -- I think decides the issue of irreparable harm just on compliance costs.

In that case, that was the issue, *de minimis* harm

versus proof of harm in a regulation that was -- had already calculated the costs. And the Fifth Circuit said that's enough.

And in some sense, it's because we take the Government at their word. If they say there are compliance costs and there are substantial compliance costs, that probably means that that's at least true that there are some compliance costs.

And each of the Plaintiffs has said we have to gather this information at cost to us. It's -- I mean, FinCEN has calculated the hourly rate as several hundred dollars. I think they've even calculated the individual compliance costs as greater than $1,200. That's something we put in our brief.

And I think this kind of hair splitting, well, $200 may be enough, 100 isn't, I don't think we have to get there. I think the Fifth Circuit has been very clear on this.

And, again, because these are constitutional claims, that gets us there as well. And the Fifth Circuit has also been very clear. A deprivation of any constitutional right is irreparable harm if there's no remedy. And there's no remedy.

So it doesn't matter which way you look at it. I think there is very clearly an irreparable harm facing the

Plaintiffs. They have to do something. They're -- they have -- they're looking at the compliance date. And once they file, they have an ongoing obligation to update, to maintain, to -- if any information changes.

So I think it is very hard for them to say there's no irreparable harm, assuming this is invalid, which is what this Court has to do when assessing that factor.

THE COURT: And then what about -- what's your response on the issue of the 300,000 members? You're not seeking nationwide injunction, but the Government says in practicality you kind of are because the one member has 300,000 members. What do you say to that?

MR. KRUCKENBERG: Your Honor, I take the conceptual concern with nationwide injunctions applying to nonparties at face value. And assuming that is a problem, that's not a problem this Court has to deal with because we have parties before the Court. And it is a fundamental aspect --

THE COURT: Well, that doesn't answer the question, though. I mean --

MR. KRUCKENBERG: Yeah.

THE COURT: -- is it true that one client has 300,000 members that, in effect, would -- or could be -- you know, although not called a nationwide injunction, it has that same impact?

MR. KRUCKENBERG: Well, it has on the parties before the Court because NFIB is here in a representation -- in a representative capacity for its members, which includes some of the named Plaintiffs but obviously not all of them.

I mean, if the United States' position is we have to list them as Plaintiffs to be able to make them parties, I mean, that's just not true. That's not the way our legal system considers multiple Plaintiffs or these sort of complicated cases.

And if it's a matter of practicality, we can certainly file a membership list as of the time of the injunction with the Court under seal. I mean, obviously, we have concerns about privacy, and that's part of the lawsuit. But there is a way to deal with that.

THE COURT: That's not the concern the Court has. It's -- I'm just trying to determine, although you say you're not asking for a nationwide injunction, could that be the impact if the Court grants you relief to just the Plaintiffs?

MR. KRUCKENBERG: I mean, effectively, the members are nationwide, yes. There are members in every state. But they are parties to this case, and they are in front of this Court.

And so if the concerns are about the Court's

equitable powers, which is what this debate usually centers on, there is no doubt that NFIB's members are before this Court. They are within this Court's jurisdiction. The United States is within this Court's jurisdiction. And so I don't see an issue.

THE COURT: And then address the Government's response to the -- looking at the various equities that she asserts side with the Government or weigh with the Government in terms of granting any kind of injunction.

MR. KRUCKENBERG: Well -- and, again, I would rely on the Fifth Circuit. I mean, this lives and dies in a lot of ways on the merits because the Fifth Circuit, I think, has been very clear. When we have a regulatory obligation like this, if it's invalid -- the Government has no interest in maintaining invalid law and making people follow an invalid law and incurring costs to do so.

And in the preliminary injunction context, I mean, that is the appropriate -- this is the appropriate mechanism. We're saying this law shouldn't take effect. This is a time-out, so you don't have to incur these potentially unlawful compliance obligations and, here, potentially unconstitutional obligations. And so I think the Fifth Circuit has just been very clear on that.

THE COURT: And then her argument in terms of -- her best argument on the Commerce Clause was substantial

effects on interstate commerce. If you want to respond to that?

MR. KRUCKENBERG: Yes, your Honor.

And, actually, just to back up one second -- I very much want to address that point, but I also want to address this no-set-of-circumstances, facial versus as-applied argument.

With respect to the Commerce Clause -- because I think what the Government has tried to do is they've tried to treat all constitutional claims equally and apply this *Salerno* test to all three. And that's not what the Court has indicated, and that's not what the *NetChoice* case indicated. I mean, that was a Second Amendment case -- or, I mean, sorry, the *Rahimi* case that we're talking about.

THE COURT: Which case -- that case helps give the Court a little more clarity. I've had a lot of those gun cases, so it's --

MR. KRUCKENBERG: Yes, your Honor. And --

THE COURT: There are still some percolating so --

MR. KRUCKENBERG: And, obviously, there's a different analysis for different constitutional rights.

And if we're -- we're thinking about the commerce either as applied or facially. I mean, we've pled both because it's unclear.

If you look at *Morrison*, that was an individual

litigant who raised a facial challenge to the federal statute, and the United States Supreme Court struck down the federal statute because it didn't apply to *Morrison*. So, essentially, they have applied an overbreadth kind of analysis in commerce challenges.

So if truly this *Salerno* no-set-of-circumstances test applied to commerce challenges, *Morrison* and *Lopez* could not possibly have come out that way. There are plenty of instances where those could have been constitutional prosecutions or where somebody engaged in interstate commerce that was within the reach of those statutes.

And so I think what the lesson there is, we look at the statute. Does the statute reach commercial activity or not? And that, I think, gets into the *Gonzales versus Raich* argument and the substantial effects test. And reading *Gonzales*, they are very clear. It has to be an economic class of activities. That's what must be regulated to reach the intrastate conduct.

This is not an economic class of activities if we look at the statute. The statute applies when you file a registration document. That is not economic. That is a registry. That is a noneconomic activity that just so happens to be one that lots of businesses engage in, and that is not substantial effect on interstate commerce.

And, your Honor, just to address the foreign affairs issue, I just wanted to answer a question that you asked me earlier about the authorities we're relying on.

I just want to direct the Court to one of the cases we mentioned in our briefing. It's *Dunbar versus Seger-Thomschitz*. It's a Fifth Circuit case. The reason I point that out is it talks about the foreign affairs powers and how Courts look at them. And the Court there said -- the Fifth Circuit said that when something is within the realm of traditional state responsibilities, it's not -- it does not implicate the foreign affairs powers.

And I think that is -- rings true in this case because, again, we have -- the federal government tried to displace the state regulatory system on this national level even though this is a traditional state interest.

And I would also just point out the CTA doesn't apply internationally. Any international entity to have to register has to have a presence in the U.S., so they have to register to do business with a state.

So, again, this kind of idea that it's international, yes, it may incidentally effect some international interests. That's not the sweep of the statute, and we have no idea how often that might even come up. It may never come up. That's clearly not enough to justify this entire regime.

And if the Court has no other questions, we'll rest on our briefing.

THE COURT: Okay. Very good.

Well, thank y'all both for your arguments. I enjoyed those immensely, and I will take the matter under advisement. I understand the time constraints, and I will try to make a decision, you know, as quick as I can.

So -- and I will -- well, I don't want to promise anything in terms of a date or anything, but we will work on it diligently and get you an answer in plenty of time.

I have issued two nationwide injunctions -- now, the one wasn't my fault. I got a lot of criticism for it by parties because they didn't file their request for injunctive -- not by the parties but by the public years ago. But the motion for injunction came, like, right before the deadline so -- for the rule to go into effect, so it wasn't my fault. But you've brought this in plenty of attention -- plenty of time for the Court to resolve it, and I will get it resolved in plenty of time so --

But, otherwise, we'll be in recess. Thank y'all.

(Proceedings concluded, 10:31 a.m.)

COURT REPORTER'S CERTIFICATION

I HEREBY CERTIFY THAT ON THIS DATE, DECEMBER 16, 2024, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS.

/s/
CHRISTINA L. BICKHAM, CRR, RDR

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS TOP COP SHOP, INC., ET AL., Plaintiffs, v. MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., Defendants.	FIFTH CIRCUIT DOCKET NO.: 24-40792 DISTRICT COURT NO.: 4:24-CV-478 **DECLARATION OF CHRISTIAN CLASE**

DECLARATION OF CHRISTIAN CLASE

I, Christian Clase, make the following declaration under penalty of perjury pursuant to the laws of the United States:

1. I am over the age of 18, am under no legal disability, and am competent to testify. If called as a witness, I would and could testify competently to the facts set forth in this declaration based on my personal knowledge.

2. I am an attorney licensed in Tennessee.

3. After the injunction was issued, FinCEN posted a notice on its website that the January 1, 2025, reporting date was no longer in effect. Ex. A.

4. Exhibit "A" is a screenshot of FinCEN's website, that I took on December 17, 2024, that shows the notice FinCEN posted in response to the injunction.

5. Since this Court preliminarily enjoyed the CTA, I have observed extensive media coverage concerning the CTA in both traditional news publications and legal blogs. These articles explain, to a wide audience, that the CTA and its reporting rule were enjoined by a federal court, and that reporting companies are no longer required to submit beneficial ownership information on January 1, 2025. Ex.'s B, C, D, & E.

6. Exhibits "B" "C," "D," and "E" are true and correct PDF copies of online news articles, and in their respective order, were published on the websites of Reuters, the United States Chamber of Commerce, Bloomberg Tax, and the Wall Street Journal.

7. Since the CTA was enjoined, many law firms have advised their clients about the injunction, and I have seen several firm-wide communications and mass mailing efforts concerning the injunction. Ex.'s F, G, H & I.

8. Exhibits "F," "G," "H," and "I" are true and correct PDF copies of articles law firms have posted on their own websites discussing the CTA's injunction, and, in their respective order, these articles appeared on the websites of Gibson Dunn; Skadden, Arps Slate, Meagher & Flom LLP; Holland and Knight; and Baker Hostetler.

9. I have also been contacted by other attorneys and members of the business community seeking information about the effect of the preliminary injunction on their clients', or their own, reporting obligations.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 17, 2024:

/S/ Christian Clase
Christian Clase

ADDENDUM

EXHIBIT A

Get FinCEN News Updates

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Beneficial Ownership Questions?

Contact FinCEN

BOI | BENEFICIAL OWNERSHIP INFORMATION

Many companies are required to report information to FinCEN about the individuals who ultimately own or control them. FinCEN began accepting reports on January 1, 2024. Learn more about reporting deadlines.

Prepare

- How do I file?
- Do I qualify for an exemption?
- How do I get a FinCEN ID?

File

- File a report using the BOI E-Filing System
- Create a FinCEN ID (optional)

FAQ **Need More Information? View our FAQ page.**

Need More Information? Chat With Us Here.

Stay Informed. Subscribe to FinCEN Updates.

Alert: Impact of Ongoing Litigation – Deadline Stay – Voluntary Submission Only

In light of a recent federal court order, reporting companies are not currently required to file beneficial ownership information with FinCEN and are not subject to liability if they fail to do so while the order remains in force. However, reporting companies may continue to voluntarily submit beneficial ownership information reports.

The Corporate Transparency Act (CTA) plays a vital role in protecting the U.S. and international financial systems, as well as people across the country, from illicit finance threats like terrorist financing, drug trafficking, and money laundering. The CTA levels the playing field for tens of millions of law-abiding small businesses across the United States and makes it harder for bad actors to exploit loopholes in order to gain an unfair advantage.

On Tuesday, December 3, 2024, in the case of *Texas Top Cop Shop, Inc., et al. v. Garland, et al.*, No. 4:24-cv-00478 (E.D. Tex.), a federal district court in the Eastern District of Texas, Sherman Division, issued an order granting a nationwide preliminary injunction that: (1) enjoins the CTA, including enforcement of that statute and regulations implementing its beneficial ownership information reporting requirements, and, specifically, (2) stays all deadlines to comply with the CTA's reporting requirements. The Department of Justice, on behalf of the Department of the Treasury, filed a Notice of Appeal on December 5, 2024.

Texas Top Cop Shop is only one of several cases in which plaintiffs have challenged the CTA that are pending before courts around the country. Several district courts have denied requests to enjoin the CTA, ruling in favor of the Department of the Treasury. The government continues to believe—consistent with the conclusions of the U.S. District Courts for the Eastern District of Virginia and the District of Oregon—that the CTA is constitutional.

While this litigation is ongoing, FinCEN will comply with the order issued by the U.S. District Court for the Eastern District of Texas for as long as it remains in effect. Therefore, reporting companies are not currently required to file their beneficial ownership information with FinCEN and will not be subject to liability if they fail to do so while the preliminary injunction remains in effect. Nevertheless, reporting companies may continue to voluntarily submit beneficial ownership information reports.

EXHIBIT B

Texas judge blocks anti-money laundering law's enforcement nationwide

By **Nate Raymond**

December 4, 2024 11:39 AM CST · Updated 13 days ago

A bronze seal for the Department of the Treasury is shown at the U.S. Treasury building in Washington, U.S., January 20, 2023. REUTERS/Kevin Lamarque/File Photo Purchase Licensing Rights

Dec 4 (Reuters) - A federal judge in Texas has issued a nationwide injunction blocking the enforcement of an anti-money laundering law that requires corporate entities to disclose to the U.S. Treasury Department the identities of their real beneficial owners.

U.S. District Judge Amos Mazzant in Sherman, Texas, on Tuesday sided with the National Federation Of Independent Business and several small businesses and non-profits by

The decision marked the second time a judge has deemed the law unconstitutional. An Alabama federal judge reached a similar conclusion in March in response to a separate challenge to the law but issued a narrower injunction, blocking its enforcement as applied to the parties before him, including the National Small Business Association.

Mazzant said the law was an "unprecedented" attempt by the federal government to legislate in an area traditionally left to the states by monitoring companies created pursuant to state law and ending the anonymity various states provide in the formation of corporations.

"For good reason, Plaintiffs fear this flanking, quasi-Orwellian statute and its implications on our dual system of government," Mazzant wrote.

He said Congress had no authority under its powers to regulate commerce, taxes and foreign

Tenth Amendment.

The Justice Department declined to comment on Wednesday.

The bipartisan measure was enacted as part of an annual defense spending toward the end of Republican President-elect Donald Trump's first term in early January 2021, after Congress overrode a veto Trump issued for unrelated reasons.

Supporters of the legislation said it was designed to address the country's growing popularity as a venue for criminals to launder illicit funds by setting up entities like limited liability companies under state laws without disclosing their involvement.

Under the law, corporations and LLCs were required to report information concerning their beneficial owners to the Treasury Department's Financial Crimes Enforcement Network, which collects and analyzes information about financial transactions to combat money laundering and other crimes.

The lawsuit was filed in May by lawyers at the Center for Individual Rights on behalf of five small

that represents small businesses.

Mazzant is one of two judges assigned to hear cases in Sherman, Texas. He was appointed to the bench by Democratic former President Barack Obama as part of a deal with Texas' two Republican senators on a group of judicial nominees in the state and is known for ruling in favor of conservative litigants.

He blocked the law's enforcement ahead of a Jan. 1 deadline for companies to comply with its requirements.

Caleb Kruckenberg, the center's litigation director, said Mazzant's preliminary injunction would provide small businesses "a reprieve while the courts, and likely the Supreme Court, can consider the constitutional issues further."

The case is Texas Top Cop Shop v. Garland, et al, U.S. District Court for the Eastern District of Texas, No. 4:24-cv-00478.

For the National Federation Of Independent Business: Caleb Kruckenberg of the Center for Individual Rights

For the U.S.: Stuart Robinson and Faith Lowry of the U.S. Department of Justice

Nate Raymond
Thomson Reuters

Nate Raymond reports on the federal judiciary and litigation. He can be reached at nate.raymond@thomsonreuters.com.

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EXHIBIT C

Corporate Transparency Act Requirements Halted by Federal Court

Unless and until an appellate court overrules or narrows the injunction, no small businesses are obligated to comply with the reporting requirements

Judge Halts Implementation CTA GUIDE

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Updated
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A federal court in Texas halted the implementation of the Corporate Transparency Act's (CTA) beneficial ownership reporting requirements. Holding that the CTA is likely unconstitutional, the court issued a preliminary injunction barring the government from enforcing the CTA and its reporting requirements against anyone.

Prior to the ruling, small businesses that met certain criteria would have had to file reports with the Department of the Treasury by January 1, 2025, or risk fines and criminal penalties.

The preliminary relief will remain in effect until the conclusion of legal proceedings, at which point the court may enter a permanent injunction. In the meantime, the government will likely appeal the preliminary injunction.

Unless and until an appellate court overrules or narrows the injunction, no businesses are obligated to comply with the reporting requirements.

Background on the CTA

The CTA was enacted by Congress on January 1, 2021, as part of the National Defense Authorization Act. The CTA included significant reforms to anti-money laundering laws and is intended to help prevent and combat money laundering, terrorist financing, corruption, and tax fraud.

Under the act, small businesses in the United States need to file beneficial ownership information reports (BOIR) with the Department of the Treasury by January 1.

Failure to submit the new paperwork by the deadline puts small business owners at risk of criminal penalties, imprisonment, and fines up to $10,000.

Download our guide to get updates on any legal developments with the CTA.

Judge Halts Implementation CTA GUIDE

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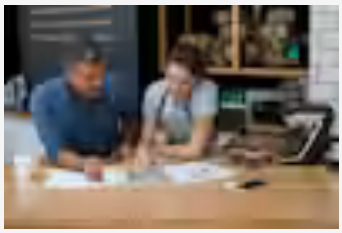

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SMALL BUSINESS

Shop Small: Everything You Need to Know About Small Business Saturday

By Lindsay Cates

EXHIBIT D

A Texas court on Tuesday struck down a federal law requiring to report business owners' identities.
Photographer: Nathan Howard/Bloomberg

December 3, 2024, 5:41 PM CST

Corporate Transparency Act Blocked Nationwide by Texas Court

John Woolley
Reporter

- Law invalidated less than one month before reporting deadline
- Court says requirements exceed Congress's commerce authority

The Corporate Transparency Act and its implementing regulations, which require US business entities to report stakeholder information to the Treasury Department, were preliminarily blocked nationwide by a Texas federal court on Tuesday.

Judge Amos L. Mazzant III of the US District Court for the Eastern District of Texas issued the injunction at the request of a family-run firearms and tactical gear retailer, called Texas Top Cop Shop Inc., among other co-plaintiff businesses and the Libertarian Party of Mississippi. Their lawsuit alleged that the CTA falls outside of Congress's powers to regulate interstate and foreign commerce because it regulates incorporated entities regardless of whether they engage in commercial activity.

"For good reason, Plaintiffs fear this flanking, quasi-Orwellian statute and its implications on our dual system of government," Mazzant wrote.

The CTA required that an estimated 32.6 million existing business entities disclose their beneficial owners to the Treasury Department's Financial Crimes Enforcement Network before 2025. The government argued that the law's function—to crack down on anonymous shell companies and deter money laundering, terrorism financing, and other illicit economic activity—falls within Congress's regulatory duties.

But the CTA still fails to pass muster, even if anonymous corporate operations can be regulated by Congress, because the Constitution's Commerce Clause can't be leveraged to compel the disclosure of information for law enforcement purposes, the court's opinion said.

"The fact that a company is a company does not knight Congress with some supreme power to regulate them in all aspects—especially though the CTA, which does not facially regulate commerce," Mazzant said.

The Justice Department didn't immediately respond to an emailed request for comment.

S|L Law PLLC and the Center for Individual Rights represent the plaintiffs.

The case is Texas Top Cop Shop, Inc. v. Garland, E.D. Tex., No. 4:24-cv-00478, 12/3/24.

To contact the reporter on this story: John Woolley in Washington at jwoolley@bloombergindustry.com

To contact the editor responsible for this story: Amy Lee Rosen at arosen@bloombergindustry.com

Documents

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EXHIBIT E

Opinion | EDITORIAL BOARD | GUEST

Repeal the Corporate Transparency Act

A judge has enjoined this burden on small business, and Congress can act.

By The Editorial Board
See No. 24-Cv-00477

Brooklyn Light Show: New City, your business could be the next of so many small businesses to receive a Treasury letter. | Illustration: Greg Groesch

Politicians prattle incredibly about their love for small business, as opposed to the corporate giants it's easy to denounce. Yet when they get the chance, they saddle small business with laws like the Corporate Transparency Act. A federal court in Texas has handed Donald Trump and the Republican Party an opportunity by imposing a nationwide injunction on the CTA's reporting mandate.

In 2020 Congress tucked the CTA into the National Defense Authorization Act in the last days of the Trump Administration and it passed over Mr. Trump's veto. The intent was to combat money launderers and drug dealers. But the result, says the National Federation of Independent Business, is a bill that imposes another compliance burden, makes confidential business data less secure, and does little to deter real criminals.

The law took effect last Jan. 1. It requires corporations or limited liability companies of fewer than 20 employees and $5 million or less in revenue to disclose details about their beneficial owners to the Treasury Department's Financial Crimes Enforcement Network (FinCEN). Failure to comply can result in up to two years in prison and a $10,000 fine.

The law defines a beneficial owner as any person who "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity." FinCEN estimates the law applies to 32.6 million small businesses and associations.

But the Dec. 3 order by federal Judge Amos Mazzant enjoins FinCEN from "enforcing the reporting rule against plaintiffs pending final judgment." The law "violates the Fifth" as a federal attempt to regulate companies created under state law and because it vests the anonymity many states designed as a feature of their corporate formation. The plaintiffs, he wrote, are likely to succeed on their claim that the law is unconstitutional.

What's next? The Biden Administration has asked the Fifth Circuit Court of Appeals for a stay of Judge Mazzant's injunction. It also wants the appellate court to rule by Dec. 27, so that businesses would still have to meet the reporting deadline of Dec. 31.

The Fifth Circuit could throw out the CTA on grounds Judge Mazzant lays out, but other courts are split. A federal judge in Alabama has ruled the CTA unconstitutional, while federal judges in Oregon and Virginia made preliminary rulings going the other way. The cases could go to the Supreme Court.

But Congress needn't wait for courts to remove this looming burden from millions of small businesses. This is the kind of unnecessary regulation that Republicans campaigned to stop. A one-year delay is already under consideration as an amendment to the year-end spending bill being debated in Congress. Congress can adopt this amendment, deliver relief to small business, and give the courts the time they need to resolve this mess.

Treasury Secretary Janet Yellen receives a briefing during a visit to the Financial Crimes Enforcement Network (FinCEN) in Vienna, Va., Jan. 8, 2024. | Photo: Evelyn Hockstein/Reuters

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No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

MERRICK GARLAND,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas (No. 4:24-CV-478)

BRIEF OF AMICI CURIAE STATES OF WEST VIRGINIA, KANSAS, SOUTH CAROLINA, AND 22 OTHER STATES IN OPPOSITION TO STAY PENDING APPEAL

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

In moving to stay the district court's well-reasoned decision, the federal government has next to nothing to say about federalism. But as the district court recognized, the Corporate Transparency Act, 31 U.S.C. § 5336, asserts power that "threatens the very fabric of our system of federalism." *See* ECF No. 21, at 74. After all, the Act purports to grant the federal government unprecedented control over all manner of corporate law—even though "no principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *Id.* at 88 (quoting *NSBU v. Yellen*, 721 F. Supp. 3d 1260, 1271 (N.D. Ala. 2024)). And the district court—just like the other district court to address these issues before it—was right. The CTA takes an unprecedented swipe at the quintessentially state-controlled area of corporate law. Meanwhile, the costs from that unlawful play are staggering for the States and the people who live and work there.

The *amici* States of West Virginia, Kansas, South Carolina, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming take seriously our longstanding and primary role in regulating corporations—that is,

"entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). We are also concerned with Congress overstepping into our traditional zones of authority when it abuses its enumerated Commerce Clause power. And we are sensitive to the ways burdensome legislation (and its implementing regulations) hurt our residents and small businesses. The CTA implicates all three of these concerns. The States thus file this brief to explain how the CTA disrupts the balance of federalism—on which our constitutional system depends—and burdens too many real Americans along the way.

SUMMARY OF THE ARGUMENT

I.A. The States' authority to regulate domestic corporations doing business within their borders is as traditional as state powers come. Corporations are creatures of state law. And the States have kept primary watch over corporate affairs throughout the Nation's history. In purpose and effect, the CTA improperly displaces the States when it comes to the requirements that do—and do not—attach to an entity's incorporation.

I.B. The federal government's claim to Commerce Clause authority shows the CTA's federalism distaste for what it is. Modern Commerce Clause jurisprudence insists that federalism-based themes infuse the analysis. The

Supreme Court holds the line when Congress tries to stretch its commerce power into something approaching the general police power that only the States hold. Congress did just that in the CTA because the law regulates non-commercial conduct that does not substantially affect the interstate economy.

II. The CTA will harm the States and their residents. Even the federal agency that enforces the CTA, the Financial Crimes Enforcement Network, or FinCEN, doesn't say otherwise. FinCEN admits that in just the first two years after its implementing rule goes into effect, American small businesses will be forced to spend over 150 million hours and nearly $30 billion trying to comply with the CTA's reporting requirements. And those estimates are likely far too low. The States will also face significant costs complying with their own requirements under the law in educating the regulated public and offering up sensitive data to FinCEN. All this pain comes at the expense of our economies and the people who make them run.

ARGUMENT

I. The CTA Regulates Purely Local Concerns That The Constitution Leaves To The States.

Some statutes wrongly blur the line between state and federal powers even though they stop short of direct preemption. The CTA is one of them.

A. Federalism drives the analysis when Congress intrudes into corporate regulation.

1. Though "the Federalists and Anti-Federalists" rarely agreed completely on anything, they all insisted that "corporations were *not* sovereigns." *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 191 (5th Cir. 2023) (Oldham, J., concurring) (emphasis added). Instead, the Founding "embraced the English conception of corporations"—meaning corporations "could only be created with the consent of the sovereign." *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *460). The Federalists would have pushed further by enshrining into law the idea that the States themselves were "akin to corporations," with "mere 'corporate rights.'" *Id.* (quoting 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 323, 328 (1907)). But "[t]he Anti-Federalists responded strongly and persuasively" and "proved triumphant" when the "Federalists eventually conceded that States were not corporations and hence would retain sovereign immunity." *Id.* at 191-92.

From that debate flowed one of our country's most lasting norms: the Constitution may grant "broad power to Congress," but "our federalism *requires* that Congress treat the States in a manner consistent with their

status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999) (emphasis added).

A key way the States exercise that sovereign status is in regulating those same corporations the Federalists once likened them to. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636, 4 L. Ed. 629 (1819). That means (much like federal agencies created and limited by statute) a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Id.* And it's *state* law that does the creating. *E.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("state law" "is the font of corporate directors' powers" (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979))). So as the Supreme Court has long recognized, when States pass "corporate governance" laws, they are regulating "entities whose very existence and attributes are a product of state law." *CTS Corp.*, 481 U.S. at 89.

Part and parcel with federalism principles and the States' traditional powers is that the States get to be "laboratories for experimentation with various regulatory regimes." Carl W. Mills, *Breach of Fiduciary Duty as*

Securities Fraud: Sec v. Chancellor Corp., 10 FORDHAM J. CORP. & FIN. L. 439, 447 (2005). In other words, federalism expects different States to make different choices when it comes to corporate law. Corporations, in turn, "can shop around for attractive corporate domiciles" by comparing those different "legal regimes." *Id.* And the States can benefit (or not) from the consequences of their decisions. *See id.* at 447 (describing benefits that flow to the States when corporations set up shop, including "franchise taxes," "fee revenues," and "patronage").

Whether this sort of competition creates a "race to the bottom," a "race to the top," or something in between is a matter of "heated debate." Mills, *supra*, at 448. But that doesn't change the load-bearing reality that the States get to choose their own course. Nor the fact that our constitutional system believes that the States' ability to adopt "alternative solutions to the many difficult regulatory problems that arise in corporate law" is valuable—and "cannot be adequately replaced by a uniform federal standard." *Id.* at 498 (quoting STEPHEN M. BAINBRIDGE, THE CREEPING FEDERALIZATION OF CORPORATE LAW, REGULATION, 26, 27-28 (Apr. 1, 2003)). Although other nations provide the ability to incorporate federally, for instance, *see*, *e.g.*, Canada Business Corporations Act, R.S.C. 1985, c. C-44, we never have. It

remains just as true now as at the Founding that incorporation specifically is a state function. *E.g.*, Mills, *supra*, at 445 (explaining how States "set the rules for incorporation," have "the ability to create corporations" in the first place, and keep "primary responsibility for regulating internal corporate affairs").

In short, "[n]o principle of corporation law and practice" has been "more firmly established than a State's authority to regulate domestic corporations." *CTS Corp.*, 481 U.S. at 89.

2. Against this historical background, the CTA raises all kinds of federalism red flags.

"At its core, the CTA" reflects Congress's choice to "embrace a reporting regime where the federal government, not the states, would collect, hold, and share beneficial ownership information." Kevin L. Shepherd, *Compliance with the New Reporting Regulations Under the Corporate Transparency Act*, 40 PRAC. REAL EST. LAW. 3, 6 (Jan. 2024). And it shifts to the federal level "oversight to the regulation of business entities and their operations" which "traditionally has resided with U.S. states." William E.H. Quick, *The Corporate Transparency Act: A New Federal Reporting Obligation That Impacts Almost Everyone*, 79 J. MO. B. 270, 273 (2023). True, it doesn't touch directly on state incorporation laws or require States to do the

federal government's work for it. But by intent and scope, it still overtakes too much state-law ground.

Start with its purposes. The "sense of Congress" was that it needed to "set a clear, Federal standard for incorporation practices." Pub. L. No. 116-283, § 6402(5)(A) (appended as a statutory note to 31 U.S.C. § 5336). Given that the first rule of "corporation law and practice" is that the States—not Congress—"regulate domestic corporations," *CTS Corp.*, 481 U.S. at 89, the CTA starts on shaky ground.

Its remaining purposes aren't much better—especially "enabl[ing] … law enforcement efforts to counter money laundering" and "bring[ing] the United States into compliance with international anti-money laundering" standards. Pub. L. No. 116-283, § 6402(5)(D)-(E). Money laundering and related crimes are serious. But when it comes to law enforcement, it's the States who have "near-complete autonomy, historical primacy, and enormous institutional advantages." Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1099 (2023). So the default in criminal matters is for the "federal system" to "provid[e] a thin, roving backup to the states' broad defensive line." *Id.* at 1099. Congress needs to rely on more before flipping that default and "convert[ing] an astonishing amount of

traditionally local criminal conduct into a matter for federal enforcement." *Bond v. United States*, 572 U.S. 844, 863 (2014) (cleaned up). Particularly so when the ripple effects of "[s]ubtracting the states from an area" of traditional enforcement often "push federal enforcement to build up the capacity to take on more primary responsibilities, which increases the overall federal footprint." Blondel, *supra*, at 1098.

The statute's scope underscores the problem. "Despite the limited number of bad actors who form the target of the CTA, the law casts a very wide net"—so wide that "[m]uch of the business community swept into" it "will be unwitting and innocent bycatch." Quick, *supra*, at 271. The financial and administrative burdens for these many entities are huge. *See infra* Part II. The law's "reporting obligations" also "touch on the sensitive issue of personal anonymity historically enjoyed by U.S. beneficial owners." Quick, *supra*, at 273. *And* they create new risks of serious civil and criminal penalties, including thousands in fines and penalties and up to 2 years in prison, for the thousands of reporting companies doing legal business in the States.

All this shows the CTA as an example of "overly punitive" federal lawmaking that strips law-abiding corporations of the ability to "check excessive regulation by opting out of federal regulation and selecting a

different jurisdiction for incorporation." Mills, *supra*, at 498. When left to the States as the constitutional structure expects, comparing State-by-State financial crime rates can test how needed measures like this might be. Not so with federally imposed uniformity. And the States and their residents must bear these burdens for a statute whose "effectiveness may be undercut" because it relies on "money launderers who, by definition, are already willing lawbreakers," to "comply voluntarily" with the CTA's reporting mandate. Reid Kress Weisbord & Stewart E. Sterk, *The Commodification of Public Land Records*, 97 NOTRE DAME L. REV. 507, 557-58 (2022).

So the district court was right to treat the federal government's claimed bases of authority with skepticism because of it. Cutting away the States' space for "social and economic experiments" in their zones of traditional authority gets the Constitution's fondness for "more local and more accountable" government backward. *West Virgina v. EPA*, 597 U.S. 697, 739 (2022) (Gorsuch & Alito, JJ., concurring) (cleaned up). In a constitutional case like this, the federal-state asymmetry a statute leaves behind matters.

B. Federalism confirms that the Commerce Clause cannot justify the CTA.

The Court should also reject the federal government's Commerce Clause theory. Allowing Congress to regulate incorporation in this manner

would blur the distinction between what is local and what is national in a way the Constitution does not allow.

1. Start from the beginning. Article 1, section 8, clause 3 of the Constitution grants Congress power "[t]o regulate Commerce with foreign Nations, and among the several [S]tates, and with the Indian Tribes." Courts "invalidate a congressional enactment only upon a plain showing that Congress has exceeded [the Commerce Clause's] bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). But Congress's power here is not limitless, and courts evaluate purported exercises "in the light of our dual system of government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Congress may not extend its power "so as to embrace effects upon interstate commerce so indirect" as to "effectually obliterate the distinction between what is national and what is local." *Id.* The "completely centralized government" a rule like that would allow, *id.*, leaves no room for the States.

Next take two of the seminal cases in modern Commerce Clause jurisprudence: *United States v. Lopez*, 514 U.S. 549 (1995) and *Morrison*, 529 U.S. 598. Recognizing that the Commerce Clause's distinction between national and local power could have been seen as on a path to obliteration in the prior decades, both cases insist that limit still matters. And though the

Court focused on several factors that doomed the laws at issue, both cases also highlight federalism-protecting themes that required the Court's results. Existing precedent had come dangerously close to converting "congressional authority under the Commerce Clause to a general police power *of the sort retained by the States*." *Lopez*, 514 U.S. at 567 (emphasis added). So the Court put an end to the federal government's reliance on tenuous causal chains that tried to dress up local issues as affecting interstate commerce. In *Morrison*, for instance, the Court could "think of no better example of the police power, which the Founders denied the National Government and reposed in the States," than the type of criminal law Congress had enacted. 529 U.S. at 618. Adopting the federal government's approach would have let Congress reach most "*any* crime," *id.* at 615, as well as legislate in other quintessential state zones like "family law and direct regulation of education," *Lopez*, 514 U.S. at 565.

That result would have been flatly at odds with the Framers' intent—their "insight" was "that freedom was enhanced by the creation of two governments, not one." *Lopez*, 514 at 576 (Kennedy, J., concurring). Preserving the States' sovereignty protects that design, and that freedom. Concluding otherwise, in the Court's view, would have been "remarkable"

because it would "undermine[] th[e] central principle of our constitutional system" that "the people's rights would be secured by the division of power" between the federal government and the States. *Morrison*, 529 U.S. at 616 n.7 (collecting cases).

Even before *Morrison*, lower courts had started to notice the Supreme Court's "considered judgments" that "incrementally, but jealously, enforced the structural limits on congressional power that inhere in Our Federalism." *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 826 (4th Cir. 1999), *aff'd sub nom. Morrison*, 529 U.S. 598. And the pattern continued. Just one other example: in *Jones v. United States*, 529 U.S. 848 (2000), the Court refused to extend the federal arson statute to "an owner-occupied private residence" in large part because "arson is a paradigmatic common-law state crime" and the Court was loathe to "significantly change the federal-state balance" in that way. *Bond*, 572 U.S. at 859 (cleaned up). The common denominator at work in all these cases is that "power bestowed and power withheld under the Constitution" is a "foundational principle[]" of federalism—even when allowing the federal government more power may seem "expedient." *Brzonkala*, 169 F.3d at 826. In short, the Commerce

Clause's boundary line is "not solely a matter of legislative grace," but a constitutional imperative. *Morrison*, 529 U.S. at 616.

2. Given all that, the district court was right to reject the CTA on Commerce Clause grounds. It should be easy enough first to reject the federal government's idea that corporate incorporation is a "channel[]" or "instrumentalit[y] of interstate commerce." *Lopez*, 514 U.S. at 558. "Channels" mean "the interstate transportation routes through which persons and goods move," while "instrumentalities" refers to "the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods." *United States v. Ballinger*, 395 F.3d 1218, 1225-26 (11th Cir. 2005) (cleaned up). The CTA deals with reporting requirements for beneficial owner information when an entity incorporates, *see generally* 31 U.S.C. § 5336—things that neither move themselves nor create a route for others.

The CTA doesn't "substantially affect" interstate commerce, either. *Lopez*, 514 U.S. at 559. Again, we're dealing with incorporation, the act of forming a legal corporation under state law. It is a preliminary step *before* commercial action; at the point of incorporation, a company is not engaging in any commerce at all. In fact, it's not a certainty that an incorporated entity

will ever engage in commerce. State statutes envision non-business activities as valid for incorporated entities, for example, like "[m]aintaining, defending, mediating, arbitrating, or settling" actions or engaging in "activit[ies] concerning its internal affairs." 15 Pa. Cons. Stat. § 403(a)(1)-(2). Even those who incorporate with the intent of engaging in commerce can later decide not to do business for various reasons. So without more, the act of incorporation and any reporting obligations that come with it cannot be said to be commerce.

Indeed, the CTA even lacks a jurisdictional element—a textual requirement for case-by-case determinations that incorporation activity substantially affects interstate commerce. As in *Lopez* and *Morrison*, "no express jurisdictional element which might limit [the statutes'] reach to a discrete" conduct that has "an explicit connection with or effect on interstate commerce" confirms the constitutional defect. *Morrison*, 529 U.S. at 611-12 (quoting *Lopez*, 514 U.S. at 562). Nor is it enough that much of what a corporation may do after incorporation affects interstate commerce. Congress can regulate areas of traditional state responsibility, like some parts of corporate conduct, so long as those areas also "substantially affect interstate commerce." *Lopez*, 514 U.S. at 566. But courts still look at the particular assertion of authority at issue—"though broad," Congress's power in these

overlapping contexts "does not include the authority to regulate each and every aspect" of the historically state-law matter. *Id.*

Finally, the CTA looks nothing like the statutes the Court has upheld under Congress's commerce power. Even *Wickard v. Filburn*, 317 U.S. 111 (1942)—"perhaps the most far reaching example of Commerce Clause authority over intrastate activity"—"involved *economic* activity." *Lopez*, 514 U.S. at 560 (emphasis added). Incorporation is a purely legal activity, not a good or service or otherwise traditionally understood as commerce. And *Gonzales v. Raich*, 545 U.S. 1, 22 (2005), where the Court held that Congress had authority to regulate local cultivation and possession of marijuana, doesn't help the federal government, either. Unlike this case, no one in *Raich* disputed that the Controlled Substances Act "was well within Congress' commerce power." 545 U.S. at 15. Only "individual applications of a concededly valid statutory scheme" were at stake. *Id.* at 23. Also unlike here, *Raich* involved "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession" of the whole host of illegal substances. *Id.* at 24. So exempting the local application would have "undercut" that comprehensive and indisputably interstate commercial regime. *Id.* at 18. No broader, comprehensive regulatory scheme exists to be

frustrated here. And it's easy to see why not: Congress *can't* regulate the "total incidence" of corporate practices that might "pose[] a threat to a national market," *id.* at 17 (cleaned up), because that goal would quickly extend to all aspects of corporate law—which no one thinks is "well within Congress' commerce power," *id.* at 15.

Raich, then, is about starting with federal power and sweeping in local applications needed for uniformity. It's not about reaching into the States' zone from the get-go. So even it supports the idea that federalism's background principles come home to roost in Commerce Clause cases. Congress cannot claim a theory of power that makes it "difficult to perceive any limitation," "even in areas … where States historically have been sovereign." *Lopez*, 514 U.S. at 564. If the Court were to find this a close or difficult case, then, federalism's protections generally and the State-protecting philosophy behind Commerce Clause jurisprudence specifically would say to resolve it on the side of keeping historically state-law matters under state control.

II. The CTA Harms The States And Their Residents.

Apart from its legal flaws, the CTA also significantly injures the States and our residents and small businesses.

A. The CTA's costs are massive.

Complying with the CTA's demands will cost billions of dollars and tens of millions of personnel hours. *First*, consider the time demands for small businesses across the country. FinCEN estimates the burden to file initial reports will range between 90 minutes for reporting companies with a "simple structure," to 370 minutes for those with an "intermediate structure," to 650 minutes for those whose structure is "complex." 87 Fed. Reg. 59,498, 59,573 (Sept. 30, 2022). Those estimates translate to *118,572,335* hours nationwide filing reports in the CTA's first year—followed by another 18,204,421 hours in its second. *Id.* at 59,581.

Bad enough as those admitted numbers are on their own, they're likely underestimates. For example, the time FinCEN allots for a reporting company with a "simple structure" presumes that a single employee will handle the task and will spend a mere 90 minutes to read and "understand" the statutory and regulatory requirements and definitions; "[i]dentify, collect, and review information about beneficial owners and company applicants"; and "fill out and file [the] report." *Id.* at 59,573. Expecting all that to happen well before lunch on a single day is unrealistic—especially when a botched rush job could have severe consequences. (More on that below.)

Indeed, when it came to its rule implementing the CTA, FinCEN had many public comments explaining how its "estimated time burden … for filing initial reports was unrealistically low given the complexity of the requirements." 87 Fed. Reg. at 59,553. As the U.S. Chamber of Commerce explained, for instance, "FinCEN should not underestimate the significant burden that will be caused by simply trying to understand beneficial ownership requirements. Disclosure of beneficial ownership is *an entirely new federal requirement*, from an agency that *most businesses are unfamiliar with*." Comment of U.S. Chamber of Commerce, Dkt. No. FINCEN-2021-0005, at 3 (May 7, 2021), bit.ly/3V0PThm (emphases added). Another commenter explained, reasonably enough, "that the 20[-]minute allotment to read the form and understand the requirement from the initial report time estimate should be increased to no fewer than 4.5 hours per report." 87 Fed. Reg. at 59,553. Still another explained how FinCEN's estimates "are off by at least 400 percent and quite likely several times that." *Id.* at 59,554.

FinCEN's already-faulty initial numbers don't even include the time needed to apply for and update FinCEN identifiers—the "unique identifying number[s] that FinCEN will issue to individuals or reporting companies upon request, subject to certain conditions." 87 Fed. Reg. at 59,507. Here, FinCEN

estimates an additional time burden of 110,553 hours in year one and 21,091 hours in year two. *Id.* at 59,581. Then add to *that* the time to update initial filings after circumstances like name and address changes, identification number expirations, beneficial owners who pass away, or "management decision[s] resulting in a change in beneficial owner." *Id.* at 59,574. Companies must file updates within 30 calendar days of each of these triggering circumstances, *id.* at 59,592, requiring (again, under FinCEN's own and questionably low estimates) yet another 7,657,096 hours in year one, *id.* at 59,581. And unlike the other burdens, this one goes *up* in future years: FinCEN estimates 16,826,105 hours will be needed the second year. *Id.*

Second, the financial toll of all this is severe. FinCEN estimates each reporting company will incur between $85.14 and $2,614.87 to file an initial report. 87 Fed. Reg. at 59,559. "If all 32,556,929 existing reporting companies have to incur [that expense] in the same single year, the aggregate cost … is approximately $21.7 billion for Year 1" and $3.3 billion after. *Id.* at 59,559, 59,581. FinCEN thinks updating reports will cost another $3.3 billion the first two years. *Id.* at 59,581. Put another way, complying with the CTA will impose "undoubtedly significant costs of approximately *$22.8 billion* in the first year and *$5.6 billion each year thereafter*." *Id.* at 59,582 (emphases added).

Here too, FinCEN's figures are incomplete. They include employee wages (based on the too-low hour estimates discussed above) and costs to engage professionals like attorneys and CPAs—but only for "intermediate structure" and "complex structure" reporting companies. 87 Fed. Reg. at 59,573. The idea that no "simple structure" companies will need help navigating the CTA and completing their filings is irresponsible. After all, "any person"—not just the company itself—who fails to report "complete or updated beneficial ownership information" faces civil penalties of $500 per day, up to $10,000 in fines, and 2 years in federal prison. 31 U.S.C. § 5336(h)(1), (h)(3)(a). As one court put it, "tens of millions of Americans must either disclose their personal information to FinCEN" "or risk years of prison time and thousands of dollars in civil and criminal fines." *NSBU*, 721 F. Supp. 3d at 1269. To mitigate that risk, most reporting companies will likely need legal counsel or other expert help to "navigat[e] their FinCEN reporting responsibilities while safeguarding against potential risks and fraudulent practices." Matthew B. Edwards & D. Parker Baker III, *The Basic Ins and Outs of the Corporate Transparency Act*, 35 S.C. LAWYER 24, 29 (Sept. 2023).

And the financial costs don't end even there. The time to apply for and update FinCEN identifiers will carry associated wage costs—FinCEN is

willing to admit at least another $6.2 million for that in the first year and around $950,000 afterward. 87 Fed. Reg. at 59,577. Commenters also pointed out that FinCEN missed the "cost of securing data" for reports, "including images of identification documents, as well as the harms should such information not be kept secure." *Id.* FinCEN acknowledged these "potentially significant costs to businesses for securing the data and in increased identity theft risk to individuals in the event of a data breach." *Id.* But curiously, it neglected any "estimates for these costs." *Id.*

Third, the States will incur direct costs on top of what their residents and businesses will suffer. The CTA requires relevant state and tribal agencies (as determined by the Secretary of the Treasury) to "cooperate with and provide information" FinCEN requests to create and maintain a database of sensitive personal information. 31 U.S.C. § 5336(d)(2). It also requires States to notify filers about their reporting obligations; give them copies of the Treasurer's reporting company form; and update forms, websites, and physical premises with CTA reporting information. *Id.* § 5336(e)(2)(A). This all takes time and money, too—resources state governments will be required to divert from other enforcement and regulatory priorities.

True, subsection 5336(j) authorizes an appropriation that FinCEN can funnel to the States to help cover compliance costs. 31 U.S.C. § 5336(j). But that relief is only potential, and incomplete. The CTA merely "authorize[s]" Congress to appropriate funds to FinCEN; it doesn't guarantee Congress will come through. *Id.* Any funds will dry up after three fiscal years. *Id.* FinCEN will also control any money—if it is dissatisfied with a State's protocols, for instance, it could withhold reimbursement. It could also determine that the States' receipts are not "reasonable" costs "necessary to carry out" the CTA. *Id.* In short, the States remain on the hook for the time and money the CTA requires, not just their resident businesses.

B. The CTA's toll hurts the States' economies.

This forced re-direction of small company labor and state resources will strain the States' economic development. It all takes a direct hit on small businesses' productivity, for starters. Businesses that employ 20 or fewer employees—that is, those subject to the CTA, 31 U.S.C. § 5336(a)(11)(A) and (B)(xxi)—rely heavily on each individual employee, so disrupting their workflow matters. Companies will inevitably pass on the costs of tying up significant percentages of their workforces to comply with the CTA's onerous reporting requirements in the form of higher prices for their products and

services. FinCEN doesn't say otherwise. Instead, it pleads ignorance, saying it "does not have accurate estimates that are reasonably feasible regarding the effect of the rule on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of U.S. goods and services." 87 Fed. Reg. at 59,579.

Let's add a few of the numbers FinCEN was not interested in confronting. Some estimate that federal regulations cost the U.S. economy over $1.9 trillion a year. CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 6, 33 (2022). Small businesses like those the CTA and FinCEN's implementing rule target *already* bear a heavy share of that staggering figure—63% of the total cost by one estimate. *See* Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act*, 41 WM. & MARY L. REV. 1425, 1432 (2000). Costs like these often scare away investors by the prospect of "reduce[d] or eliminate[d] … returns" from "[r]adical and vacillating changes in [the] law." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92, 99 (2021). And consumers face nearly 1% price increases for every 10% rise in overall federal regulation. DUSTIN CHAMBERS,

ET AL., HOW DO FEDERAL REGULATIONS AFFECT CONSUMER PRICES? AN ANALYSIS OF THE REGRESSIVE EFFECTS OF REGULATION 29 (2019), https://bit.ly/4bH7q3s.

The CTA's burdens are not limited to for-profit, commercial entities, either. Just like their for-profit corporate cousins, any "nonprofit that meets the definition of a reporting company" and that doesn't qualify for one of the statutory exemptions "will have to file" with FinCEN. Sandra Feldman, *Nonprofit Organization Considerations for FinCEN Beneficial Ownership Information Reporting Requirements*, WOLTERS KLUWER (Feb. 27, 2024), bit.ly/3WE9eWM. And some estates and trusts will be required to comply as well. *See* Christine Fletcher, *Navigating the Corporate Transparency Act: Estate Plan Implications*, FORBES (Mar. 4, 2024, 3:49 PM), bit.ly/44JSfEj.

So the CTA's requirements are no mere inconvenience. Apart from being illegal, they hurt the States and the people that do business in and otherwise add value to our States in real and lasting ways.

CONCLUSION

This Court should deny the Government's motion and refuse to enter any stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Consistent with Rule 27(d)(2) of the Federal Rules of Appellate Procedure, this brief contains 5,181 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), as required by Rule 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point CenturyExpd BT font.

/s/ Michael R. Williams
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No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Texas Top Copy Shop, et al.,
Plaintiffs-Appellees,

v.

Merrick Garland, Attorney General of the United States et al.,
Defendants-Appellants.

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CASE NO. 4:24-CV-478

BRIEF OF THE NATIONAL RETAIL FEDERATION, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND RESTAURANT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO THE GOVERNMENT'S EMERGENCY MOTION TO STAY

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to those already listed in the parties' motion papers, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order for the judges of this court to evaluate possible disqualification or recusal.

Amici: National Retail Federation, National Association of Convenience Stores, and Restaurant Law Center

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/s/ Brett Bartlett
Brett Bartlett

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STATEMENT OF *AMICI CURIAE*

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

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

businesses with more than 60 percent of convenience stores having single-store operators and more than 95% of the industry operating as independent businesses.

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

While the NRF, NACS, and the Law Center are tax-exempt organizations under section 501(c) of the International Revenue Code and are exempt from the Corporate Transparency Act ("CTA" or the "Act") and the corresponding Reporting Rule, a large portion of their members (the "Members") will be required to comply with the Act if deemed constitutional and enforceable. The Members would be required to meet their reporting obligations by January 1, 2025, if the

Government's Motion is granted. The Members therefore have an interest in this matter and in particular, supporting denial of the Government's Motion in favor of the District Court's preliminary injunction.[1]

SUMMARY OF ARGUMENT

This Court should affirm the District Court's order granting a preliminary injunction (enjoining the CTA, 31 U.S.C. § 5336 and the Reporting Rule, 31 C.F.R. § 1010.380 and staying the compliance deadline of January 1, 2025) and deny Appellants' emergency motion to stay the preliminary injunction because Appellees satisfied the conditions to warrant preliminary injunctive relief and staying the injunction would have irreversible negative repercussions for small businesses throughout the nation.

ARGUMENT

A stay is treated as an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of

[1] No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the parties to this filing. The NRF, NACS, and Law Center file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all parties to the appeal have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

right, even if irreparable injury might otherwise result to the appellant." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016). To justify a stay, a movant must show that "(1) it is likely to succeed on the merits of its appeal, (2) it will be irreparably injured if the injunction is not stayed, (3) the stay would not substantially harm [the appellee(s)], and (4) granting the stay would serve the public interest." *Exxon Corp. v. Berwick Bay Real Est. Partners*, 748 F.2d 937, 939 (5th Cir. 1984). Because the Government cannot satisfy these requirements, its Motion to Stay should be denied.

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

In its 80-page opinion granting Appellees' Motion for Preliminary Injunction, the District Court thoughtfully examined the arguments of both sides, ultimately determining that Appellees had met their burden to support granting a preliminary injunction. As a threshold matter, the District Court examined the legal standing of each Plaintiff, concluding that each Plaintiff met its Article III standing requirements. (Opinion and Order at 22.) The District Court proceeded to evaluate the four fundamental elements for obtaining injunctive relief: the threat of harm from the CTA (*id.* at 23 – 32), the likelihood of Plaintiffs' success on the

merits (*id.* at 32 – 73), whether the threatened harm outweighed any damage from an injunction (i.e., balancing the equities) (*id.* at 73 – 74), and if such relief would harm the public (*id.*). *See A.T.N. Indus., Inc. v. Gross*, 632 F. App'x 185, 191 (5th Cir. 2015) ("A preliminary injunction may be granted if the plaintiff establishes the following rote elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.").

In the course of its analysis, the District Court gave the Government every benefit of the doubt and considered the likely outcome "even if" any given argument favored the Government. To wit, the "Court open[ed] each door" but concluded the "CTA finds no solace behind any door." (Doc. 21 at 55). The court correctly concluded that the facts and case law overwhelmingly supported Appellees' position that the CTA is likely unconstitutional and that a preliminary injunction is warranted. Given the District Court's well-reasoned opinion and finding that

Plaintiffs demonstrated a likelihood of success on the merits, the Government is not likely to prevail on its appeal.

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

The Government will not suffer irremediable harm absent a stay. Government enforcement authorities are not being denied any information it has previously had access to by way of the injunction. Nor is it being deprived of its existing tools and resources to combat financial crime. *See, e.g., Louisiana by & through Murrill v. United States Dep't of Educ.*, No. 24-30399, 2024 WL 3452887, at *3 (5th Cir. July 17, 2024) (finding that the injunction pending appeal did not prevent the government from enforcing existing or longstanding regulations to prevent the conduct covered by the agency's enjoined rule). At most, if the District Court ultimately determined the CTA was constitutional and dissolved the injunction, FinCEN would simply have access to the ownership information at a later date—beyond the arbitrary January 1, 2025 date. *See id.* (concluding that the government "can hardly be said to be injured by putting off the enforcement of a Rule it took three years

to promulgate after multiple delays"). There is therefore no true "disruption" to the Government.

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

Eliminating the Court's preliminary injunction would result in consequences to *amici's* members that cannot be reversed. The public faces a compliance deadline of January 1, 2025—a mere two weeks away—which the District Court suspended through its granting of Appellants' Motion for Preliminary Injunction. Given that imminent deadline, which businesses across the nation no longer think applies to them, the practical implications of Appellants' demand to stay the injunction is severe. If the Government's Motion is granted, Appellees and the public subject to the CTA and Reporting Rule will be required to comply with the reporting obligations by January 1st or face the potential civil penalties up to $10,000 or imprisonment up to two years. Small businesses who have deferred their compliance obligations in light of the injunction could therefore be confronted with potential imprisonment in the new year.

The Act itself creates new obligations to reporting companies that come at a cost. Such costs include the financial burden and time to prepare the requisite beneficial ownership information ("BOI") submission and the retention of professional advice to aid in the submission, to which Appellees attested in their respective Declarations. Even if Appellants prevailed on the merits of their action, those would be sunk costs never to be repaid. *See Louisiana v. Biden*, 55 F. 4th 1017, 1034 (5th Cir. 2022) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs[.]") (citation omitted); *see also Murrill*, 2024 WL 3452887, at *2 ("Irreparable harm is demonstrable by significant, unrecoverable compliance costs."). The Government acknowledges these expected time expenditures, compliance costs, and legal expenses, but maintains such costs are minimal. (Doc. 21 at 16.) Yet, the legislative record demonstrates that by FinCEN's own estimation, the financial impact of the Act is significant. *See* 87 Fed. Reg. at 59585-86 ("FinCEN estimates that the total cost of filing BOI reports is approximately $22.7 billion in the first year and $5.6 billion in the years after.").

Like Appellees, Members will also suffer immediate harm if the injunction is stayed as they would be forced to satisfy the reporting requirements by January 1, 2025, or be deemed noncompliant. This is a tall ask, especially for small businesses with limited personnel and resources. There are a number of steps involved to meet compliance before Members (individually, "Company") even reach preparing and filing BOI reports, including but not limited to:

1. Identify individuals to monitor CTA regulations and notify Company management of any relevant changes.

2. Adopt Company policy regarding CTA compliance.

3. Develop CTA-related training.

4. Review Company's organization chart and other records to ensure they are up to date.

5. Determine whether the Company is a "reporting company".

6. Determine if any exemptions apply and memorialize exemption analysis.

7. Collect reporting information on the reporting companies.

8. Determine all reportable beneficial owners for reporting companies.

9. Collect reporting information on beneficial owners; obtain FinCEN Identifier number for each reportable beneficial owner.

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

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

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

Compliance with the CTA is also not a one-time exercise. After filing a BOI report, Members are expected to implement a compliance process to monitor and report any changes or inaccuracies in BOI reports. They are required to file updates if any information about the reporting company or beneficial owners and control persons changes after the initial BOI filing is made. Likewise, they are required to file a corrected report if the Company discovers any inaccuracy. And if an exemption applies, Members must continue to monitor that such exemption continues to apply, because it must file a BOI report within 30 calendar days after the date the exemption no longer applies. Just the same, any reporting company that becomes exempt must update its BOI report within 30 calendar days of the date it meets the exemption criteria. These additional recordkeeping obligations further illustrate the harm Members face. *Career Colleges & Sch. of Texas v. United States Dep't of Educ.*, 98 F.4th 220, 235 (5th Cir. 2024) (recognizing "enhanced recordkeeping requirements inflict a kind of irreparable harm that warrants the issuance of a preliminary injunction").

The CTA also impacts Members' best practices for data security and general company operations. In light of the BOI data, Members must

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

Critically, noncompliance is not without risk because failures to satisfy reporting obligations may result in a civil penalty or imprisonment. 31 U.S.C. §§ (h)(1) – (3). Failing to meet the January 1, 2025 deadline could result in a civil fine of up to $500 a day, totaling up to $10,000 and criminal penalties of imprisonment for up to two (2) years. 31 U.S.C. § 5336(h)(1) – (3). This potential outcome serves as another basis for the injunctive relief granted by the District Court. *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 728 F. Supp. 3d 394, 410 (N.D. Tex. 2024) (finding that "members facing criminal penalties and fines for noncompliance during

the pendency of this lawsuit" satisfied the irreparable harm requirement).

Compliance with the CTA also comes at the cost of Appellees' and Members' constitutional rights. Appellees challenge the constitutionality of the Act on three grounds: (i) it exceeds Congress' enumerated powers; (ii) it violates Appellees' First Amendment rights; and (iii) it violates Appellees' Fourth Amendment rights. (Doc. 21, A140 – A158 (Plaintiffs' Motion for Preliminary Injunction)), the second and third considerations of which give rise to irreversible harm.

If Appellees and Members are required to comply by January 1, 2025, they will be required to reveal private information about their respective companies. Such information includes the identity of each "beneficial owner", including legal name, date of birth, residential or business address, and identifying number from an acceptable identification document (e.g., passport). 31 U.S.C. §§ 5336(b)(1)(A), (b)(2)(A). FinCEN can retain the information for at least five years after the reporting company terminates. *Id.,* §§ 5336(c)(1), (2)(B). FinCEN may also disclose the information to other Federal agencies and foreign entities under certain circumstances. *Id.,* § (c)(2)(B). This is significant

because the preliminary injunction is the only measure to insulate unnecessary disclosure of Members' beneficial ownership information to not only FinCEN (for an extended period) but also third parties.

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

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

The crux of an injunctive relief is to preserve the status quo. *See Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) ("The purpose of a preliminary injunction is to preserve the status quo and thus prevent irreparable harm until the respective rights of the parties can be ascertained…"). The nationwide injunction serves that purpose, as opposed to a selective result that varies arbitrarily by venue. *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), as revised (Nov. 25, 2015) ("It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction.") (collecting cases). The status quo here is simply a pre-CTA era, which is history as we all know it. *See Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (explaining courts can grant "interim relief" to "preserve the status quo *ante*"). That is, the company-ownership information FinCEN seeks by way of the CTA and that Appellees and the Members desire to maintain confidential are preserved as such, while eliminating the significant time and cost of compliance until final adjudication by the Court.

CONCLUSION

For all the foregoing reasons, this Court should affirm the District Court's grant of a preliminary injunction and deny Appellants' request for a stay.

Dated: December 18, 2024

Respectfully submitted,

/s/ Brett Bartlett

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) and includes 2,881 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, size 14 font. Pursuant to 5th Cir. R. 32.1, the footnotes have been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, size 12 font.

Dated: December 18, 2024 Respectfully,

/s/Brett Bartlett
Brett Bartlett

CERTIFICATE OF SERVICE

I hereby certify that I e-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 18, 2024. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I hereby certify that on December 18, 2024, the undersigned also mailed the foregoing to:

Faith E. Lowry
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L. Street, N.W.
Washington, D.C. 20005

Dated: December 18, 2024

/s/Brett Bartlett
Brett Bartlett

Attorney for National Retail Federation, National Association of Convenience Stores, and Restaurant Law Center - Amici

No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, *et al*.,

Defendants-Appellants.

MOTION REQUESTING LEAVE TO FILE BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND JOB CREATORS NETWORK FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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MOTION

Pursuant to Fed. R. App. P. 27 and 29 and the Court's December 18, 2024 docket entry (given as #121), the National Association of Wholesaler-Distributors (NAW) and Job Creators Network Foundation (JCNF) (collectively, Movants or *amici*), respectfully request leave to file a brief in this case as *amici curiae* in support of the Plaintiffs-Appellees. Movants are serving and filing their proposed brief with this motion as an accompanying document per Fed. R. App. P. 27(a)(2)(B).

ARGUMENT

I. Legal Standard

Under Fed. R. App. P. 29(a)(2)–(3), an *amicus curiae* [1] "may file a brief [A] by leave of court or [B] if the brief states that all parties have consented to its filing," and otherwise by motion if the motion [2] has the accompanying proposed brief and [3] states [A] "the movant's interest; and [B] the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case."

II. Movants Meet the Rule 29 Requirements

1. Consent

Movants obtained consent from all parties to file an *amicus curiae* brief in this case and noted so in their first filing of the brief on December 18, 2024. Considering the Court's docket entry #121, Movants provide this additional motion.

2. Accompanying Brief

Movants are serving and filing their proposed brief as Ex. 1 to this motion.

3. Rule 29(a)(3) Statements

A. The Movants' Interests

NAW represents the wholesale distribution industry - the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW comprises direct-member companies and a federation of national, regional, and state associations across 19 commodity lines of trade, encompassing approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses.

JCNF is a 501(c)(3) nonpartisan organization founded by entrepreneurs committed to educating employees of Main Street America about government policies that harm economic freedom. Through its Legal Action Fund, JCNF defends against government overreach to ensure that America's free market system is not only protected but allowed to thrive.

Both organizations have compelling interests in the outcome of this litigation. NAW's members face immediate and concrete injuries from the CTA's implementation, as the overwhelming majority of wholesaler-distributors are precisely the type of closely-held businesses that must shoulder the Act's burdensome reporting obligations. JCNF's institutional mission centers on

defending small businesses against precisely this type of regulatory overreach. The CTA's unprecedented insertion of federal authority into matters of business formation and governance—traditionally the exclusive province of state law—represents exactly the sort of structural threat to economic liberty that JCNF was established to oppose. Together, these organizations represent both the practical business interests and broader constitutional principles that the CTA endangers.

B. Desirability and Relevance

The proposed brief will assist the Court's deliberations in several distinct ways. First, *amici* offer complementary perspectives on how the Corporate Transparency Act's (CTA) reporting requirements directly impact small and medium-sized businesses. NAW provides insight from the distribution sector's operational viewpoint, while JCNF contributes broader small business policy expertise. Together, they present a comprehensive picture of the CTA's practical implications for American enterprise.

Second, the brief analyzes how the CTA's mandates exceed Congress's constitutional authority through both empirical evidence and legal analysis. NAW's extensive experience with federal regulatory frameworks combines with JCNF's focused expertise in government overreach to illuminate the constitutional infirmities of the CTA's approach to beneficial ownership reporting.

Third, *amici* present detailed arguments regarding the irreparable harm that small businesses will suffer absent the district court's injunction. NAW provides concrete examples from its membership base, while JCNF contextualizes these harms within broader patterns of regulatory burden on small businesses. This dual perspective strengthens the analysis of the equitable factors governing the stay request.

Fourth, the brief examines why the public interest and balance of equities favor maintaining the injunction. Drawing on their distinct organizational missions, *amici* show how the CTA's implementation would undermine both specific industry interests and general principles of economic freedom that benefit society as a whole.

III. Conclusion

For the foregoing reasons, Movants respectfully request that the Court grant their motion and accept the accompanying brief either as filed or for filing in this case.

Dated: December 20, 2024

s/ Grady J. Block
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CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it has 703 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED this 20th day of December 2024

s/ Grady J. Block
Grady J. Block

CERTIFICATE OF ELECTRONIC FILING

In accordance with this Court's CM/ECF User's Manual and Local Rules, I hereby certify that the foregoing has been scanned for viruses with Sentinel One, updated December 20, 2024, and is free of viruses according to that program.

In addition, I certify that all required privacy redactions have been made and the electronic version of this document is an exact copy of the written document to be filed with the Clerk.

DATED this 20th day of December 2024

s/ Grady J. Block
Grady J. Block

EXHIBIT 1

No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND JOB CREATORS NETWORK FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, National Association of Wholesaler-Distributers and the Job Creators Network Foundation submit this supplemental certificate of interested persons to fully disclose all those with an interest in this motion and provide the required information as to their corporate status and affiliations.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to those listed in the briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae: National Association of Wholesaler-Distributers is a 501(c)(6) non-profit trade association. It has no parent corporation or subsidiary, it does not issue shares or securities, and no publicly held corporation owns 10% or more of its stock.

Amicus Curiae: Job Creators Network Foundation is a 501(c)(3) non-profit organization. It has no parent corporation or subsidiary, it does not issue shares or securities, and no publicly held corporation owns 10% or more of its stock.

/s/ Grady J. Block
Grady J. Block

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TABLE OF AUTHORITIES

Regulations

INTEREST OF *AMICI CURIAE*[1]

National Association of Wholesaler-Distributors (NAW) is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct-member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume providing stable and well-paying jobs to more than 6 million workers.

The Job Creators Network Foundation (JCNF) is a 501(c)(3) nonpartisan organization founded by entrepreneurs committed to educating employees of Main Street America about government policies that harm economic freedom. JCNF's Legal Action Fund defends against government overreach to ensure that America's free market system is not only protected but allowed to thrive. *Amici* file this brief

[1]All parties consented in writing to the filing of this brief, no party's counsel authored this brief in part or in whole, and no person other than *amici* and their counsel made any monetary contribution to fund its preparation or submission.

on their own behalf and on behalf of their members' companies, whose operations and employees are placed at risk by the Corporate Transparency Act (CTA).

SUMMARY OF THE ARGUMENT

The district court's well-reasoned injunction against enforcement of the CTA rests on solid constitutional ground, recognizing that the statute's invasive reporting requirements likely exceed Congress's enumerated powers, infringe upon protected privacy and associational rights, and impermissibly intrude upon traditional areas of state authority. The government's request to "stay" the injunction disregards the government's own serious legal deficiencies in its argument while downplaying the immense and irreparable harm that small businesses, including wholesaler-distributors, will suffer under the CTA's burdensome mandates. When weighed against the government's speculative law enforcement justifications, the balance of equities and the public interest decisively favor preserving the injunction pending a thorough adjudication of the CTA's constitutionality.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CTA IS LIKELY UNCONSTITUTIONAL.

The district court's conclusion that the CTA "appears likely unconstitutional," *Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-CV-478, 2024 WL 5049220 (E.D. Tex. Dec. 5, 2024), is premised on a rigorous application of controlling constitutional principles. The CTA's reporting mandates represent a "drastic two-

step departure" from the foundational precepts of federalism that undergird our system of dual sovereignty. *Id*. The Constitution's allocation of authority between the federal government and the States reserves the power to regulate the formation and internal governance of business entities to the States. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations[.]"). By attempting to arrogate to the federal government an unprecedented degree of control over this quintessentially local domain, Congress has violated the boundaries that the Framers delineated in the Constitution and encroached upon the sovereign prerogatives of the States.

The government's invocation of the Commerce Clause cannot absolve the CTA's constitutional infirmities. While the commerce power undoubtedly endows Congress with broad regulatory authority, it is not a license to "pile inference upon inference" to manufacture a nexus to interstate commerce where none exists. *United States v. Lopez*, 514 U.S. 549, 567 (1995). The attenuated connection between the CTA's reporting requirements and commercial activity falls far short of the "substantial relation" to ***interstate*** commerce necessary to justify federal intrusion into areas of traditional state concern. *Id*. at 559.

The CTA's regulatory scheme bears little resemblance to the comprehensive economic regulations that have been upheld under the Commerce Clause. Unlike the

statutes at issue in cases such as *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), the CTA does not target a specific commercial activity or seek to regulate a fungible commodity that flows through ***interstate*** markets. Rather, it indiscriminately conscripts state-created business entities into a federal reporting apparatus, irrespective of those entities' participation in interstate commerce. This approach, divorced from any meaningful consideration of the entities' actual economic footprint, stretches the Commerce Clause too far.

The district court's conclusion that the CTA exceeds Congress's authority under the Commerce Clause fits Supreme Court precedent, most notably the Court's decision in *NFIB v. Sebelius*, 567 U.S. 519 (2012). There, the Court invalidated the individual mandate provision of the Affordable Care Act, holding that Congress cannot "regulate individuals precisely because they are doing nothing." *Id*. at 552 (opinion of Roberts, C.J.) (upholding the ACA on other grounds).

The CTA contravenes this fundamental constitutional precept. Rather than regulating preexisting economic activity, the statute manufactures an artificial and unconstitutional reporting obligation—the disclosure of beneficial ownership information—and then purports to let the federal government regulate the very same disclosure that it wrongly compels. This bootstrapping logic is irreconcilable with *NFIB*'s central teaching: Congress cannot conjure commercial activity into existence as a pretext for expanding the federal government's control over private (or at least,

non-federal) activities. The Commerce Clause is not an infinitely elastic fount of federal power, it is only a limited grant of authority to Congress constrained by the structural boundaries of federalism.

Sanctioning the CTA's approach to Commerce Clause authority would yield a federal government of limitless reach, empowered to regulate every aspect of life. Congress is turning a State issue into a supposed "interstate" issue just so that Congress can purport to extend its own power; but State registration of businesses is not an "interstate" issue, and Congress has no right to regulate it.

Nor can the CTA's constitutionally flawed provisions be salvaged by resorting to the Necessary and Proper Clause. While that clause empowers Congress to enact laws that are "convenient, or useful" to exercise its enumerated powers, it is not an independent wellspring of federal authority. *See NFIB*, 567 U.S. 519, 560 (2012) ("Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power."). The CTA's gratuitous imposition of onerous reporting burdens on small businesses can be characterized as neither "narrow in scope" per *United States v. Comstock*, 560 U.S. 126, 148, (2010) nor an "incidental" addition, *M'Culloch v. Maryland*, 17 U.S. 316, 365, (1819), to a valid federal regulatory scheme. Rather, it represents a sweeping expansion of federal power into a domain historically reserved to the States, untethered from any intelligible limiting principle.

The CTA's constitutional shortcomings go beyond its disregard for the structural boundaries of federalism. The statute's indiscriminate disclosure mandates also encroach upon individual rights secured by the First and Fourth Amendments. By requiring small-business owners to divulge a wealth of sensitive personal information—ranging from home addresses to government-issued identification numbers—the CTA works a profound intrusion into the sphere of constitutionally protected privacy. This wholesale abrogation of the right to confidentiality in one's personal affairs cannot be reconciled with the Fourth Amendment's protection against unreasonable searches and seizures.

Equally troubling are the CTA's implications for associational freedom. The compelled disclosure of ownership and control structures threatens to chill individuals' exercise of their First Amendment rights to associate for political, religious, or expressive purposes. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."). This concern is heightened when the disclosure requirements apply to organizations with expressive or political purposes, such as fundraising, as compelled identification of beneficial owners can deter individuals from associating or supporting such groups, chilling political engagement and free association.

The district court's skepticism of the CTA's beneficial ownership reporting

scheme is further buttressed by the critique offered in the testimony presented to Congress. *See* Harned, Karen, Testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, 116th Cong. (June 20, 2019)[2] at 6. As Ms. Harned explained, FinCEN Director Kenneth Blanco has candidly acknowledged the agency's inability to independently verify the accuracy of the beneficial ownership information collected under the CTA. *Id*. Blanco's admission lays bare a fundamental defect in the CTA's design: the statute compels the disclosure of sensitive personal data while offering no meaningful mechanism to ensure the integrity of the information unconstitutionally obtained.

Compelled disclosure of associational ties, the Supreme Court has held, must be justified by a compelling governmental interest and narrowly tailored to achieve that end. *See NAACP,* 357 U.S. 449, 462 (1958). Here, Congress's inability to ensure the accuracy of the reported information severely undermines the government's asserted interests in the CTA's supposed beneficial-ownership database. A repository of unverified, potentially inaccurate personal data is of dubious, at best, utility to the government's financial crime enforcement efforts and reinforces the district court's conclusion that the CTA's indiscriminate reporting requirements cannot withstand exacting scrutiny.

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[2] https://www.banking.senate.gov/imo/media/doc/Harned%20Testimony%206-20-19.pdf

Measured against the Constitution, the CTA simply cannot withstand scrutiny. It impermissibly aggrandizes federal power at the expense of state sovereignty, transgresses the outer boundaries of Congress's enumerated powers, and impinges upon individual rights. The district court properly recognized that this expansion of federal authority into the realm of corporate transparency is not likely to succeed on the merits. Its decision to enjoin enforcement of the CTA pending adjudication makes sense.

II. "ENJOINING THE INJUNCTION" WOULD CAUSE IRREPARABLE HARM TO BUSINESSES.

The government's motion disregards the extensive record showing the severe and irreparable harm that the CTA will inflict on small businesses. For the enterprises that make up *amici*'s membership, the costs of compliance—financial, operational, and constitutional—will be immense and unrecoverable.

As the district court found, and as corroborated by FinCEN's own economic assessments, the CTA imposes a draconian regulatory burden on reporting companies. Even under the most conservative estimates, small businesses will be compelled to spend between $85 and $2,615 per beneficial ownership report, solely to ascertain their obligations and assemble the requisite information. *See Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59,569, 59,585 (Sept. 30, 2022). The financial toll will undoubtedly be greater for businesses with more complex ownership structures.

And these are not one-time expenditures but rather perpetual drains on business resources. The CTA imposes an ongoing reporting requirement, mandating the filing of updated beneficial ownership information following any change in reportable data. *See* 31 U.S.C. § 5336(b)(1)(D). For dynamic enterprises with evolving ownership structures, this obligation will cause continuous diversion of capital and manpower from productive economic activities to the deciphering of opaque regulatory commands. The related opportunity costs—foregone growth, hiring, and investment—are inevitable and substantial.

The CTA's injury to small businesses, however, transcends financial metrics. By compelling the disclosure of sensitive personal information, the statute works an extraordinary intrusion into the protected privacy and associational interests of small-business owners. The mandated reporting of residential addresses, birth dates, and copies of drivers' licenses tears away the presumptive confidentiality of personal data and exposes individuals to a panoply of risks, ranging from inadvertent disclosure to targeted misappropriation. Such intimate details, once relinquished to the federal government, cannot readily be reclaimed. No ultimate adjudication on the merits can restore the privacy interests compromised by premature disclosure.

The persistent ambiguity surrounding the scope of the CTA's requirements will only make these problems worse. The contours of the statute's conceptions of "beneficial ownership" and "substantial control"—the essential triggering

conditions for the reporting obligation—remain elusive. Yet the consequences of noncompliance are severe, exposing even inadvertent missteps to civil and criminal sanctions. Ensnared in this statutory thicket, many business owners will have no choice but to overcorrect, erring on the side of ***overreporting*** at the price of confidentiality. That is not what our Constitution requires of small businesses.

Further worsening the potential for irreparable harm is Congress's startling lack of awareness about the CTA's requirements among the small-business community. As a recent survey reveals, nearly half of small-business owners are entirely unaware of their new reporting obligations under the CTA.[3] This dearth of knowledge, coupled with the immediacy of the statutory compliance window, sets the stage for a wave of inadvertent violations by small-business owners acting in good faith. The CTA's penalties, which accrue by hundreds of dollars each day, will rapidly transform unsuspecting entrepreneurs into unwitting criminals, subject to enterprise-crippling fines and even imprisonment. There is simply no way the Founders of this Nation were hoping to trick small-business owners into becoming criminals.

The government's assurance that "FinCEN has engaged in a large-scale effort

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3 Charles Mirabile & Sandra Feldman, New Survey – Half of Small Business Owners Are Unaware of the Corporate Transparency Act, WOLTERS KLUWER (Apr. 14, 2023), https://www.wolterskluwer.com/en/expert-insights/new-survey-half-of-small-business-owners-are-unaware-of-the-corporate-transparency-act.

to inform and encourage as many corporations to report as possible" scarcely alleviates these irreparable harms. Brief of Defendants-Appellants at 16. Indeed, FinCEN's "outreach" serves only to compound the constitutional injury by inducing the premature disclosure of sensitive information in the face of legal uncertainty. The government's professed concern that a stay will cause "many corporations to believe they no longer have to report," *id*. at 17, gets the whole thing completely backward. An unconstitutional reporting obligation cannot be bootstrapped into a justification for its own enforcement simply because regulated entities will otherwise default to the status quo.

The government's attempt to downplay the real-world hardships confronting small businesses under the CTA withers under scrutiny. *Amici*'s members, and entrepreneurs across the Nation, stand on the precipice of a fast-approaching compliance deadline that threatens to unleash a cascade of economic and constitutional harms. The district court has erected a critical bulwark against this gathering storm. Lifting that protection now, before the CTA's validity can be definitively adjudicated, would prematurely expose law-abiding enterprises to irremediable injuries. There is no good reason to "enjoin" the injunction.

III. PUBLIC INTEREST AND EQUITABLE FACTORS FAVOR DENIAL OF A STAY.

Beyond the manifest threat of irreparable harm to regulated businesses, the public interest in preserving the Constitution's structural safeguards against federal

overreach weighs heavily in favor of keeping the injunction in place. The Constitution's carefully reticulated system of checks and balances, its diffusion of authority between federal and state governments, and its codification of inviolable individual rights represent a collective societal patrimony. When Congress oversteps the boundaries of its enumerated powers or tramples on protected liberties, all Americans suffer injury—not just the directly regulated parties.

The government's talismanic insistence that "enjoining" the district court's injunction will advance the public interest in "target[ing] financial crime and protect[ing] national security," Brief of Defendants-Appellants at 15, underlines the government's failure to demonstrate that the CTA's dragnet is necessary to the achievement of those objectives. There is no direct and meaningful nexus between ownership transparency and the government's asserted interests.

Finally, the government's request to "enjoin" the district court's injunction would pull the rug out from under businesses that have structured their affairs in reliance on the injunction. Since the court's order issued, *amici*'s members have allocated their limited resources and charted their operational plans against the backdrop of a legal status quo that does not include the CTA's onerous mandates. "Enjoining" the district court's injunction would overturn those settled expectations ***on the eve*** of the statutory reporting deadline, and doing so would thrust these businesses into a state of intolerable uncertainty, suddenly forced to fulfill costly,

unconstitutional obligations. The predictability of the business environment is itself a public good, one that is ill-served by the yo-yoing of CTA compliance requirements.

CONCLUSION

For the foregoing reasons, NAW and JCNF respectfully urge this Court to deny the government's motion for a stay pending appeal.

DATED this 18th day of December, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,608 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

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No. 24-40792

In the
United States Court of Appeals
for the Fifth Circuit

TEXAS TOP COP SHOP, INC, et al.,

***Plaintiffs-Appellees*,**

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, et al.,

***Defendants-Appellants*.**

On Appeal from the United States District Court
for the Eastern District of Texas

Response of the Small Business Association of Michigan and the Chaldean American Chamber of Commerce as *Amici Curiae* in Support of Appellees and in Opposition to the Appellants' Emergency Motion to Stay Pending Appeal

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Certificate of Interested Persons and Corporate Disclosure

***Texas Top Cop Shop, Inc. et al. v. Garland et al.*, No. 24-40792**

Counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges may evaluate possible disqualification or recusal.

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Under Federal Rule of Appellate Procedure 26.1, the Small Business Association of Michigan and the Chaldean American Chamber of Commerce disclose that (1) none of the amici are a publicly held corporation or other publicly held entity, (2) none of the amici have any parent corporations, and that (3) no publicly held corporation or other publicly held entity owns 10% or more of the stock of any of the amici.

Dated: December 17, 2024

/s/ Stephen J. van Stempvoort

Counsel of Record for Amici Curiae

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Interest of *Amici Curiae*[1]

The Small Business Association of Michigan ("SBAM") is a statewide organization for small business owners in Michigan, with over 32,000 members. SBAM's mission is the success of Michigan's small businesses, and it frequently advocates on public policy issues affecting small business owners.

The Chaldean American Chamber of Commerce (the "Chaldean Chamber") advocates and promotes small businesses and economic opportunities, particularly for businesses and individuals who are affiliated with the Chaldean American community. Chaldeans are Aramaic-speaking, Eastern Rite Catholics indigenous to Iraq. More than 4,000 businesses are members of the Chaldean Chamber.

Amici's interest in this case arises from their concerns regarding the Corporate Transparency Act's impact on small businesses. The CTA requires millions of law-abiding Americans, including SBAM's and the

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than amici and their members contributed money to fund this brief. Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

Chaldean Chamber's members, to report sensitive, private information to law enforcement without any suspicion of wrongdoing.

The CTA will substantially impact amici's members. FinCEN estimates that each reporting company's cost of filing the initial beneficiary ownership interest report will range from $85.14 to $2,614.87.[2] Based on those estimates, the total cost of compliance for SBAM's 32,000 members will be between roughly $2.5 million and $78.4 million, and the total cost of compliance for the Chaldean Chamber's 4,000 members will be between approximately $340,000 and $10.5 million. On a national scale, FinCEN estimates that the cost of compliance will be about $21.7 billion in 2024 and around $3.3 billion each year afterward.[3]

Because of these and other concerns, amici and other plaintiffs filed a constitutional challenge to the CTA in the U.S. District Court for the Western District of Michigan, which remains pending (*SBAM v. Yellen*, No. 24-cv-00314).

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[2] *See* Beneficial Ownership Information Reporting Requirements for Financial Crimes Enforcement Network (FinCEN), 87 Fed. Reg. 59498, 59573 (Jan. 1, 2024), available at https://www.federalregister.gov/d/2022-21020/p-958.

[3] *See id.*

Introduction

Despite telling small businesses that they need not comply with the Corporate Transparency Act ("CTA") while the district court's nationwide injunction is in effect, the government asks this Court to subject more than twenty million small businesses to a January 1, 2025 reporting deadline, with only a handful of business days before compliance is due. The potential harm to small businesses is off the charts. The CTA imposes criminal penalties for noncompliance, and there is no chance that the twenty million companies that have not yet reported will be able to do so by December 31. And using FinCEN's own estimates, the collective compliance costs for those twenty million small businesses will be approximately $14 billion.

On the other end of the scale, the government has already extended the reporting deadline by six months for thousands of entities, including businesses in states affected by various hurricanes. The government fails to demonstrate a pressing need for it to subject millions of entities to a virtually immediate reporting deadline, especially when the government has extended that deadline for numerous small businesses already. In fact, the CTA contemplated that existing entities would have up to two

years after the effective date of FinCEN's final regulations in which to comply with the CTA—that is, until January 1, 2026. The government fails to explain why it has a compelling interest in requiring compliance a full year earlier than Congress believed necessary.

Instead of requiring millions of Americans to spend their holidays trying to avoid criminal liability by complying with the CTA's overzealous requirements, this Court should deny the government's motion.

Argument

The burden is on the government to demonstrate that a stay of the district court's order is appropriate. The government must demonstrate (1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that granting of the stay would serve the public interest. *Burgess v. Fed. Deposit Ins. Corp.*, 871 F.3d 297, 300 (5th Cir. 2017).

Although amici believe that the CTA suffers from numerous constitutional defects, amici focus for purposes of this brief on the balance of the harms, which tilts decisively against the government's request to

subject twenty million companies to a reporting deadline only a few days before compliance is due.

I. Millions of small businesses will be significantly harmed if the January 1, 2025 compliance deadline is reinstated.

A. The CTA is a novel statute that suffers from significant constitutional defects.

The CTA reflects the government's attempt to collect information about American citizens in a way that has never been tried before. The statute requires ordinary citizens to provide their personal, private information directly to the Financial Crimes Enforcement Network ("FinCEN"), without any individualized suspicion and without any of the procedural safeguards that the Fourth Amendment ordinarily requires. FinCEN then uses this private information to create a database that law enforcement officers can rummage through to search for evidence of potential criminality. The CTA also allows FinCEN to share that information with other federal and state law enforcement agencies and even foreign intelligence services, usually without court oversight. *See generally* Amicus Brief of SBAM and the Chaldean Chamber, *Community Assocs. Inst. v. Dep't of Treasury*, No. 24-2118 (4th Cir., filed Nov. 19, 2024). It is a federal felony for a small business to willfully fail to comply with the CTA. *See* 31 U.S.C. § 5336(h)(1), (3).

Because of these and other constitutional defects in the CTA, the CTA has been subject to numerous legal challenges and broad public criticism. Challenges are pending in the Fourth, Ninth, and Eleventh Circuits, as well as in several district courts. *See Community Assocs. Inst. v. Dep't of Treasury*, No. 24-2118 (4th Cir.); *Firestone et al. v. Yellen et al.*, No. 24-6979, (9th Cir.); *NSBU v. Yellen*, No. 24-10736 (11th Cir.); *Small Bus. Assoc. of Mich. et al. v. Yellen et al.*, No. 1:24-cv-00314 (W.D. Mich.).

In several of these cases, the CTA challengers have attracted broad amicus support. Amici in the pending Eleventh Circuit appeal, for example, include twenty-two states, who emphasized their sensitivity "to the ways burdensome legislation (and its implementing regulations) hurt our residents and small businesses." (Dkt. 57, p. 11). Many public interest groups filed amicus briefs, too, including the Project for Privacy and Surveillance Accountability, Inc. (Dkt. 82), the Hamilton Lincoln Law Institute (Dkt. 50), Community Associations Institute (Dkt. 94), Americans for Prosperity Foundation (Dkt. 39), The Cato Institute (Dkt. 43), National Federation of Independent Business Legal Center (Dkt. 48), the National Taxpayers Union Foundation (Dkt. 52), Advancing

American Freedom (Dkt. 54), among other organizations.[4] These organizations represent the interests of hundreds of thousands, if not millions, of Americans.

B. Snapping the January 1, 2025 deadline back into place would require more than twenty million small businesses to report to FinCEN over the course of only a few days.

Widespread confusion has been a feature of the CTA since its inception. Many reporting entities—all of which are small businesses or entities, and many of which have varying levels of sophistication and access to legal advice—are not even aware of the act. And other entities remain in the dark about who must report. *See, e.g.*, Nicholas Brown, *FinCEN, BOI, CTA: What Does Any of This Stuff Mean?*, NC State Extension (Updated Dec. 9, 2024).[5] FinCen's regulations do little to help. For example, they explain that a "beneficial owner" must report, that a "beneficial owner" includes someone who has "substantial control" over an entity, and that "substantial control" means—tautologically—"substantial control." *See* 31 C.F.R. § 1010.380(d)(1) (i)(D).

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[4] Amici also filed an amicus brief in the Eleventh Circuit (Dkt. 51).

[5] https://farmlaw.ces.ncsu.edu/2024/10/fincen-boi-cta-what-does-any-of-this-stuff-mean/

The CTA's reporting requirements have been so poorly understood that—as the government admits—despite 14 million hits on FinCEN's online guidance and after fielding over 200,000 inquiries through its Beneficial Ownership Contact Center, more than *two-thirds* of the CTA-reporting entities had not filed their required reports with less than one month left before the deadline. (A87-A88, Gacki Dec. ¶¶ 12, 15). As of December 3, 2024, only ten million out of 32.6 million companies had filed their reports. (A88, Gacki Dec. ¶ 15).

There is no way that the remaining small businesses will be able to comply in the last few days of December, over the holidays. And because the CTA imposes criminal penalties for noncompliance, *see* 31 U.S.C. § 5336(h), reinstating the January 1, 2025 deadline at this late stage threatens to impose criminal liability on millions of American small business owners and entrepreneurs.

Changing the status quo yet again would only escalate the confusion caused by the shifting status of the CTA. After the district court enjoined the CTA nationwide, FinCEN issued an alert, directing small business owners that they are not obligated to file reports due to the injunction. *See* Alert: Impact of Ongoing Litigation – Deadline State –

Voluntary Submission Only, https://www.fincen.gov/boi . News outlets have likewise reported that the court enjoined the CTA. *See, e.g.*, Nate Raymond, *Texas judge blocks anti-money laundering law's enforcement nationwide*, Reuters (Dec. 4, 2024, 12:39pm);[6] Matthew F. Erskine, *Court Blocks Corporate Transparency Act—A Win For Federalism? Updated* Forbes, (Dec. 4, 2024, 8:52am).[7] Changing the rules again—in the middle of the holiday season—would only exacerbate the confusion that already exists.

C. Requiring twenty million companies to comply with the CTA would collectively cost small businesses approximately $14 billion.

The CTA requires FinCEN to "minimize burdens on reporting companies associated with the collection of [beneficial ownership' information." 31 U.S.C. § 5336(b)(1)(F)(iii). That task is not facilitated by reopening the floodgates to millions of reports only a few days before compliance is due.

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6 https://www.reuters.com/legal/government/texas-judge-blocks-anti-money-laundering-laws-enforcement-nationwide-2024-12-04/

7 https://www.forbes.com/sites/matthewerskine/2024/12/04/court-blocks-corporate-transparency-act-a-win-for-federalism/

The cost of compliance is significant. FinCEN estimates that the cost of each initial report "ranges from $85.14 to $2,614.87" and that the "aggregate cost to all existing reporting companies is approximately $21.7 billion for Year 1." [8] Given that fewer than a third of entities had reported by December 3, 2024, it would cost the remaining twenty million reporting companies roughly $14 billion, collectively, to comply with the CTA. Those costs dwarf—by a factor of more than 3,000—the $4.3 million that FinCEN has spent on its "expansive public service announcement campaign." (A87-A99, Gacki Dec. ¶¶ 14, 15).

II. The government's interest in enforcing a January 1, 2025 reporting deadline is low.

A. The CTA envisioned that existing companies would have up to two years to report to FinCEN, not twelve months.

On the flip side, the government contends only that it has an interest in enforcing the CTA; it does not point to any specific interest that it has in enforcing a January 1, 2025 reporting deadline.

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[8] *See* Beneficial Ownership Information Reporting Requirements for Financial Crimes Enforcement Network (FinCEN), 87 Fed. Reg. 59498, 59573 (Jan. 1, 2024) (to be codified at 31 C.F.R. pt. 1010), available at https://www.federalregister.gov/d/2022-21020/p-958.

Nothing in the CTA itself mandates such a deadline. The CTA was enacted nearly four years ago, and for entities pre-dating FinCEN's final rulemaking, the CTA envisioned a period of up to two years "after the effective date of the regulations" for reporting entities to submit reports. *See* 31 U.S.C. § 5336(b)(1)(B). FinCEN's regulations became effective on January 1, 2024.[9] The government does not explain why it has a compelling need for a one-year reporting period instead of the two-year period that the CTA itself allows for.

B. The Government has extended the reporting deadline for thousands of businesses already.

The government's assertion that it has a paramount interest in resurrecting a January 1, 2025 deadline is also belied by its own actions.

FinCEN has issued five different notices extending the reporting deadline in areas affected by Hurricanes Beryl, Debby, Francine, Helene, and Milton. *See* https://fincen.gov/boi. Each of these notices covers different geographical areas and imposes different deadlines. *See, e.g.* FinCEN Provides Beneficial Ownership Information Reporting Relief to

[9] *See* Beneficial Ownership Information Reporting Requirements for Financial Crimes Enforcement Network (FinCEN), 87 Fed. Reg. 59498, 59573 (Jan. 1, 2024) (to be codified at 31 C.F.R. pt. 1010), available at https://www.federalregister.gov/d/2022-21020/p-958.

Victims of Hurricane Helene; Certain Filing Deadlines in Affected Areas Extended Six Months (Oct. 29, 2024).[10]

Thousands of other small businesses are also exempt from the CTA's reporting requirements. On March 1, 2024, the Northern District of Alabama in, *National Small Business United (NSBU) v. Yellen*, No. 5:22-CV-1448-LCB, 2024 WL 899372, (N.D. Ala. Mar. 1, 2024), enjoined FinCEN and the Department of Treasury from enforcing the CTA against the named plaintiffs and the members of the National Small Business Association. *Id*. The government did not move to stay the district court's order in that case, and the Eleventh Circuit has not yet ruled in that appeal. The government does not explain why some small businesses must comply with a January 1, 2025 deadline when others don't.

In this case, too, the government has not exhibited haste. The district court entered the nationwide injunction on December 3, 2024. (Mem. Op. & Order, Dkt. 30). The government did not move to stay the district court's order for more than a week. (Mot. to Stay, Dkt. 35). It then filed a motion to stay in this Court but requested a briefing schedule that

[10] https://www.fincen.gov/sites/default/files/shared/FinCEN-BOI-Notice-Helene-508FINAL.pdf

extended briefing until December 23, 2024. (Mot. to Stay, 5th Cir. Dkt. 21, p. 2). Meanwhile, FinCEN advised small businesses that they need not file reports while the nationwide injunction was pending. *See* Alert: Impact of Ongoing Litigation – Deadline State – Voluntary Submission Only, https://www.fincen.gov/boi. These actions suggest that the government itself views the January 1, 2025 as an arbitrary deadline, rather than an immovable date certain.

C. The district court's nationwide injunction imposes much needed uniformity—and staying it would cause mass confusion.

For small businesses around the country, the district court's nationwide injunction brings crucial uniformity to the CTA's reporting deadlines. Because the CTA implicates millions of Americans—many of whom don't know about the CTA's requirements—the district court's nationwide injunction should remain undisturbed pending appeal. The injunction provides clarity and consistency to entities who have yet to report while federal courts address the CTA's constitutional issues.

Although nationwide injunctions may be viewed with skepticism in other contexts, nationwide relief is appropriate in challenges brought under the Administrative Procedures Act. Federal regulations have

nationwide effect. The government's "protests against nationwide relief are incoherent in light of its use of the [challenged regulations] to prescribe uniform federal standards." *Career Colleges & Sch. of Texas v. United States Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024).

Conclusion

The Court should deny the government's motion to stay the district court's preliminary injunction pending the resolution of this appeal.[11]

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[11] Alternatively, the Court should extend the nationwide reporting deadline by six months, just as FinCEN previously extended the deadline by six months to entities in states affected by natural disasters. This Court has the authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion" of the government's appeal. 5 U.S.C. § 705; *Career Colleges & Sch. of Texas v. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024). Extending the nationwide reporting deadline by at least six months would provide additional time for the remaining twenty million entities to clarify their reporting obligations and would create parity by establishing a single reporting deadline for all entities.

Certificate of Compliance

This amicus filing opposing appellant's motion contains 2,598 words, excluding the parts of the motion exempted by rule. This filing complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 31(a)(6) because it has been prepared in proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

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Certificate of Service

I hereby certify that on December 17, 2024, the foregoing was filed through the Court's Electronic Filing System, which will send notice to all counsel appearing in this matter.

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FOR THE FIFTH CIRCUIT

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v.

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Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas Sherman Division

AMICUS BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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MOTION FOR LEAVE TO FILE AMICI BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a) and Fifth Circuit Rule 29.1, Amici Community Associations Institute ("CAI") moves the Court for leave to file the attached Brief Amici Curiae in support of Plaintiff-Appellee's Brief. The proposed brief is attached to this Motion. In support of this Motion, CAI states as follows:

1. Community Associations Institute is an international organization dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 49,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 75.5 million homeowners who live in more than 365,000 community associations in the United States.

2. CAI and its members recognize that the sustained health of the community association form of ownership in the United States depends in large part upon the willingness of owners to continue to serve on volunteer boards to make their homes and communities better places to live. Community Associations were not given one of the twenty-three (23) exemptions under the Corporate

Transparency Act.[1] CAI believes that this was an oversight. CAI respectfully submits that homeowner associations are not "hotbeds" of financial crimes or terrorist activity by anonymous players using shell corporations to disguise their activities, which is the stated purpose of the Corporate Transparency Act ("CTA").

3. Leave to file a brief as amici curiae should be granted when "the amici have an 'interest in the case,' and it appears that their brief is 'relevant' and 'desirable,'" such as when "it alerts the merits panel to possible implications of appeal." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3rd Cir. 2002) (Alito J.) (quoting Fed. R. App. P. 29(a)(3)); *see also id.* At 132 ("The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent.").

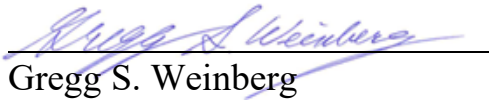
4. CAI submits that there experience in representing and supporting community associations both in the United States and internationally and understand the make and needs of the various community associations in the United States. CAI states that it can provide an important perspective concerning how the CTA will adversely impact community associations without furthering the stated purpose of the CTA.

[1] A small number may be exempt as 501(c)(4) organizations, however, that is the exception to the norm.

5. Pursuant to Federal Rule of Appellate Procedure 29(a)(6) and Fifth Circuit Rule 29.1, amicus curiae briefs are due "no later than 7 days after the principal brief of the party being supported is filed." CAI's Motion and Brief has been timely submitted on December 18, 2024.

For these reasons, Amici respectfully request that the Court grant this Motion for Leave to File a Brief Amici Curiae and accept the attached brief for filing.

Respectfully submitted,



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Dated: December 18, 2024

No. 24-40792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS TOP COP SHOP, et al.,

Plaintiffs-Appellees,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas Sherman Division

AMICUS BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TEXAS TOP COP SHOP, et al.,	
Plaintiffs-Appellees,	
v.	
MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, et al.	
Defendants-Appellant,	

CERTIFICATE OF INTERESTED PERSONS

Amicus Curiae Community Associations Institute submits this Certificate of Interested Persons and Corporate Disclosure Statement. See Fed. R. App. P. 26.1; 5TH CIR. R. 28.2.1. In addition to the individuals set forth in the Appellants' Brief, Appelles' Brief, and Briefs of other Amici Curiea, the following entities and individuals have an interest in the matter:

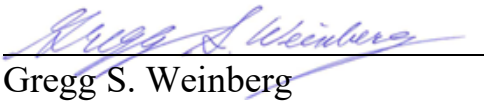
1. **Community Associations Institute**, *Amicus Curiae*, in support of Plaintiffs-Appellees;
2. **Allcock, Edmund**, counsel for *Amicus*;
3. **Bunn, Brendan P.**, counsel for *Amicus*;

4. **Weinberg, Gregg**, counsel for *Amicus*
5. **Mullen, John M.**, counsel for *Amicus*

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Community Associations Institute has no parent corporation and no publicly traded corporation owns more than 10% of Community Associations Institute.

Respectfully submitted,



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Dated: December 18, 2024

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I. IDENTITY AND INTEREST OF AMICUS CURIAE.

The Community Associations Institute ("CAI") is an international nonprofit research and education organization formed in 1973 by the Urban Land Institute, the National Association of Home Builders, and the United States Counsel of Mayors to provide the most effective guidance for the creation and operation of condominiums, cooperatives, and homeowners associations. CAI is dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 49,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 75.5 million homeowners who live in more than 365,000 community associations in the United States. These residents constitute roughly 30% of the population of the United States.

Community associations are property developments in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. The regimes include, among others, condominiums, homeowners associations, and co-operatives. The community association presents a unique form of ownership where responsibility for the

submitted property is shared between the individual owner or member, on the one hand, and an association, trust, or corporation, on the other. To that end, many commentators have suggested that community associations make up and comprise the last bastion of affordable housing in the United States.

All community associations are governed by nonprofit organizations led initially by the developer or declarant and eventually by a group of volunteer homeowners elected by their fellow homeowners. Depending on the locality, community associations are formed as a nonprofit corporation, trust, or, less frequently, unincorporated associations. The primary role of community associations is to manage the common areas of the community, i.e. fix the roofs, maintain the lawns, shovel the snow, insure the buildings, etc. The elected board of volunteer homeowners take on or oversee these tasks free of charge. Volunteer board members of community associations cycle on and off their boards frequently, at least annually through the election process, and sometimes more frequently because of relocation, resignation, death and/or removal.

CAI submits this amicus brief on behalf of its members who recognize that the sustained health of the community association form of ownership in the United States depends in large part upon the willingness of owners to continue to serve on

their associations' volunteer boards to make their homes and communities better places to live.[1]

Community associations were not given one of the twenty-three (23) exemptions under the Corporate Transparency Act ("CTA").[2] CAI believes that this was an oversight. CAI respectfully submits that community associations are not "hotbeds" of financial crimes or terrorist activity by anonymous players using shell corporations to disguise their activities, which is the stated purpose of the CTA. First, community associations are anything but anonymous. Their owners are on public record with local registries of deeds when they buy property in a community. Community associations also record the identities of their volunteer board members with the local registry or secretary of state's office annually. Second, given that community association boards are made up of volunteer homeowners who ensure the lawns are cut, roofs are repaired, and the swimming pools are maintained in affordable housing across America, they are as far from a terrorist or financial threat as could be. They are the backbone of America, homeowners living in and volunteering to make their communities better.

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[1] CAI has also filed an amicus brief regarding the Corporate Transparency Act in *National Small Business United, et al. v. U.S. Department of the Treasury, et al.*, No. 24-10736, 11th Cir., as well as been party to an action in *Community Associations Institute, et al. v U.S. Department of the Treasury, et al.,* Case No. 1:24-cv-1597, E.D. Va.

[2] A small number may be exempt as 501(c)(4) organizations, however, that is the exception to the norm.

Notwithstanding this, the Financial Crimes Enforcement Network ("FinCEN") and the Department of the Treasury (collectively the "Government") have specifically refused to grant community associations an exemption from reporting under the CTA. This could be because they recognize that community associations make up 25% of the United States population and because an underlying goal of the Government is to create as large of a facial recognition database as possible. However, CAI respectfully submits that requiring community associations and their volunteer homeowner leaders to comply with the beneficial ownership reporting requirements will chill volunteer participation going forward and is contrary to other express legislative intent in promoting volunteerism in nonprofit organizations.

The CTA contradicts Congress's prior express intent in encouraging and providing immunity for volunteers of nonprofit entities. The Federal Volunteer Immunity Act of 1997, 42 U.S.C. § 139 (1997), expressly provides immunity for negligent acts of volunteers with nonprofit entities. In enacting this legislation, Congress specifically found that "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them and the withdrawal of volunteers has had an adverse effect on organizations." Yet the CTA subjects volunteer homeowners to imprisonment and civil fines if they don't

upload their driver's license to a government website the moment they begin their service, undermining prior legislation and prior stated legislative intent.

Volunteerism is the backbone of every community association. Board members are not paid for their service. CAI respectfully submits that volunteer homeowners will be less likely to serve in that capacity if they are required to file a beneficial ownership report with the Government, proving their sensitive personal information including their driver's license and photo identification and then to amend their filings each time their board brings on new board members or obtain new state issued driver's licenses. This is especially true where failure to comply brings with it $500.00 per day fines and the possibility of imprisonment.

It's horrifying to imagine that a homeowner could be subject to imprisonment in the United States of America because they purchased a home and volunteered to serve on the board of directors for their community association but failed to upload a photograph of their state issued driver's license to a federal database. Homeowners will no doubt be reluctant to volunteer in light of the potential Orwellian consequences imposed by the CTA.

CAI submits that the CTA will have a devastating and unintended consequence on community associations and their operations throughout the United States. CAI respectfully submits that the CTA exceeds the power of Congress to regulate activity that is governed entirely by the states in which the

community associations are located. The CTA's application to community associations and their volunteer homeowners but not to business corporations that have more than $5,000,000.00 in profits per year demonstrates the absurdity of its reach and the reality that it is not in furtherance of its stated purpose. Moreover, as detailed herein, the CTA is constitutionally vague and its application to community associations is like attempting to fit a square peg into a round hole.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI urges this Court to deny the Government's Motion, leaving the Preliminary Injunction in force.

II. DECLARATION OF AMICUS

Pursuant to Fed. R. App. P. 29, CAI makes the following declarations:

1. This brief was not authored in whole or in part by counsel for any of the parties to this case.

2. Neither the parties to this case nor their counsel contributed money that was intended to fund preparing or submitting this brief.

3. The amicus curiae and its counsel have not represented the parties to this appeal in another proceeding involving similar issues.

III. STAYING THE DISTRICT COURT'S PRELIMINARY INJUNCTION WILL CREATE IRREPARABLE HARM TO COMMUNITY ASSOCIATIONS, PARTICLARLY TO THEIR VOLUNTEER HOMEOWNER BOARD MEMBERS.

Introduction

The CTA was enacted on January 1, 2021 with a stated purpose of combating money laundering and terrorism financing by cracking down on the use of anonymous "shell companies."[3] While there may be laudable purposes in requiring that persons behind "shell companies" report personal information, the CTA has unfortunately caught homeowners' and condominium associations and housing cooperatives ("community associations") in its wide and expansive net. Community associations are hardly "shell companies" with anonymous or nefarious ownership; these non-profit associations are run by volunteers who openly own homes in their residential communities.

The CTA, as implemented, would require every U.S. homeowner who volunteers to serve on their community association board to report personal information to FinCEN,[4] despite the dubious connection between the purposes of CTA and requiring these volunteers to provide their information to FinCEN.

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[3] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

[4] If a volunteer homeowner becomes a board member, they are required to file a beneficial ownership report with FinCEN or be subject to penalties. However, that same board member is further required to amend their beneficial ownership report with FinCen within thirty (30) days if they change their e-mail address or renew their driver's license.

Nonetheless, community association volunteers nationwide have been ramping up to fulfill the CTA's reporting requirements, expending substantial resources to achieve compliance, only to be told to "stand down" per the effect of the District Court's Preliminary Injunction. Now the Government insists on re-implementing the CTA reporting deadline in two short weeks, hardly an emergency in the larger picture of the purposes of the CTA. Worse, to suddenly reverse course and effectively require volunteers to scramble to report their information in the last week of December would be devastating and result in irreparable harm to community associations throughout the Nation. Accordingly, the Government's Motion should be denied, leaving the Preliminary Injunction in force.

A. The CTA Was Already Unduly Burdensome as to Community Associations, Creating Substantial Compliance Costs to These Non-Profit Entities and Their Volunteers.

As noted above, the CTA reporting requirements already operate to discourage volunteer service on community association boards. If homeowner volunteers fail to file or amend their beneficial ownership report timely, they will be subject to penalties or imprisonment.[5] The CTA is also unclear on the

[5] Application of the CTA to community associations is already having a chilling effect on volunteerism within communities. Many people are uncomfortable providing personal information for inclusion in FinCEN's database. Additionally, the penalties for noncompliance are so severe as to discourage individuals from volunteering to serve their neighbors on their association's board of directors. Why would someone volunteer for a position that provides no compensation when they are subjected to potential fines of up to $250,000.00 and two years in jail if the person fails to provide their personal information to FinCEN?

consequences if one volunteer fails to file their beneficial ownership report with FinCEN. Does that subject other members to penalties? Are volunteer board members now required to police the other volunteers' CTA reporting?

Due to these potential penalties, community associations and their volunteers throughout the United States have been working in "overdrive" during the last several months to find a way to comply with FinCEN's reporting requirements. Some associations hire vendors at substantial expense (particularly given that these nonprofit entities have "no-frills" budgets) to help secure information from the board volunteers. Others turned to lawyers or CPAs to shepherd them through the FinCEN reporting process, made even more challenging due to reluctance by some volunteers to provide such information.

All of these compliance efforts were oriented around the January 1, 2025 deadline. When the District Court entered the Preliminary Injunction staying enforcement of the CTA nationwide, most community associations stood down their efforts to collect data from their volunteers pending the outcome of this case. While this did not reverse the harm and costs already imposed on community associations by the CTA, it "stopped the bleeding" at least until the District Court can enter a final order and rule on the merits.

B. Staying the Injunction at This Late Date Will Cause Irreparable Harm to Community Associations Nationwide, Further Damaging the Community Association Industry.

The Government now demands that the Preliminary Injunction be stayed by December 27, 2024. The effect of entering a stay will be that community association volunteers subject to the BOI reporting requirement will have just two business days to file their reports with FinCEN, with those days falling in the midst of the holiday season and other year-end family activities. It is difficult for community associations to find volunteers to serve under the best of circumstances, and a legally-mandated mad scramble for volunteers to file reports in late December will only exacerbate the situation and harm community associations nationwide.

It should be recalled that failing to meet the January 1, 2025 deadline could result in substantial civil and criminal penalties for these volunteers and the associations they serve, consequences wildly disproportionate given that these homeowners simply volunteered to help out their local community by serving on their board of directors. Exposing these volunteers to such penalties under the tight deadline implicated by staying the Injunction is exactly the kind of irreparable harm the Court should consider in balancing the relative harms and determining whether a stay is merited under these unusual circumstances.

The Government argues that it will suffer irreparable harm if the Preliminary Injunction is not stayed. Nothing could be further from the truth. What is the harm to the Government arising from a slight delay in the reporting deadline while the District Court reaches a final determination on the merits as to the constitutionality of the CTA? None. Yet, the CTA's penalty provisions – particularly when levied against volunteer board members in a homeowners' association – are sufficiently substantial that they could very well devastate an industry that relies wholly on volunteerism to fuel its governance structure.

In sum, for these volunteers to be advised on one day that the CTA reporting requirement deadline has been stayed, followed by a sudden reversal and a shockingly sudden deadline to comply, will do nothing but set up community associations for failure, especially given the challenges of the season and the volunteer-driven structure of this industry. Such a result would be both inequitable and reeking with irreparable harm. Delivering potential civil and criminal penalties upon community volunteers is hardly in keeping with the spirit of equitable jurisprudence and, accordingly, the Government's motion to stay the Preliminary Injunction should be denied.

CONCLUSION

For the reasons as set forth above, CAI states that this Court should deny the Government's Motion to Stay the Preliminary Injunction.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) as the text consists of 2,418 words as counted by Word for Microsoft 365 programming program used to generate this brief. This brief also complies with the type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) - (6) as it was prepared using Word for Microsoft 365 in 14-point font.

Dated: December 18, 2024

Counsel for Community Associations Institute