No. 24A653

In the Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL, ET AL.,

Applicants,

v.

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

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND JOB CREATORS NETWORK FOUNDATION IN SUPPORT OF RESPONDENTS

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IDENTITIES AND INTERESTS 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 also allowed to thrive.

The application for a stay of the district court's injunction certainly runs counter to *amici*'s interests in protecting small-to-medium-size businesses ***across the country*** from unconstitutional government interference in

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[1] Per Supreme Court Rule 37.6, the undersigned affirm that no counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution for the preparation or submission of this brief.

their operations. And even more pressing in the current posture, it seeks the Court's permission to ring a bell—requiring disclosure of private information—that *amici*'s members will never be able to un-ring ***even if*** the lower courts (and maybe this Court) ultimately decide on the merits that the relevant provisions of the Corporate Transparency Act are unconstitutional.

To be clear, the district court concluded that the relevant provisions of the Act, 31 U.S.C. § 5336, and corresponding "Reporting Rule," 31 C.F.R. § 1010.380, likely ***are*** unconstitutional. App.4a (5th Cir.); App.96a–App.97a (E.D. Tex.). So where does that leave *amici* and their members? As the district court recognized, once small businesses ***nationwide*** are compelled to make the Act's unconstitutionally required disclosures, "the bell has been rung." App.49a. Accordingly, while *amici* understand that the Court generally discourages *amicus curiae* briefs in cases postured like this one, the pressing need to protect small-to-medium-size businesses across the country from unconstitutional and ***unfixable*** government interference in their operations leads *amici* to respectfully ask the Court to consider this brief and reject the application for a stay of the district court's injunction.

SUMMARY OF THE ARGUMENT

The Framers of our Constitution set up a careful balance of federal and state authority. In enumerating Congress's supreme power to regulate interstate commerce, U.S. Const. Art. I, § 8, Cl. 3, the Framers plainly did not contemplate transforming business owners into federal criminals through regulatory sleight of hand. The district court's well-reasoned injunction against enforcement of the Corporate Transparency Act (Act or CTA) rests on solid ground, recognizing that the statute's confusing, invasive reporting requirements likely exceed

Congress's enumerated powers and impermissibly intrude upon traditional areas of state authority, and they probably also infringe upon protected privacy and associational rights. So if the Court grants the application, then the resultant lifting of the district court's injunction would immediately subject millions of businesses to unconstitutional reporting requirements and severe penalties before the lower courts (and maybe this Court) definitively can assess the Act.

That result would be simply unfair to the small-to-medium size businesses that will suffer the brunt of the CTA's reporting requirements and concomitant penalties. Further, it is unclear to this day *how* small-to-medium-size businesses can follow the Act and Reporting Rule; yet the consequences of noncompliance are severe, exposing even inadvertent missteps to civil and potentially criminal sanctions. Business owners will have no choice but to overreport at the price of confidentiality—if they even have actual knowledge of their obligations under the Act. Viewed in that light, the CTA and Reporting Rule will rapidly transform unsuspecting entrepreneurs into potential criminals, subject to enterprise-crippling fines and even imprisonment. There is simply no way the Framers were hoping to trick small-and-medium-size business owners into becoming criminals.

By denying the application, the Court can safeguard *amici* and their members from these crushing, unjust results at least until the Act's validity is decided conclusively.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CTA IS LIKELY UNCONSTITUTIONAL ON ITS FACE.

The district court's conclusion that the CTA "appears likely unconstitutional," App.20a, is premised on a rigorous application of controlling constitutional principles. The Act's reporting mandates are a "drastic two-fold 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 trying 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 endows Congress with some 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 Act'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 economic regulations that courts have 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 Act 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' participations 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 this Court's precedent, most notably the Court's decision in *NFIB v. Sebelius*, 567 U.S. 519 (2012). There, this 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 (upholding the ACA on other grounds). The Act 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.

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. at 560 ("Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power."). The Act's gratuitous imposition of onerous reporting burdens on all sizes of 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 is a sweeping expansion of federal power into a domain historically reserved to the States, untethered from any intelligible limiting principle.

Bond v. United States, 564 U.S. 211 (2011), provides further guidance: there, the Court emphasized that federalism operates as a vital check on centralized power, serving to "preserve[] the integrity, dignity, and residual sovereignty of the States." *Id.* at 221. Moreover, State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (internal quotations omitted). The formation and internal governance of business entities is precisely such an area of traditional state authority. The government's attempt to commandeer state-created entities into a federal reporting regime contravenes *Bond*'s teaching that "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.* at 222.

II. THE CTA LIKELY WOULD ALSO BE UNCONSTITUTIONAL AS APPLIED HERE.

The district court only reached the facial challenge, App.91a, which is further reason for the Court to deny the application while the lower courts assess the CTA's validity. And in doing so they likely would find that the Act's constitutional shortcomings go beyond its disregard for the structural boundaries of federalism. *See* App.49a.

The statute's indiscriminate disclosure mandates also encroach upon individual rights secured by the First and Fourth Amendments. By requiring business owners, including the many small-to-medium-size businesses that make up *amici*'s membership, 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' exercises 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 consistent with a 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 explained, the FinCEN Director had candidly acknowledged the agency's inability to independently verify the accuracy of the information collected under the Act. *Id*. The Director's admission lays bare a fundamental defect in the Act'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 beneficial-ownership database. A repository of unverified, potentially inaccurate personal data is of dubious utility (at best) to the government's financial crime enforcement efforts and is consistent with the district court's conclusion that the Act's indiscriminate reporting requirements cannot withstand exacting scrutiny.

III. STAYING THE INJUNCTION WOULD CAUSE IRREPARABLE HARM TO BUSINESSES.

The application disregards the extensive record showing the severe and irreparable harm that the CTA will

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[2]https://www.banking.senate.gov/imo/media/doc/Harned%20Testimony%206-20-19.pdf (last visited Jan. 9, 2025).

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 learn 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 labor from productive economic activities to the deciphering of opaque regulatory commands. The related opportunity costs—foregone growth, hiring, and investment—are inevitable and large.

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-and-medium-size 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—"the bell has been rung." App.49a. 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 potentially 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 the small-and-medium-size businesses across the country.

The general lack of awareness about the CTA's implications for businesses worsens the problems. As articles have explained since passage of the Act, for example, "a significant portion of businesses subject to" the Act's reporting requirements "are either unaware of the reporting obligations they face or are unsure about how they will comply."[3] This dearth of knowledge, coupled with the potential pendency of the statutory compliance window, sets the stage for a wave of inadvertent violations

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[3] David Feider & Paul Lyon, "Wolters Kluwer survey reveals low awareness and high uncertainty among small businesses in navigating new Beneficial Ownership requirement," WOLTERS KLUWER (Oct. 10, 2023), https://www.wolterskluwer.com/en/news/survey-reveals-low-awareness-and-high-uncertainty-in-navigating-new-beneficial-ownership-requirement (last visited Jan. 9, 2023).

by small-and-medium-size business owners acting in good faith. The Act's penalties, which increase by hundreds of dollars each day, will rapidly transform unsuspecting entrepreneurs into potential criminals subject to enterprise-crippling fines and even imprisonment. There is simply no way the Framers were hoping that Congress and the Executive Branch would trick these business owners into becoming criminals.

The applicant's assurance that "FinCEN has devoted major resources to . . . educating the public about [the CTA's] requirements," Appl. for a Stay 28; App.107a, does not alleviate these irreparable harms. Indeed, FinCEN's "devotion" to the Act serves only to compound the constitutional injury by inducing the premature disclosure of sensitive information in the face of legal uncertainty. The applicant's professed concern that it will have to "re-educat[e] the public," Appl. for a Stay 29; App.105a, 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 applicant's attempt to downplay the real-world hardships confronting small-and-medium-size businesses under the CTA withers under scrutiny. *Amici*'s members, and entrepreneurs ***nationwide***, confront the consequences of a compliance deadline that has just passed and 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 judged, would prematurely expose law-abiding enterprises to irremediable injuries. There is no good reason to "enjoin" the injunction.

CONCLUSION

For the foregoing reasons, NAW and JCNF respectfully ask the Court to deny the application for a stay of the injunction issued by the district court.

DATED this 10th day of January, 2025.

Respectfully submitted,

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